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HUMAN CAPITAL MANAGEMENT

## MEMORANDUM

HCM 2016-11

Date: September 20, 2016

To: All Appointing Authorities

From: Lucinda Meltabarger, OMES Human Capital Management  
Administrator

Re: New FLSA Rules

# New FLSA Rules

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On May 18, 2016, President Obama and Labor Secretary Perez announced the publication of the Department of Labor's final rule regarding the new overtime regulations.

## What's New?

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**Salary and compensation levels needed for executive, administrative and professional workers to be exempt have changed.**

Effective Dec. 1, 2016, the standard salary level will be set at the 40th percentile of earnings of full-time salaried workers in the lowest-wage census region, currently the South. The new standard salary level will now be \$913 per week (\$47,476 annually) for a full-year worker.

Additionally the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test will be changed to the annual equivalent of the 90th percentile of full-time salaried workers nationally. The new amount will be \$134,004 effective Dec. 1, 2016.

Essentially this means that any employee making less than \$47,476 per year will now be classified as a non-exempt employee. Also, employees will not be subject to the white collar exemptions test until their salary is more than \$47,476 per year.

Time Period	Previously	Effective Dec. 1, 2016
<b>Full-Time Salaried Workers</b>		
Per Week	\$455	\$913
Per Year	\$23,660	\$47,476
<b>Highly Compensated Employees (HCE)</b>		
Per Year	\$100,000	\$134,004

Future automatic updates to these new salary thresholds will occur every three years, beginning Jan. 1, 2020. The standard salary will be updated to maintain the 40th percentile threshold and the HCE compensation will be updated to maintain the 90th percentile threshold. Updated rates will be published at least 150 days before their effective date. These earning thresholds are only effective measures of exempt status if they are kept up to date. Regular updates are the best method to ensure these tests remain effective.

### Non-Discretionary Bonuses

For the first time, the Federal Department of Labor has changed the regulations to allow non-discretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary test requirement. For employers to credit non-discretionary bonuses and incentive payments toward a portion of the standard salary level test, such payments must be paid on a quarterly or more frequent basis.

**Non-discretionary bonuses** and incentive payments are forms of compensation promised to employees to induce them to work more efficiently or to remain with the company. Examples include bonuses for meeting set production goals, retention bonuses and commission payments based on a fixed formula.

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. An example would be an unannounced bonus or spontaneous reward for a specific act.

Discretionary bonuses will not be included when satisfying the salary test requirement.

## What Does this Mean for the State?

### Longevity

Longevity payments **will not** count toward the salary test requirement because they are not paid at least quarterly.

### Pay-for-Performance

There is some gray area on the issue of whether or not our pay-for-performance incentive is a non-discretionary bonus based on the fact that the appointing authority has some control over whether or not the individual receives the pay-for-performance bonus based on the employee's



performance rating. Until further guidance is issued to the contrary, we will continue to designate this as a non-discretionary bonus.

- A pay-for-performance incentive pay **will** satisfy up to 10 percent of the salary test requirement if the payment is made each time the employee receives a paycheck.
- A pay-for-performance incentive **will not** count toward the salary test requirement if the payment is made as a one-time lump sum.

### Skill-Based Pay

- A skill-based pay incentive pay **will** satisfy up to 10 percent of the salary test requirement if the payment is made each time the employee receives a paycheck.
- A skill-based pay incentive **will not** count toward the salary test requirement if the payment is made as a one-time lump sum.

## Options for Compliance

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- **Raise Salaries:** For workers whose salaries are close to the new threshold and who pass the duties test, employers may choose to raise these workers' salaries to meet the new threshold and maintain their exempt status.
- **Pay Overtime or Compensatory Time:** State and local government employers also can continue to pay newly eligible employees a salary and pay overtime, or provide comp time for overtime hours in excess of 40 per week.
  - Unlike private sector employees, state and local governments can provide compensatory time rather than cash overtime payments assuming certain criteria is met. For more information please see [Merit Rule 260:25-7-12](#).
- **Monitor Employee's Workload:** Employers can limit the need for employees to work overtime by ensuring that workloads are distributed to reduce overtime, that staffing levels are appropriate for the workload and that workers are managing their time well.

**Note:** Compensatory time accrued before Dec. 1, 2016, by exempt employees whose status will change to non-exempt effective Dec. 1, 2016, is not required to be paid out at the expatriation of the 180 time period. However, should your agency choose to pay out the accrued compensatory time, it shall be used or paid at a straight time basis in accordance with 260:25-7-12, rather than at the time and a half rate. Additionally, it is of paramount importance that you establish a way to differentiate the compensatory time earned prior to and after Dec. 1, 2016, for recordkeeping purposes should your agency become the subject of a Department of Labor complaint.

If you have questions or require additional information, please feel free to contact Jake Smith at 405-521-6327 ([Jacob.Smith@omes.ok.gov](mailto:Jacob.Smith@omes.ok.gov)) or contact your classification/compensation liaison at HCM or by calling 405-521-2177.

<https://www.ok.gov/opm/documents/2016FLSAOklahomaPolicyGuidelines.pdf>

