

FLSA Changes: Implementation Guide

This guide is the second of a two-part series we have developed to assist with the impending federal Fair Labor Standards Act (FLSA) changes. The first, "FLSA Changes: Decision-Making Guide," can be found in the Guides section of our Document Library and covers our recommended steps to plan for the changes. These steps include identifying which exempt employees could be affected; calculating hours worked by these employees; considering which compensation strategy is most appropriate; and conducting a compensation analysis for each employee.

What should we be doing now?

In this guide we focus on implementation of changes your organization may need to make in the wake of the final rule. There are the steps in that process that we'll be looking at:

1. Considering the company's policies & practices
2. Communicating the changes internally
3. Conducting training to ensure understanding and compliance
4. Monitoring and revising company budgets and processes



This guide also features the following resources:

- Sample memo to employees regarding time tracking measures
- Sample FLSA Reclassification letter to employees
(which can also be found as an editable Word document in the Support Center)
- FAQs

STEP 1

Consider the Company's Policies & Practices



With the possible reclassification of a number of your organization's employees, we recommend reviewing your current policies and procedures. This is especially important for organizations who don't currently have many non-exempt employees, and therefore may not be as focused on policies that deal with timekeeping and work hours. If these policies and practices aren't currently covered in your employee handbook, we recommend adding them now, or distributing them separately as handbook amendments. Once distributed, employees should sign-off to acknowledge their acceptance and understanding of these important policies. Samples of each policy can be found in the Support Center by clicking on the Tools icon. If your policies and practices are already covered in your handbook, now is a good time to reemphasize them with the newly classified employees.

Changing habits can be a challenge, but changing the habits of your formerly exempt employees with regards to timekeeping is critical to prevent a wage and hour violation. These employees are likely used to "running the clock" after hours – many of them may be used to responding to work email, finishing up projects, taking client calls, or engaging in other work tasks during non-work hours. While intentionally working off-the-clock may not be your employee's goal, we want to be sure that the policies are clear about expectations with respect to off-the-clock work and the organization's commitment to recording all time worked by non-exempt employees.

THE GOLDEN RULE

While reviewing the recommended policies, keep in mind the golden rule of wage and hour: **non-exempt employees must be paid for all time they are "suffered or permitted" to work.** This doesn't just mean time in the office, but all time, whether approved by the employer or not.

→ Timekeeping Policies and Practices

Consider that your previously exempt employees may not be familiar with your timekeeping procedures, e.g., how to track time worked, limits on clocking in before their scheduled start time, how to properly track evening work to check emails, how and when to turn in their time for each pay period.



→ Off-the-Clock Work Policy

All hours worked by a non-exempt employee must be recorded and compensated, even those performed outside of the employee's standard shift. Therefore, it's critical to have a policy in place that informs employees that all time worked must be tracked, and that off-the-clock work is prohibited by the company. In other words, employees must follow their written work schedule and may be disciplined for not doing so. Please note that refusing to pay for unauthorized time worked – whether it's regular or overtime – is not permissible.

→ Bring Your Own Device Policies



If a non-exempt employee checks their work email on their personal device (e.g. smart phone, tablet, or home computer), time spent working on this device is considered time worked, and should be tracked and paid accordingly. Many employers don't allow a non-exempt employee to use their personal devices for work purposes for this very reason, or only allow such use upon authorization from the company. Additionally a good Bring Your Own Device policy will require that employees accessing company information from their device have security measures in place to protect the company's confidential information.

→ Meal and Rest Period Policies

Many states require meal and/or break periods for non-exempt employees, depending on the length of their shift, and many companies choose to provide meal and break periods voluntarily. It's important to inform employees of these breaks and your clock in/out procedures, and to notify them that no work should be performed during such breaks. Again, if work is performed, it must be compensated, so the policy should include instructions for notifying a manager or supervisor if a working meal period occurs.



→ Overtime Policies and Practices

Now is the time to ensure that you're familiar with your state and local overtime laws. Although most employers will only be subject to the federal requirement to pay time and one-half for hours worked over 40 in one workweek, Alaska, California, Colorado, and Nevada each have daily overtime provisions, and Massachusetts and Rhode Island require some employers to pay a premium for work on Sundays and certain holidays. It's important that employees and managers are aware of the rules for compliance.

Additionally, if the company requires pre-authorization of overtime worked in order to stay on budget and control spending, it's best to share these expectations via an overtime policy.

→ Travel Time Policies and Practices

Since non-exempt employees must be paid for all time worked, travel time for those customarily engaged in work travel may require further consideration. There are a few narrow exceptions when travel time isn't payable (e.g. when the employee is a passenger in a vehicle or during a standard morning/evening commute), but it's good to assess an employee's travel schedule to ensure proper pay.



→ Payroll Changes

Incentive pay:

Payroll changes are especially relevant as they relate to issuing incentive pay (non-discretionary bonuses, commissions or any other non-hourly pay) to non-exempt employees. Per FLSA requirements, overtime must be calculated weekly based on the employee's "regular rate of pay". However, incentive pay must be included in the employee's "regular rate of pay" calculation. For weeks in which a non-exempt employee earns both overtime and incentive pay – whether provided at the time or retroactively – the company must calculate (or recalculate) the employee's regular rate of pay so that it includes both their base pay and incentive pay for the week, then utilize the new amount for overtime calculations. Please see the FAQs at the end of this guide for an example calculation.

Workweek:

It's important that the individual responsible for payroll, along with managers and employees, are well-aware of the company's 7-day workweek. Every company must have an established workweek that is not adjusted or altered to avoid overtime. Each workweek is assessed individually for overtime calculations, and overtime must be paid for each workweek in which it is earned.

Note:

Arrangements where an employee receives amounts of time off (also known as compensatory or "comp time") in place of overtime wages are **not permitted** for non-exempt employees of private employers. *Non-exempt employees are due all applicable overtime pay for applicable overtime hours worked in the workweek.*

Communicate the Changes

Applicable changes need to be communicated clearly to the whole company. Things to consider:

- **Who will communicate these changes?**

Think about the size and structure of your organization, and who is most capable of getting the message to all employees in an efficient and positive manner. Consider managers, the executive team, and your human resources professional.

- **Who do we need to communicate with?**

Decide if you will only discuss changes with newly non-exempt employees or if a company-wide notification makes the most sense. The latter may be preferable if the changes will impact a number of employees whose status is not changing. For instance, if numerous work schedules will need to be rearranged, if employees who used to answer multiple internal questions on weekends will no longer be able to, or if the lunch room is going to be much more crowded, then you may want to extend your notification to all (or most) employees.

- **What will be communicated?**

A sample letter is provided at the end of this guide. An editable Word document version of this letter can also be found in the Support Center by searching "FLSA Reclassification Letter" in the Documents section. The letter includes the following:

- A high-level overview of the FLSA changes
- The decision-making process for FLSA classification
- New classification as non-exempt
- Changes to compensation structure beyond classification as non-exempt
- Company policies and practices for non-exempt employees

- **How will changes be communicated?**

This communication may be in the form of an email, web meeting, live meeting, or one-on-one meetings. We recommend several communications over the course of time, beginning with a high-level overview. Reminders even after the change in classification will be necessary to make certain that new policies and practices are understood and followed.



- **What is the timing for communication?**

Some states have requirements for advance notice of any changes to pay. Others require issuing written notice of the change. The full details for each state can be located in the State Laws section of the HR Support Center.

For those states that don't have requirements, we recommend at least one pay period advanced notice of any changes to pay, but for a change in classification two or more pay periods' advanced notice is best.

- **What should be documented?**

Assuming your state does not have specific documentation requirements, we recommend clearly documenting these changes for the employee's personnel file. A useful tool for this is the Employee Status Change Form located in the Documents section of the Support Center. All details for the classification change should be documented, including new FLSA classification as non-exempt, type of pay received (e.g., hourly, salary, piece rate), and the effective date of the change. This document should be signed by the employee, their manager, and the human resources representative, and then stored in the employee's personnel file. If the company makes changes to non-exempt employment policies as discussed above, updated policies should be distributed and acknowledged by each employee, and the acknowledgement form should be maintained in their personnel file.

STEP 3

Conduct Training

Set aside time to train your supervisors and managers to ensure that new and updated company policies and practices are accurately communicated, understood, followed, and enforced. Additionally, managers and supervisors must understand the company's overtime practices and the budget implications of reclassifying employees. For example, if overtime should be avoided entirely, managers may need to adjust their scheduling to accommodate for this. Managers also may need to examine their staffing models to ensure adequate staffing for service or product output.

Employees must be trained so that they are aware of each policy and how it affects them and their work each day. Employees must also understand that once they are trained and acknowledge the policies, failure to comply will result in discipline.

Both managers and employees must be aware of what constitutes compensable time, as this is likely a sizeable adjustment. For



example, travel time and time spent checking emails at night must be compensated. Employees will need to know how to report this time, and managers will need to know how to schedule accordingly.

When training employees on the relevant policies and practices, it may be worth a few minutes of your time to discuss that the driving force behind these changes is the FLSA, not your opinion of the reclassified

employees. For better or worse, being exempt (or salaried) has been a status symbol in the American workplace. Given the potential for bruised egos, it's important to communicate that this change isn't a result of the employee's performance, dedication to the company, or contribution – it's simply a result of changes to federal law that the company must comply with.

Tip:

Time, energy, and money spent on training will be well-spent. Proactive training on compliance – prior to the rule's effective date and in the following six months to a year – will cost a small fraction of the price of defending wage and hour claims.

STEP 4

Monitor and Revise Company Budgets

Once the final rules are issued (assuming you've done the legwork to determine how many hours your currently exempt employees are working), you should be able to analyze company budgets to determine the impact. Depending on the scale of the changes your organization needs to make, continuous monitoring of budgets may be necessary for the first six months to a year.

You may also want to consider planning ahead and assessing next year's budget. Keep in mind that the DOL's proposal includes a mandatory increase to the minimum salary threshold; these increases will be indexed to inflation. Although we do not yet know exactly what method will be used to account for inflation, if included in the final law, there will be mandatory annual increases to the minimum salary threshold. This means that each year employers will need to go through the same process of identifying exempt employees that don't meet the pay criteria, assessing pay options, and reclassifying if needed.



FLSA Reclassification Letter

[Date]

[Name]

[Street Address]

[City, State ZIP]

Dear [Employee Name],

This letter is to inform you that your position has been reclassified as non-exempt. This change will be effective [enter date], at which time you will be paid [per hour, salary non-exempt, per piece rate]. Details on the reason for this change along with steps for the future are provided below, but please feel free to visit with your manager or [HR representative's name] with any questions. We are here to answer questions and will provide as much information as possible.

We'd like to provide you with some background on changes to the law that have affected your employee classification. The federal Fair Labor Standards Act (FLSA) and state laws govern position classifications as exempt or non-exempt, and these laws apply to all positions. Positions that are exempt from the FLSA meet very specific criteria such as a minimum salary amount, salary pay basis, and specific job duties. Positions that do not meet these criteria are called non-exempt, and the laws require that non-exempt positions are paid overtime and minimum wage.

Prior to recent federal law changes, exempt positions making \$455 per week [\$800 per week in California; \$675 per week in New York] were not eligible for overtime or minimum hourly rates of pay. Therefore, because of your previous classification as exempt, your position was not eligible for these.

However, in July, 2015 the Department of Labor proposed changes to what are common referred to as the "white collar" exemptions. The proposals were to increase the minimum salary to \$970 per week. The final regulations, released on [enter date] increased the minimum salary to [\$XXX] per week, or [\$XXX] annually.

[Company] has reviewed your position with these legal rule changes in mind and has elected to reclassify the position as non-exempt.

As a non-exempt employee, you will be asked to track and record all hours worked, and you will receive overtime if you work more than 40 hours in a workweek. For your reference, our company workweek begins at 12:00am on [day, e.g. Sunday] and ends at midnight on the following [day, e.g. Saturday].

There are several company policies and practices that are important to be aware of with regards to your new classification, and we will hold a company training on [date] at [time]. [Alternative: There are several company policies and practices that are important to be aware of with regards to your new classification. Your manager/supervisor will share these with you, and [HR representative's name] is available to answer any questions. Alternative: There are several company policies and practices that are important to be aware of with regards to your new classification; they are attached to this letter, along with an acknowledgement form. Your manager will set aside time for you to review these policies and ask questions.]

You play a key role with [Company] and we assure you that this is not a demotion and has nothing to do with your value to [Company]. We value your contribution and hard work for our team! This change is being driven by the updated FLSA rules and has nothing to do with your performance or contributions to the company. Your job title and job duties will not change.

[Optional, and suggested if true: Steps have been taken to ensure that this change to non-exempt does not result in a decrease in your compensation. In fact, if you work 40 hours per week, your compensation should remain the same. Additionally, because you are now eligible for overtime, your compensation may actually increase if you work more than 40 hours. However, please note that all company overtime must be approved ahead of time by a manager or supervisor.]

If you have questions concerning this action or need further clarification about your classification, please reach out to me or your manager.

Sincerely,

[Signature]

[Name and Position Title]

FAQs

When should I change an employee's status to non-exempt?

As soon as possible once the final rules are released!

We recommend notifying employees of their classification change at least 2-4 weeks ahead of the effective date. Then, for ease of payroll processing, we recommend an effective date for the change no later than the start of the pay period that includes the final rule's effective date. This will prevent a mid-pay period classification change. Issuing pay to an employee for one pay period that includes classification as both exempt and non-exempt is complicated, and your payroll specialist will thank you for using a pay period start date for ease of transition.

Is issuing commissions, bonuses, or other pay to non-exempt employees different?

Yes, and it's definitely more complicated than it is for exempt employees.

The FLSA requires that overtime is calculated weekly based on the employee's "regular rate of pay". However, although they may not seem "regular", commissions, non-discretionary bonuses and other non-hourly pay must be included in the "regular rate of pay" calculation.

For weeks in which a non-exempt employee earns both overtime and incentive pay – whether provided at the time or retroactively – the company must calculate (or recalculate) the employee's regular rate of pay so that it includes both their base pay and incentive pay for the week, then utilize the new amount for overtime calculations.

Here's an example of this calculation, courtesy of the Department of Labor:

An employee paid biweekly at a rate of \$12 per hour plus a \$100 attendance bonus, working a schedule of 56 hours per week as shown in the chart below, would be due overtime pay as follows:

WEEK 1	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Hours Worked	8	8	8	8	8	8	8
WEEK 2	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Hours Worked	8	8	8	8	8	8	8

(calculation continued on next page)

$\$100$ (bi-weekly attendance bonus) \div 2	= \$50 (weekly bonus equivalent)
56 hours worked \times \$12/hour + \$50 (weekly bonus equivalent)	= \$722 (total ST compensation)
\$722 (total ST compensation) \div 56 hours worked	= \$12.89 (regular rate)
\$12.89 (regular rate) \times $\frac{1}{2}$	= \$6.45 (half-time premium)
\$12.89 (regular rate) + \$6.45 (half-time premium)	= \$19.34 (overtime rate)
40 (straight time hours) \times \$12.89 (regular rate)	= \$515.60 (straight time earnings)
16 (overtime hours) \times \$19.34 (overtime rate)	= \$309.44 (overtime earnings)
Total earnings for week one	\$825.04
Total earnings for week two	\$825.04
Total earnings for bi-weekly period	\$1,650.08

What's the difference between a non-discretionary and discretionary bonus?

Essentially, non-discretionary bonuses are goal-based and guaranteed if goals are met. Discretionary bonuses are at the employer's whim and cannot be expected.

The FLSA defines non-discretionary bonuses as those that are announced to employees to encourage them to work more steadily, rapidly or efficiently, and bonuses designed to encourage employees to remain with an organization. If there is an established set criteria an employee has to meet, and the bonus is guaranteed to be earned once those criteria are met, that will be considered a non-discretionary bonus. All non-discretionary bonuses must be included in the regular rate of pay, as outlined above, and will impact the overtime rate when they are issued in the same workweek in which overtime is earned.

Not many bonuses qualify as discretionary under the FLSA, though those that do allow exclusion from the regular rate of pay and overtime calculations. A discretionary bonus provided to an employee is just that: something an employer is not obligated to provide and can give to any employee for any reason or no reason at all. Generally they're given out of appreciation, loyalty, or good service. Employees do not expect them.

Will bonuses and commission count towards the minimum salary threshold?

Probably not. They don't currently and we have no reason to believe that the new rules will be different.

Note that those exempt under the Outside Sales Employee exemption (which is narrow) are not subject to the minimum salary requirement at this time, and we have not heard that this will change with the proposed rules.

Can I classify an employee as salaried non-exempt?

Yes. However, this hybrid salaried/non-exempt pay classification can present challenges.

The idea behind paying employees this way is that for weeks where they work 40 hours or fewer, you can essentially hit the “regular weekly pay” button and be done with it. Unfortunately, this has a tendency to make both the employer and employees lackadaisical about timekeeping. But this pay classification still requires strict timekeeping, just as for all non-exempt employees, in order to determine overtime eligibility. This includes timekeeping entries for when work begins and ends as well as compliance with the state's meal and/or rest period requirements, if applicable. In the event that hours are not tracked properly and there is a dispute, the burden of proof will be on the employer to substantiate that pay was accurate for hours worked, and this will likely be very challenging.

Can part-time exempt employees remain part-time?

Yes, but they will still have to meet the new minimum salary threshold.

Regardless of whether an employee is full or part-time, they must meet each of the criteria for an exempt classification under the FLSA. Therefore, so long as the pay meets the minimum salary threshold, they are paid on a salary basis, and they meet the duties test, they may be classified as exempt. Failure to meet the minimum salary amount, or any of the other criteria for an exempt classification, will result in a non-exempt classification determination.

Does this change even apply to me?

Almost certainly.

There are two ways in which employees can be covered by the FLSA. The first is called “enterprise coverage”. This applies when an employee works for an employer who has an annual dollar volume of cash sales or business done of \$500,000 or more. It also applies if the employer is a hospital, business providing medical or nursing care for residents, school or preschool, or government agency.

The second type of cover is called “individual coverage”. Even when there is no enterprise coverage, the FLSA will cover individuals engaged in interstate commerce. If an employee makes goods that will be shipped out of state, places telephone calls to another state, sends or receives out-of-state shipments, or partakes in any number of other basic business activities, they will qualify for individual coverage.