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The DOL Overtime Rule

Questions and Answers for Big “I” Members

(Updated June 30, 2016)

The federal law that regulates employment issues for most employees is the Fair Labor Standards Act (FLSA).¹ The FLSA is enforced by the Department of Labor (DOL) Wage and Hour Division. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees. On May 23, 2016, the DOL released in the Federal Register an update to the regulation that exempts certain employees from overtime and minimum wage requirements, commonly referred to as the “white collar” exemptions.²

The new regulation changes the salary threshold at which employees can qualify for certain “white collar” exemptions from overtime and minimum wage requirements. The new regulation also changes the salary requirements to qualify for the “highly compensated employee” exemption from overtime and minimum wage requirements. The new rule does not impact employees who are currently considered “non-exempt” (i.e. legally required to overtime and minimum wage pay). The new rule is effective December 1, 2016.

Employee salaries and overtime eligibility status should be reviewed and adjusted, as needed, to comply with the new rule. Below you will find a list of questions and answers that cover the changes to the overtime rule, as well as information on how the changes impact or do not impact current federal employment law. States also have their own employment laws that may impose additional or different requirements beyond the federal requirements, which are not covered in this document.

¹ 29 USC § 201, et seq.

² 29 CFR §§ 541.0-541.710

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1. What does the new rule do?

The new rule essentially does four things:

1. Raises the annual salary threshold for which an employee can be considered exempt (i.e. overtime pay is not legally required) under the administrative, executive, professional, or computer “white collar” exemptions from \$23,660 to \$47,476, effective December 1, 2016. The \$47,476 annual salary threshold only applies to employees for which the employer wishes to claim, and who otherwise qualify for, one of the above named exemptions.
2. Allows for nondiscretionary bonuses and incentive payments (including commissions) to be used to satisfy up to 10% of the \$47,476 salary threshold, effective December 1, 2016. This 10% cap only applies to calculating the \$47,476 minimum salary threshold for the relevant “white collar” exemptions.
3. Raises the salary threshold for “highly compensated employees” from \$100,000 to \$134,004, effective December 1, 2016.
4. Requires that both the \$47,476 and \$134,004 thresholds be automatically updated every three years, starting January 1, 2020.

2. What are the “white collar” exemptions?

The FLSA requires that most employees be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempts certain computer employees.

Effective December 1, 2016, with the exception of the narrowly defined outside sales exemption, to qualify for one of the “white collar” exemptions, employees must first earn a salary of at least \$913 a week, or \$47,476 annually. Currently, the salary threshold is \$455 a week, or \$23,660 annually. The salary level is not a minimum wage requirement, and no employer is required to pay an employee the salary specified in the regulations, unless the employer is claiming an applicable “white collar” exemption.

Any employees, except for outside sales employees, who earn less than \$47,476 annually cannot be classified as an exempt employee under one of the “white collar” exemptions and must be paid overtime for all hours worked over a 40 hour workweek. If an employee earns a salary greater than \$47,476 on an annual basis he or she is still legally entitled to receive paid overtime for all hours worked over a 40 hour workweek, generally at a rate not less than one and one-half times their regular rate of pay, unless the employee qualifies for one of the “white collar” exemptions by satisfying the “duties test” for that individual exemption.

The “duties tests” for executive, administrative and outside sales exemptions (those exemptions most common for insurance agencies) are outlined on the table on the next page. It is important to have clear job descriptions that are regularly reviewed against actual job duties for all employees for which the employer is claiming exempt status. The classification of any individual employee is a case-by-case determination dependent on that employee’s specific job duties, state, and federal law. Employee classification is not determined by job title alone; it is a fact specific inquiry.

There are two other “white collar” exemptions, the requirements for which are not covered here, the professional exemption and the computer exemption. The professional exemption applies to learned professionals, practicing doctors or lawyers, teachers, and creative professionals, such as actors or musicians. Some accountants and actuaries may fall under the professional exemption depending on their job duties and educational training. Insurance agents do not fall under this exemptions. The exemption for computer professionals is narrow, and would not include a position such as CTO, though a CTO may fall under one of the other “white collar” exemptions. The computer exemption applies to positions such as a software engineer.

Executive (i.e. Manager)	Administrative	Outside Sales
<p>To qualify for the executive exemption <u>all</u> of the following job duties must be satisfied:</p> <p>(1) primary duty³ must be managing the business at which the employee is employed, or managing a customarily recognized department or subdivision</p> <p>(2) must customarily and regularly⁴ direct the work of at least 2 full-time employees or their equivalent (i.e. 1 full-time employee and 2 part-time employees)</p> <p>(3) must have authority or influence over the hiring, firing, or employment changes (i.e. promotions) of other employees</p>	<p>To qualify for the administrative exemption <u>all</u> of the following job duties must be satisfied:</p> <p>(1) primary duty must be the performance of office or non-manual work directly related to the management or general business operations⁵ of the employer or the employer’s costumers</p> <p>(2) primary duty must include the exercise of discretion and independent judgment⁶ with respect to matters of significance⁷</p> <p><i>Note: The DOL does not generally consider employees whose primary duty is inside sales to qualify for the administrative exemption.</i>⁸</p>	<p>To qualify for the outside sales exemption <u>all</u> of the following job duties r must be satisfied:</p> <p>(1) primary duty must be making sales⁹ or obtaining orders or contracts for services</p> <p>(2) must be customarily and regularly engaged away from the employer’s place or places of business</p> <p><i>Note: There is no minimum salary requirement for outside sales employees and outsides sales employees must primarily work outside of their office, or home.</i>¹⁰</p>

³ “Primary duty” means “the principal, main, major, or most important duty that the employee performs.” 29 CFR § 541.700.

⁴ “Customarily and regularly” means “a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed ‘customarily and regularly’ includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.” 29 CFR § 541.701.

⁵ To meet the “directly related to management or general business operations” requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. See, DOL Fact Sheet 17C, available at https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

⁶ In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. See, DOL Fact Sheet 17C, available at https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

⁷ The term “matters of significance” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. See, DOL Fact Sheet 17C, available at https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

⁸ 29 CFR § 541.203. See also, DOL Administrators Interpretation No. 2010-1 (Mar. 24, 2010) available at: https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf

⁹ “Sales” means “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition” which includes “the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.” 29 CFR § 541.501(a). See also, *Christopher v. SmithKline Beecham Corp*, 132 S. Ct. 2156 (2012).

¹⁰ “The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls.” 29 CFR § 541.502.

3. What is the “highly compensated employee” (HCE) exemption?

Effective December 1, 2016, under the HCE exemption an employee must earn at least \$134,004 a year in total compensation. This is a 34% increase from the current threshold of \$100,000. The “duties test” for the HCE exemption requires that the employee’s primary duty be office or non-manual work and the employee must customarily perform at least one of the duties or responsibilities of an executive, administrative, or professional employee.

For example, an employee who makes a salary of \$50,000 a year and earns \$100,000 a year in commissions, and who customarily and regularly supervises 4 employees would fall under this exemption because their salary meets the HCE requirements and they meet one of the requirements of the executive exemption. More information on how HCE compensation is calculated can be found in Question 8.

4. How are producers and other agency employees impacted by the new rule?

All agency employees, including producers—who are designated as employees and not independent contractors—will be impacted by the rule, dependent on their current salary and employee classification status.

- For any employee who is properly classified as non-exempt (i.e. overtime pay is required), no change is required under the new rule, regardless of employee compensation.
- For any employee who is properly classified as exempt (i.e. overtime pay is not required) under either the administrative, executive, professional, or computer exemption and who makes less than \$47,476 on a salary basis, that employee’s status must be changed to non-exempt and overtime must be paid for all hours worked over a 40 hour workweek, generally at a rate not less than one and one-half times their regular rates of pay, or their salary must be raised over the threshold.
- For any employee who is properly classified as exempt under either the administrative, executive, professional, or computer exemption and who makes more than \$47,476 on a salary basis, no change is required under the new rule.
- For any employee who is properly classified as exempt pursuant to the outside sales exemption, no change is required under the new rule, regardless of employee compensation.
- For any employee who is properly classified as exempt under the HCE exemption, and who makes less than \$134,004 their salary must be raised over the threshold, or they must be reclassified.

5. Are independent contractors impacted by the new rule?

The new rule does not apply to and has no impact on independent contractors, as independent contractors are not employees. However, you should be aware that on July 15, 2015 the DOL issued an administrator’s interpretation regarding independent contractors.¹¹

The guidance takes a stricter approach on who qualifies as an independent contractor by deemphasizing the degree to which a business controls an individual’s work, and focusing instead on the economic realities test, which looks at whether the worker is economically dependent on the business or in business for him or herself. The guidance applies to the DOL and its audits and determinations, however, courts are free to consider the guidance or not.

It is also worth noting that the test for determining independent contractor status under the FLSA is not the same as the IRS test. Both the IRS and FLSA tests for determining independent contractor status should be considered when seeking to classify an individual as an independent contractor.

¹¹ Administrator’s Interpretation No. 2015-1 (July 15, 2015), available at: https://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm

6. Does the DOL have a specific rule or guidance regarding employee classification for insurance agencies?

There is no hard and fast rule for the classification of producers, customer service representatives, or other agency personnel. The DOL has issued some guidance that is relevant to independent insurance agencies, however, classification of employees is a case-by-case determination depending on that employee's specific job duties within the agency, as well as relevant state law. When considering the classification of employees the following may be helpful:

- 29 CFR § 541.203 states that: "Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption."
- In an opinion letter from 2009 the DOL opined on when life insurance agents could be classified under the outside sales or the administrative exemption, stating "[D]epending on the duties actually performed, an insurance agent may qualify for either the outside sales or administrative exemption.... Each agent must be evaluated on an individual basis..."¹²
- The DOL does not generally consider insurance sales to qualify for the FLSA retail sales exemption, which exempts certain commissioned employees from overtime pay.¹³

7. Can paid benefits, such as health insurance, be counted toward the salary threshold?

Generally, earning a salary means that an employee receives regular predetermined amounts of compensation each pay period and the predetermined amount cannot be reduced during that pay period because of variations in the quantity or quality of one's work.¹⁴ In computing salary amounts the payment of insurance, or contributions to retirement plans or other fringe benefits should not be included.¹⁵ However, as explained in question 8, up to 10% of the minimum salary requirement can be satisfied by commissions, nondiscretionary bonuses and incentive payments under the new rule.

8. Can commissions and bonuses be counted toward the salary threshold?

Under the new rule employers for the first time will be able to use nondiscretionary bonuses, incentive payments, and commissions to satisfy up to 10% of the \$47,476 salary threshold, provided those payments are made on a quarterly or more frequent basis. This 10% cap only applies to calculating the \$47,476 minimum salary threshold for the relevant "white collar" exemptions; it does not apply to employees properly classified as non-exempt or outside sales employees.

Under the HCE exemption, \$47,476 of the \$134,004 salary threshold must be earned on a salaried basis, however, the remainder of the salary can be earned from nondiscretionary bonuses and incentive payments (including commissions).

¹² DOL Opinion Letter FLSA 2009-28 (Jan. 16, 2009), available at:

https://www.dol.gov/whd/opinion/flsa/2009/2009_01_16_28_flsa.htm

¹³ See, DOL Fact Sheet #6, available at: <https://www.dol.gov/whd/regs/compliance/whdfs6.pdf> and 29 CFR § 779.317 "Partial list of establishment lacking "retail concept" ("Insurance; mutual, stock and fraternal benefit, including insurance brokers, agents, and claims adjustment offices."), available at: <https://www.gpo.gov/fdsys/pkg/CFR-2010-title29-vol3/pdf/CFR-2010-title29-vol3-sec779-317.pdf>. See also, *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959).

¹⁴ 29 CFR § 541.602

¹⁵ In the final rule, the DOL declined to consider including in the salary requirement payments for medical, disability, or life insurance, or contributions to retirement plans or other fringe benefits, and the DOL reemphasized that such forms of compensation remain excluded from the salary level test calculation. See, DOL analysis of the rule on page 127: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11754.pdf>

Promised bonuses such as those announced to employees to induce them to work more efficiently or to remain with the firm are considered nondiscretionary.¹⁶ Examples include individual or group production bonuses, and bonuses for quality and accuracy of work. Incentive payments, including commissions, are also considered non-discretionary. Commissions are considered nondiscretionary incentive payments as such payments are generally based on a prior contract or understanding and employees generally have a contractual right to the commission promised.¹⁷ By contrast, discretionary bonuses are those for which the decision to award the bonus and the payment amount is at the employer's sole discretion and not in accordance with any preannounced standards. For example, an unannounced holiday bonus would qualify as a discretionary bonus, because the bonus is entirely at the discretion of the employer

If an employee does not earn enough to satisfy the minimum salary threshold during a given quarter (i.e. commissions are lower than anticipated), an employer may make a "catch up" payment no later than the next pay period after the end of the quarter. Any such "catch up" payment counts only toward the prior quarter's salary. The new rule does not give specific date ranges for what the DOL considers to be a quarter; it is at the employer's discretion when the quarter will begin.

9. Can non-exempt employees earn commissions?

Non-exempt employees can earn commissions. If you have a non-exempt employee who earns 100% of their salary from commissions that is permitted under the FLSA, as long as any overtime and minimum wage requirements are being satisfied, as well as any state legal and regulatory requirements.

10. Can comp time be offered in lieu of overtime pay?

Private sector employees are not permitted to offer comp time (i.e. extra time off for extra hours worked above 40 hours in a seven day workweek) in lieu of monetary overtime pay legally required to be paid to employees under the FLSA. Comp time can be offered as long as it is not an alternative to legally required overtime pay.

The following examples illustrate when comp time is or is not permitted under the FLSA. State laws may impose different standards:

- If a non-exempt employee works ten hours on a Monday he or she can work six hours on Tuesday and would not necessarily be entitled to two hours of overtime for the Monday, as long as the employee's total hours for a seven day workweek do not exceed 40 hours.
- If a non-exempt employee works ten hours Monday through Thursday and zero hours for the remainder of the week, he or she would not necessarily be entitled to overtime pay because the employee's total hours for a seven day workweek do not exceed 40 hours.
- If a non-exempt employee works 60 hours in a seven day workweek this employee would be entitled to 20 hours of overtime, because the hours worked within the seven day workweek exceed 40 hours. The employee cannot "bank" 20 hours of comp time to be taken at some point in the future.
- If an exempt employee is required to work over a weekend and is given a "comp day" to be taken within 30 days that is permitted, because it is not an alternative to legally required overtime pay.

11. Can employees voluntarily work overtime?

For employees properly classified as exempt, those employees can work overtime voluntarily, or otherwise. Exempt employees may be paid overtime, or earn comp time at the employer's discretion but they are not legally entitled to be provided overtime pursuant to the FLSA.

¹⁶ See 29 CFR 778.211(c) and DOL analysis of the rule on page 116 footnote 65, provides these as examples and is available here: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-11754.pdf>

¹⁷ In conjunction with the rule DOL issued a Small Entity Compliance Guide, which explains why the DOL considers commissions nondiscretionary on page 5, available here: <https://www.dol.gov/whd/overtime/final2016/SmallBusinessGuide.pdf>

For non-exempt employees, the employer is potentially liable for any overtime worked whether or not it was voluntary or mandatory. Even if an employer forbids or restricts overtime, if an employee disregards the control and works overtime the employer may be liable for overtime pay in a DOL enforcement action. It is important to have clear overtime policies for both exempt and non-exempt employees, and to enforce those policies to avoid potential liability. Employers are permitted to discipline an employee for not following any overtime policies.

12. Can exempt employees be paid overtime or be classified as non-exempt?

The DOL enforcement policies are concerned about employees who are improperly classified as exempt and are therefore not receiving overtime pay that they may be legally entitled to. If an employee is eligible to be classified as exempt, an employer may voluntarily choose to classify that employee as non-exempt and pay the employee any legally required overtime. The employer may also pay any properly classified exempt employees overtime or provide them with comp time, at the employer's discretion.

13. Must agency owners be paid a minimum salary of \$47,476?

If an employee is at least a 20% owner of a covered business and their primary duty is managing the business at which he or she is employed, or managing a customarily recognized department or subdivision and he or she customarily and regularly directs the work of at least 2 full-time employees or their equivalent (i.e. 1 full-time employee and 2 part-time employees) then he or she is not subject to the \$47,476 salary requirement.¹⁸

14. Can non-exempt employees be paid a salary?

The FLSA does not require that non-exempt employees be paid hourly. Nonexempt employees may be paid by means of a salary. Salaried non-exempt employees are still entitled to FLSA overtime to the extent that they actually work more than 40 hours in a seven day workweek. When a non-exempt employee is paid by a salary, employee earnings (i.e. salary and any commissions), must be converted to its hourly equivalent to determine the regular rate of pay (generally time and one-half of which is the employee's FLSA overtime rate of pay).¹⁹ Hours should be tracked for all overtime eligible employees.

For example, an employee can be guaranteed a minimum compensation of \$400 a week, even if they work less than 40 hours in a given week, instead of being paid \$10 an hour. In both cases, the employee is still eligible for overtime if they work over 40 hours in a seven day workweek.

15. How is legally required overtime pay calculated for salaried employees?

The FLSA formula for determining the regular rate of pay is to divide the total amount of straight time compensation received by the employee (i.e. salary and commissions) for work by the number of hours that compensation was intended to pay for.²⁰ Overtime pay that is legally required under the FLSA is generally calculated at one and one half time the employee's hourly wage. So for example, to calculate the overtime pay rate for a salaried employee who earns \$40,000 annually for a 40 hour work week and does not receive commissions or other incentive compensation, you would typically do the following under the FLSA:

$$\$40,000 \text{ a year} \div 52 \text{ weeks} = \$769 \text{ a week} \div 40 \text{ hours} = \$19.23 \text{ an hour} \times 1.5 = \$28.85 \text{ an overtime hour}$$

¹⁸ 29 CFR § 541.101.

¹⁹ See, 29 CFR § 778.114 for information on calculating salaries for employees with fluctuating workweeks.

²⁰ See, 29 CFR § 778.114 for information on calculating overtime pay for salaried employees with fluctuating workweeks.

16. How is overtime pay for non-exempt employees calculated for travel?

Determining overtime compensation for travel for non-exempt employees can be complex and will depend on the time and type of travel (i.e. overnight vs. same day), as well as if work is done simultaneously with travel, among other factors.²¹ Having clear employee policies outlining what is compensable and non-compensable time related to travel is important. The DOL has provided a fact sheet that serves as a guide for when travel time is considered work time and when it is not.

The fact sheet can be found here: <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>

17. Is pay required for non-exempt employees for CE classes?

Under the FLSA, attendance at lectures, meetings, training programs and similar activities must be counted as working time, unless the following four criteria are met: (a) attendance is outside of the employee's regular working hours; (b) attendance is in fact voluntary; (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance.²²

18. How is joint-employment impacted by this rule?

The rule does not impact joint-employment (i.e. sharing of control and supervision of an employee's activity among two or more business entities.) If a joint employment relationship exists, both employers would be jointly and severally liable for FLSA compliance, including payment of overtime compensation for all joint employees.

Joint employment exists when "the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee."²³ One example of potential joint employment would involve an administrative employee who works for two agencies that have a relationship with each other (for example, common ownership, common management, shared control over operations, or agreements between the two agencies).

19. Does the DOL require that hours be tracked in a particular manner, such as a timeclock?

Under the FLSA, employers are required to maintain certain records for each non-exempt worker. The FLSA does not proscribe a specific method for tracking hours. Employers can keep records of the hours worked each day, the total hours worked each workweek, total overtime earnings for the workweek, and the like. Records should be complete and accurate. An agency should determine how to track employee hours as appropriate based on state law, agency size, agency culture, and employee classifications, among other things.²⁴

20. Are non-exempt employees permitted to work at home under the FLSA?

The FLSA does not set limits on the ability of non-exempt workers to work from home, but any agency that allows employees to work from home regularly should have a system in place to ensure that hours are properly tracked, as well as clear and legally permissible employment policies on when an employee can work from home, what constitutes hours worked, and if/when/how overtime is permitted, among other things.

21. How should hours for non-exempt employees be calculated, do lunch breaks count?

Under the FLSA, bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. Short breaks, however, are customarily included in working times. Therefore, it is at the discretion of the agency whether or not to pay employees

²¹ More information on travel time for non-exempt employees can be found at 29 CFR §§ 785.33-785.41, available at:

<https://www.dol.gov/whd/regs/compliance/wh1312.pdf>

²² 29 CFR §§ 785.27-785.32, available at: <https://www.dol.gov/whd/regs/compliance/wh1312.pdf>

²³ For more information see, DOL Administrator's Opinion No. 2016-1, available here:

https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm

²⁴ For more information see, DOL Fact Sheet #21, available here: <https://www.dol.gov/whd/regs/compliance/whdfs21.pdf>

for lunch breaks or other similar breaks in excess of 30 minutes where the employee is not working (for example if an employee runs a personal errand during the workday). Whether or not non-exempt employees are paid for lunch breaks, or other similar time not working, does not relieve the employer of any overtime liability for hours worked over a 40 hour work week.²⁵

22. How will the automatic updating of the salary threshold work?

The new DOL rule puts in place a process for automatically updating the salary threshold every three years, beginning January 1, 2020. Future updates will take effect on January 1, 2023, 2026, etc. Each update to the threshold for the relevant “white collar” exemptions will be tagged to wages for the 40th percentile of full-time salaried workers in the lowest-wage census region (currently the south/southeast), estimated to be \$51,168 in 2020. The HCE threshold will increase to the 90th percentile of wages for full-time salaried workers nationally, estimated to be \$147,524 in 2020. The DOL will post new salary levels 150 days in advance of their effective date, beginning August 1, 2019.

23. Is there an exemption for small businesses?

There is no small business exemption for the overtime rule or the FLSA. Generally, the FLSA and the overtime rule apply to employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more. However, if your business is under the \$500,000 threshold, it does not mean that your employees do not enjoy any FLSA protections. Employees are still covered by the law if they are engaged in interstate commerce, which includes such activities as making out-of-state phone calls, sending mail, or handling credit card transactions. “Engaged in interstate commerce” has been interpreted broadly to cover almost all workers.²⁶

24. How is the rule enforced?

The FLSA is enforced by the Wage and Hour Division of the DOL. Investigators are stationed across the United States and are responsible for gathering data on wages, hours, and other employment conditions or practices, in order to determine compliance with the law. While some investigations are proactive, many are in response to an employee complaint. It is a violation to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the FLSA.

Where violations are found, the DOL may recommend changes in employment practices to bring an employer into compliance. A common remedy for violations is to require employers to pay any back wages that employees may be owed. Generally, a two-year statute of limitations applies to the recovery of back pay. In the case of willful violations, a three-year statute of limitations applies.²⁷ Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,000 for each violation.²⁸

25. I am not clear on how my employees should be classified, what do I do?

If you have reviewed this Q&A and you have additional questions based on specific job duties or functions of your employee(s), we recommend that you contact the services of an appropriate, competent professional, such as an attorney or human resources professional in your state.

The DOL has also provided general and specific resources on the new rule such as FAQs, webinars, and non-profit compliance guides, among other resources. The DOL resources are available at:

<https://www.dol.gov/whd/overtime/final2016/>

²⁵ For more information see, DOL Fact Sheet #22, available here: <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>

²⁶ 29 USC § 203(s). See also, DOL analysis of the rule on pages 25 and 231-32.

²⁷ See, DOL website page on back pay, available here: <https://www.dol.gov/general/topic/wages/backpay>

²⁸ 29 CFR §§ 578.1-578.4