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### The DOL Overtime Rule & The FLSA: Questions and Answers for Big “I” Members (Updated September 29, 2016)

The federal law that regulates employment issues for most employees is the Fair Labor Standards Act (FLSA).<sup>1</sup> In May 2016, the Department of Labor (DOL) Wage and Hour Division, which enforces the FLSA, published an update to a regulation that exempts certain employees from overtime and minimum wage requirements, commonly referred to as the “white collar” exemptions.<sup>2</sup>

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.<sup>3</sup>

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 nine different topic areas:

1. General FLSA information and applicability to insurance agencies
2. The new “Overtime Rule” explained and applied
3. Employee classification
4. Paying employees generally
5. Paying non-exempt (i.e. overtime required) employees and calculating overtime
6. Paying exempt (i.e. overtime not required) employees
7. Employee classification in insurance agencies
8. Job descriptions
9. Enforcement

***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. We encourage you to review the applicable state laws because if state law is more restrictive than the federal law, the more restrictive state law is applicable.***

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<sup>1</sup> 29 USC § 201, et seq.

<sup>2</sup> 29 CFR §§ 541.0-541.710

<sup>3</sup> As of Sept. 29, 2016, two lawsuits, including one to which IIABA is a party, have been filed challenging the rule. Additionally, legislation is pending that could delay the implementation date of the rule. Nonetheless, IIABA recommends that agencies take steps to comply with the rule prior to Dec. 1, 2016, while monitoring the IIABA website and newsletters for implementation updates.

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# 1. General FLSA information and applicability to insurance agencies

## 1.1 What is the FLSA?

The FLSA is the Fair Labor Standards Act.<sup>4</sup> It is the federal law that regulates employment issues for the majority of employees in the United States. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees. The FLSA is enforced by the Department of Labor (DOL) Wage and Hour Division. This means that the DOL interprets the FLSA and issues regulations, guidance, and opinions on labor law issues such as overtime pay, or independent contract classification. The DOL is also responsible for ensuring compliance with the FLSA.

## 1.2 Is there an exemption for small businesses?

**No, there is no exemption for small businesses.** 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. This will generally mean all commercial activity. So, in the case of insurance agencies the \$500,000 threshold applies to gross annual sales premium and not gross earned commissions. Also, if the agency places any business without earning commissions that premium would be counted.

If your business is under the \$500,000 threshold, the FLSA will still apply to your employees. 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, sending email, or handling credit card transactions. “Engaged in interstate commerce” has been interpreted broadly by the DOL and the courts to cover almost all workers.<sup>5</sup>

## 1.3 Is there an exemption for family businesses?

**Yes, as long as every employee is an immediate family member to the owner.** Any establishment that has “as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner” shall not be a business subject to the FLSA.<sup>6</sup> The term “other member of the immediate family of such owner” is considered to include relationships such as brother, sister, grandchildren, grandparents, and in-laws but not distant relatives from separate households.<sup>7</sup>

## 1.4 Is there an exemption that applies to independent insurance agencies?

**No, there is no exemption for independent insurance agencies.** There is some confusion because under the FLSA employees who are paid on a commissioned basis in whole or in part and who work for a “retail and services establishment” can be exempted from overtime pay as long as certain conditions are met.<sup>8</sup> While the phrase “retail and service establishment” seems as if it could encompass independent insurance agencies, the DOL has explicitly included “insurance” and “insurance brokers” on a partial list of establishments lacking the “retail concept” in regulation.<sup>9</sup> The DOL has determined, and subsequent case law has agreed, that insurance lacks the “retail concept.” Therefore, this exemption does not apply to independent insurance agencies.

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<sup>4</sup> 29 USC § 201, et seq.

<sup>5</sup> 29 USC § 203(s)(1). See also, DOL analysis of the rule on pages 25 and 231-32.

<sup>6</sup> 29 USC § 203(s)(2).

<sup>7</sup> 29 CFR § 779.234.

<sup>8</sup> 29 U.S.C. §207(i).

<sup>9</sup> 29 C.F.R. §779.317. See also, *Mitchell v. Kentucky Finance Co., Inc.* 359 U.S. 290 (1959).

## 2. The New “Overtime Rule” explained and applied

### 2.1 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.

### 2.2 How are agency employees impacted by the rule?

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

- **Exempt employees earning less than \$47,476 are impacted.** 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.
- **Properly classified exempt employees earning between \$47,476 and \$99,999 are not impacted.** 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.
- **Exempt employees earning between \$100,000 and \$134,004 may be impacted.** 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 under a different exemption, if applicable.
- **Non-exempt employees are not impacted.** For any employee who is properly classified as non-exempt (i.e. overtime pay is required), no change is required based on the new rule, regardless of employee compensation.

- **Properly classified outside sales employees are not impacted.** 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.

### 2.3 Are independent contractors impacted by the 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.<sup>10</sup>

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.

### 2.4 Is joint employment impacted by the 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."<sup>11</sup> 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).

### 2.5 What should I do to implement the new rule, if it impacts my agency and employees?

Employers need to review the status of their employees as exempt or non-exempt to determine if the current classification is still accurate. Then employers should consider the impact of the new rule on the payment of overtime, if any is expected, and review options for adjusting payment to or status of any employees as needed. The new rule is set to take effect December 1, 2016, barring legal or legislative relief, so all reviews and any adjustments should be completed before that time. It is also prudent to review employee job descriptions and job duties in preparing for the new rule to make sure they are still applicable and compliant with the FLSA and other employment laws generally.

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<sup>10</sup> Administrator's Interpretation No. 2015-1 (July 15, 2015), available at: [https://www.dol.gov/whd/workers/misclassification/ai-2015\\_1.htm](https://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm)

<sup>11</sup> For more information see, DOL Administrator's Opinion No. 2016-1, available here: [https://www.dol.gov/whd/flsa/Joint\\_Employment\\_AI.htm](https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm)

## 3. Employee Classification

### 3.1 What is a “non-exempt employee” and when might it apply?

The FLSA requires that 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, unless the employee or business falls into an exemption. **Therefore “non-exempt” status is the default status for employees and applies to every employee who does not fall into a specific exemption.**

### 3.2 What is an “exempt employee” and when might it apply?

**There is a misinterpretation that any employee who makes above a certain amount is automatically exempt.** The FLSA requires that most employees be classified as non-exempt and 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. Another section of the FLSA exempts highly compensated employees that meet certain requirements. There may be additional exemptions from minimum wage and overtime pay under the FLSA which allows for exempt status, but they are not applicable to insurance agencies so are not covered here. **Unless an employee fits into a specific exemptions based on a variety of factors, such as job duties, he or she is non-exempt. There is no bright line rule for the classification of producers, customer service representatives, or other agency personnel.**

### 3.3 What is the “Executive” exemption and when might it apply?

For an employee to qualify under the “executive” exemption all the following conditions must be satisfied:

1. Earn at least \$47,476 annually (\$913 weekly) on a salary basis. “Salary basis” means a “predetermined or fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.”<sup>12</sup>
2. The primary duty<sup>13</sup> of the employee must be managing the business at which the employee is employed, or managing a customarily recognized department or subdivision.
3. The employee must customarily and regularly<sup>14</sup> direct the work of at least two full-time employees or their equivalent (i.e. one full-time employee and two part-time employees).

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<sup>12</sup> See, DOL Fact Sheet 17G: [https://www.dol.gov/whd/overtime/fs17g\\_salary.pdf](https://www.dol.gov/whd/overtime/fs17g_salary.pdf)

<sup>13</sup> “Primary duty” means “the principal, main, major, or most important duty that the employee performs.” 29 CFR § 541.700.

<sup>14</sup> “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.

4. The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.<sup>15</sup>

The classification of any individual employee is a case-by-case determination dependent on that employee's specific job duties, as well as state and federal law. Employee classification is not determined by job title alone; it is a fact specific inquiry. **Any employee who earns at least \$47,476 annually and is also a manager with actual authority over at least two full-time employees or their equivalent would likely fall under this exemption, regardless of their other duties.**

**Agency owners will also fall under this exemption.** Under a special rule for business owners, an employee who owns at least a 20% equity interest in the enterprise in which he or she is employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

### 3.4 What is the "Administrative" exemption and when might it apply?

For an employee to qualify under the "administrative" exemption all the following conditions must be satisfied:

1. Earn at least \$47,476 annually (\$913 weekly) on a salary basis. "Salary basis" means a "predetermined or fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed."<sup>16</sup>
2. The employee's primary duty<sup>17</sup> must be the performance of office or non-manual work directly related to the management or general business operations<sup>18</sup> of the employer or the employer's costumers.
3. The employee's primary duty must include the exercise of discretion and independent judgment<sup>19</sup> with respect to matters of significance.<sup>20</sup>

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<sup>15</sup> Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

<sup>16</sup> See, DOL Fact Sheet 17G: [https://www.dol.gov/whd/overtime/fs17g\\_salary.pdf](https://www.dol.gov/whd/overtime/fs17g_salary.pdf)

<sup>17</sup> Id. at 12.

<sup>18</sup> 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](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf)

<sup>19</sup> 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](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf)

<sup>20</sup> 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



The classification of any individual employee is a case-by-case determination dependent on that employee's specific job duties, as well as state and federal law. Employee classification is not determined by job title alone; it is a fact specific inquiry. **The administrative exemption is one of the most commonly misapplied exemptions. Most administrative assistants, secretaries, CSRs and other "support staff" will not fall under this exemption.** The DOL does not view "support staff" as having "the exercise of discretion and independent judgment with respect to matters of significance." However, an office manager or an HR manager may be viewed by the DOL as falling under this exemption.

**Most producers will not fall under this exemption as the DOL does not consider employees whose primary duty is sales to qualify for the administrative exemption.**<sup>21</sup> However, a DOL regulation provides an example of when a financial services industry employee may meet the duties of the administrative exemption. If an insurance agent who sells property and casualty products is undertaking parallel duties then they may also meet the exemption. 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.

Agencies should also review DOL Opinion Letter FLSA 2009-28 (Jan. 16, 2009), which deals with the classification of life insurance agents.<sup>22</sup> Under the opinion letter and other applicable case law if a producer's primary duty is the following the producer may fall under the administrative exemption:

- collecting and discussing one-on-one client's insurance and financial information
- analyzing information; comparing and evaluating insurance and financial products to develop individualized advice and strategies for each client based on risk tolerance, needs and objectives
- providing individualized advice and recommendations on purchase of insurance and other financial products
- structuring transactions for maximum client benefit

### 3.5 What is the "Outside Sales" exemption and when might it apply?

There is no minimum salary requirement for an "outside sales" employee. Outside sales employees may earn 100% commissions. For any employee to qualify under the "outside sales" exemption all of the following conditions must be satisfied:

1. The primary duty of the employee must be "making sales"<sup>23</sup> or obtaining orders or contracts for services.

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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](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf)

<sup>21</sup> 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](https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf)

<sup>22</sup> Available at [https://www.dol.gov/whd/opinion/flsa/2009/2009\\_01\\_16\\_28\\_flsa.htm](https://www.dol.gov/whd/opinion/flsa/2009/2009_01_16_28_flsa.htm)

<sup>23</sup> "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

2. The employee must be “customarily and regularly”<sup>24</sup> engaged away from the employer’s place or places of business.

**Some producers will fall under this exemption, but the key factor to its application is that the employee is “customarily and regularly engaged away from the employer’s place of business.”**

Working from home does not count as being away from the employer’s place of business. An outside sales employee must be making 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.<sup>25</sup> 29 CFR § 541.502.

### 3.6 What is the “Professional” exemption and when might it apply?

**Very few, if any, agency employees will satisfy this exemption. Insurance agents do not fall under this 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.

### 3.7 What is the “Computer” exemption and when might it apply?

**Very few, if any agency employees will satisfy this exemption.** The exemption for computer professionals is narrow, and would not include a position such as Chief Technology Officer or to the person in the agency responsible for tech support, though those individuals may fall under one of the other “white collar” exemptions. The computer exemption applies to positions such as a software engineer or computer programmer.

### 3.8 What is the “Highly Compensated Employee” (HCE) exemption and when might it apply?

For any employee to qualify under the “HCE” exemption all of the following conditions must be satisfied:

1. The employee must earn at least \$134,004 a year in total compensation. Under the HCE exemption, \$47,476 of the \$134,004 must be “predetermined or fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.”<sup>26</sup> The remainder of the salary can be earned from nondiscretionary bonuses and incentive payments (including commissions).
2. The employee’s “primary duty”<sup>27</sup> must be office or non-manual work and the employee must “customarily and regularly”<sup>28</sup> 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 serves as the supervisor for 4 employees, even if the individual does not have the

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evidences of intangible property.” 29 CFR § 541.501(a). See also, *Christopher v. SmithKline Beecham Corp*, 132 S. Ct. 2156 (2012).

<sup>24</sup> Id. at 13.

<sup>25</sup> 29 CFR § 541.502.

<sup>26</sup> See, DOL Fact Sheet 17G: [https://www.dol.gov/whd/overtime/fs17g\\_salary.pdf](https://www.dol.gov/whd/overtime/fs17g_salary.pdf)

<sup>27</sup> Id. at 12.

<sup>28</sup> Id. at 13.

ability to hire and fire employees, would fall under this exemption because their salary meets the HCE requirements and they meet one of the requirements of the executive exemption.

## 4. Paying employees generally

### 4.1 Can paid benefits, such as health insurance, be counted in calculating employee pay?

**No.** In computing salary and wage amounts the payment of insurance, or contributions to retirement plans or other fringe benefits (i.e. phone bill stipend or reimbursement) should not be included.<sup>29</sup> Different rules may apply as far as what is considered wages for state and federal tax purposes.

### 4.2 How should employee hours be tracked and how long should records be maintained?

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.<sup>30</sup>

The records you use to base wage compensation on (i.e. timecards) should be kept for at least two years. Payroll records should be kept for at least three years.

### 4.3 Our agency operates on a work week that is less than 40 hours, when does overtime kick in?

The FLSA requires overtime to begin once an employee has worked 40 hours, even if your agency has a standard workweek that is less than 40 hours for all or parts of the year.

### 4.4 Must I pay employees on a weekly basis?

**Payment frequency will vary under state law.** The FLSA does not require that employees are paid weekly, only that overtime and exempt status be calculated weekly.

### 4.5 Can comp time be offered in lieu of overtime pay?

**No, however comp time can be offered if it is not an alternative to legally required 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.

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

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<sup>29</sup> 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>

<sup>30</sup> For more information see, DOL Fact Sheet #21, available here: <https://www.dol.gov/whd/regs/compliance/whdfs21.pdf>

- 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 in lieu of overtime pay.
- It is permissible to provide an exempt employee with a "comp day" to be taken within 30 days because it is not an alternative to legally required overtime pay.

## 5. Paying non-exempt (i.e. overtime required) employees and calculating overtime

### 5.1 Can overtime pay be waived?

**No.** Legally required overtime pay cannot be waived.

### 5.2 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.

### 5.3 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).<sup>31</sup> Hours should be tracked for all overtime eligible employees, even those who are paid a salary.

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.

### 5.4 How is legally required overtime pay for non-exempt employees calculated?

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. all compensation including non-discretionary bonuses and commissions whether paid hourly or salaried) for work by the number of hours that compensation was intended to pay for. Discretionary bonuses, such as Holiday bonuses are not required to be considered when calculating an employee's rate of pay. Overtime pay that is legally required under the FLSA is generally calculated at one and one half time the employee's hourly wage.

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<sup>31</sup> See, 29 CFR § 778.114 for information on calculating salaries for employees with fluctuating workweeks.

For example, to calculate the hourly overtime pay rate for an employee who earns \$20 an hour and works 40 hours a week and receives a \$100 incentive bonus that week, you would typically do the following under the FLSA:

$$\$20 + (\$100 \div 40 \text{ hours}) = \$22.50 \text{ an hour} \times 1.5 = \$33.75 \text{ an overtime hour}$$

For example, to calculate the overtime pay rate for a salaried non-exempt 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:

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

### 5.5 Can non-exempt employees voluntarily work overtime?

**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.

### 5.6 How is overtime pay for non-exempt employees calculated for travel?

**It depends on the circumstances.** 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.<sup>32</sup> Having clear employee policies outlining what is compensable and non-compensable time related to travel is important. According to general guidance from the DOL:<sup>33</sup>

- *Home to work travel* is ordinary travel between your home and office at the beginning and end of the work day, and is not compensable.
- *Home to work on special one day assignment in another city* is when an employee who regularly works in a fixed location in one city and is given a special one-day assignment in another city and returns home the same day. In this case the time spent traveling to and returning from the other city is work time, except the employer may deduct/not count the time the employee would normally spend commuting to the regular work site.
- *Travel that is all in a day's work* is travel during the work day (i.e. to and from the offices of potential customers) and counts towards hours worked.
- *Travel away from home and community* is overnight travel. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile, unless the employees performs compensable work during those hours. Additionally, time sleeping generally does not count toward hours worked.

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<sup>32</sup> 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>

<sup>33</sup> See DOL Fact Sheet #22, <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>

### 5.7 Is pay required for non-exempt employees for CE classes?

**Yes.** 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.<sup>34</sup>

### 5.8 Are non-exempt employees permitted to work at home under the FLSA?

**Yes.** 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.

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

**It depends on the circumstances.** 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 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.<sup>35</sup>

### 5.10 My agency has on-call hours, is that subject to overtime pay?

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

### 5.11 Is there a way to pay a non-exempt employee a salary if their hours fluctuate every week?

Depending on state law employers may use the fluctuating workweek method.<sup>36</sup> Regardless of classification or job duties, any employee may receive a salary. If that employee meets the requirements for the fluctuating workweek method, the employer can pay for hours the employee works in excess of 40 hours per workweek at a rate which is not less than one-half times the employee's regular pay rate, as opposed to the standard time-and-one-half. The requirements of the fluctuating workweek method are as follows:

1. The employee's salary is fixed and provided each workweek, regardless of the number of hours worked.

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<sup>34</sup> 29 CFR §§ 785.27-785.32, available at: <https://www.dol.gov/whd/regs/compliance/wh1312.pdf>

<sup>35</sup> For more information see, DOL Fact Sheet #22, available here: <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>

<sup>36</sup> See, 29 CFR § 778.114 for more information on calculating overtime pay for salaried non-exempt employees with fluctuating workweeks.

2. The hours the employee works fluctuate from workweek to workweek.
3. The salary is such that in any given workweek, the employee never receives less than minimum wage pay when the salary is divided by the total hours worked.
4. The employee receives pay at a rate not less than half the regular pay rate for any hours worked in excess of 40 hours in a workweek.
5. The employer and employee have an understanding that the employee will receive a fixed salary for the hours the employee works in a workweek, whether few or many.

For example, under current law, an employer may classify an employee as exempt if they meet the duties requirements for one of the “white-collar” exemptions under the FLSA and have a salary of \$600 per workweek—which amounts to \$31,200 per year. Based on the recent changes, however, an employer cannot classify this employee as exempt on or after Dec. 1 because their salary will fall below the new threshold. An increase in the employee’s salary to meet the new threshold of \$47,476 would require more than a 50% raise, which may not be feasible for the employer.

If such an employee were to work 60 hours in a workweek, the standard overtime rate of time-and-one-half would require the employer to pay the employee as follows: \$600 for the first 40 hours the employee works, which leads to a regular pay rate of \$15 per hour. In addition, the employer must pay \$22.50 per hour ( $\$15 \times 1.5$ ) for 20 hours of overtime. This results in total pay of \$1,050 for that workweek.

If the fluctuating workweek method is an option, the employer would pay the employee as follows: \$600 for the 60 hours the employee works, which leads to a regular pay rate of \$10 per hour. In addition, the employer must pay half the regular pay rate for hours the employee works in excess of 40. Here, that overtime rate is \$5 per hour ( $\$10 \times .5$ ) for the 20 hours in excess of 40. This results in total pay of \$700 for that workweek.

Although federal regulations allow employers to use the fluctuating workweek option, several states, including California, have laws or regulations that prohibit its use. Even if state law allows the option, independent insurance agencies need to consider issues such as:

- How to document the employer and employee’s mutual understanding that the fluctuating workweek method applies.
- Whether the weekly salary is sufficient to ensure that the employee’s regular rate of pay always exceeds the minimum wage.
- Whether or to what extent the employee’s receipt of commissions and other incentive compensation affects the use of the method.
- Whether or to what extent the employer is allowed to deduct from the employee’s fixed salary.

## 5.12 Can non-exempt employees earn vacation time and sick leave?

**Yes.** Vacation and sick leave is at the discretion of employers, subject to applicable state and federal family and medical leave laws.

## 6. Paying exempt (i.e. overtime not required) employees

### 6.1 What are the salary requirements for exempt employees?

Salary requirements depend on the exemption the employee falls under:

- *Administrative, Executive, and Professional Exemptions:* Employees must earn a salary of at least \$913 a week (\$47,476 annually). This amount must be “predetermined or fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.”<sup>37</sup> Under the December 2016 overtime rule, nondiscretionary bonuses, incentive payments, and commissions can be used to satisfy up to 10% of the \$47,476 salary threshold, provided those payments are made on a quarterly or more frequent basis. 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.
- *Outside Sales Exemption:* The outside sales exemption does not have a minimum salary requirement.
- *HCE Exemption:* The employee must earn at least \$134,004 a year in total compensation. Under the HCE exemption, \$47,476 of the \$134,004 must be “predetermined or fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.”<sup>38</sup> The remainder of the salary can be earned from nondiscretionary bonuses and incentive payments (including commissions).

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

**Yes as long as they are non-discretionary.** Under the December 2016 overtime rule, 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).

Promised bonuses such as those announced to employees to induce them to work more efficiently or to remain with the firm are considered nondiscretionary.<sup>39</sup> 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.<sup>40</sup>

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<sup>37</sup> See, DOL Fact Sheet 17G: [https://www.dol.gov/whd/overtime/fs17g\\_salary.pdf](https://www.dol.gov/whd/overtime/fs17g_salary.pdf)

<sup>38</sup> Id.

<sup>39</sup> 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>

<sup>40</sup> 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>



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. The December 2016 rule did not impact the payment of discretionary bonuses.

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.

### 6.3 Can exempt employees 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 pay or comp time pursuant to the FLSA.

### 6.4 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. If an employer chooses to classify an employee who satisfies an exemption as non-exempt, all the applicable rules for non-exempt employees apply. The employer may also pay any properly classified exempt employees overtime or provide them with comp time, at the employer's discretion.

### 6.5 How will the automatic updating of the salary thresholds work?

The December 2016 overtime 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.

## 7. Employee classification in insurance agencies

### 7.1 How are producers classified?

**There is no bright line rule for the classification of producers.** Producers, who are agency employees and not independent contractors, are generally classified in one of five ways, depending on job duties and compensation.

1. Non-exempt hourly employees (i.e overtime legally required).
2. Exempt employees under the "outside sales" exemption.
3. Exempt employees under the "executive" exemption.
4. Exempt employees under the "HCE" exemption.
5. Exempt employees under the "administrative" exemption.

**For a detailed explanations of each exemption please refer to Section 3 of this document.**

## 7.2 How are administrative staff and CSRs classified?

**There is no bright line rule for the classification of agency staff.** However, in many cases support staff should be classified as non-exempt. Please see Section 3 of this document for more information.

## 7.3 How are agency owners classified?

**Agency owners should generally be exempt.** 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.<sup>41</sup>

# 8. Job descriptions

## 8.1 What bearing do job titles and job descriptions have on employee classification?

**Job titles and descriptions have no bearing on an employee's eligibility for an exemption.** However, reviewing job descriptions is something that may be instructive to the DOL if an agency is audited. Job descriptions are also important in helping to define a staff's role and responsibilities. The most important thing for the DOL in determining employee status is what the employee is actually doing so it is important to make sure that job titles and descriptions reflect actual employee duties.

## 8.2 What if I don't have job descriptions?

IIABA recommends that you have written job descriptions for all employees. Sample job descriptions are available in the "Virtual University" section of [www.independentagent.com](http://www.independentagent.com) under "Talent & Recruitment-Hiring." The job descriptions serve as a template that agencies should tailor to their individual needs.

# 9. Enforcement

## 9.1 How is the FLSA 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 or discipline an employee for filing a complaint or for participating in a legal proceeding in good faith 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.<sup>42</sup> 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.<sup>43</sup>

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<sup>41</sup> 29 CFR § 541.101.

<sup>42</sup> See, DOL website page on back pay, available here: <https://www.dol.gov/general/topic/wages/backpay>

<sup>43</sup> 29 CFR §§ 578.1-578.4

## 9.2 How does an employee prove they are entitled to overtime?

When there is a dispute over why an employee was classified as exempt or whether overtime hours were worked and unpaid, the burden of proof is on the employer. It is important that you properly document the rationale for your classification and, in the case of non-exempt employees, that you keep proper records of time worked (as required by the FLSA and applicable regulations).