

Broadcasters and Other Media Employers Must Navigate the New 2024 Overtime Requirements

By Scott R. Flick

On April 23, 2024, the U.S. Department of Labor published final regulations under the Fair Labor Standards Act (“FLSA”) that ultimately raise the minimum salary necessary to be exempt from federal overtime rules by 65%. These changes affect all businesses subject to the FLSA, but broadcasters and other media employers may particularly feel the impact given that they rarely operate on a 9am-to-5pm schedule. The increase will occur in two steps, with the first going into effect on July 1, 2024, and the second occurring on January 1, 2025. While these increases are certain to be challenged in court, the outcome of any appeals is difficult to predict. Employers need to prepare now to minimize the impact of these changes on their operations.

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The Fair Labor Standards Act is the federal law governing wage and hour requirements for employees. Pursuant to the FLSA, employers must pay employees a minimum wage and compensate them for overtime at 1.5 times their regular rate of pay for any time worked exceeding 40 hours in a workweek unless those employees are exempt from that requirement. On April 23, 2024, the Department of Labor issued a Final Rule that increases the minimum salary required for certain types of employees to be exempt from the FLSA’s overtime rules and changes the methodology that will be used to determine the applicable salary thresholds in the future. As a result, many currently exempt employees whose salaries are below the new thresholds will soon become eligible for overtime pay, requiring their employers to either increase those employees’ salaries to meet the new thresholds, or begin paying them overtime.

The Department of Labor projects the change will impact an estimated four million workers, with an additional direct cost to employers (from overtime pay and increases in salaries to maintain exempt status) of \$1.5 billion.

Although the FLSA applies to most employers, the law contains exemptions for certain types of employees, including some at small-market broadcast stations. The Final Rule does not affect these broadcast industry-specific exemptions, but will affect many other currently exempt employees in the broadcast and media industry who, unless they receive salary raises, will soon become eligible for overtime pay.

This Advisory only addresses federal law. Some state laws impose stricter standards than federal law as to which employees are exempt from overtime pay. Employers must ensure that they also meet the requirements of any applicable state or local employment laws.

Overview

The FLSA requires employers to pay non-exempt employees an overtime rate of 1.5 times their regular rate for all hours worked over 40 hours per workweek. However, the FLSA exempts from its overtime rules certain classes of employees who are paid on a salary basis and who also meet specific “white collar” duties tests. The Department of Labor’s Final Rule increases the minimum salary required for these classes of employees to be deemed exempt from the FLSA’s overtime rules, but does not alter the duties tests for those exemptions.

The new salary requirements will go into effect in two phases. Beginning July 1, 2024, employees classified as exempt from overtime under the “executive”, “administrative”, or “professional” (“EAP”) exemptions must receive a guaranteed weekly salary of at least \$844 (\$43,888 annually) to continue to be exempt. The previous minimum salary to qualify as exempt was \$684 per week (\$35,568 annually). Six months later, on January 1, 2025, the minimum salary to be exempt will increase to \$1,128 per week (\$58,656 annually). This salary level is tied to the 35th percentile of wages for full-time salaried employees in the country’s lowest-wage Census Region. The Final Rule allows employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the salary exemption threshold. Such payments must be made on an annual or more frequent basis. Discretionary bonuses cannot be used to satisfy any part of the salary level requirement. For EAP employees, employers may make one catch-up payment within one pay period after the end of each 52-week period to achieve the required salary level for the EAP exemptions. The catch-up payment only counts towards the prior year’s salary, and not towards the 52-week period in which it is paid.

The other affected employee exemption is the “highly compensated employee” (“HCE”) exemption. An HCE is an employee who customarily and regularly performs one or more duties of an EAP employee (but not all of them) and is compensated at a specified higher minimum salary level. The minimum total annual compensation to qualify an employee for the HCE exemption will be \$132,964 annually, effective July 1, 2024, (up from \$107,432 under the current regulations), and \$151,164 annually, beginning January 1, 2025. These compensation levels respectively represent the 80th and 85th percentile of wages for full-time salaried employees nationally. Employers may make a yearly catch-up payment in order to achieve the minimum annual compensation level to qualify that employee for the HCE exemption.

The minimum salary thresholds for both the EAP and HCE exemptions will be revised every three years based on updated earnings data beginning on July 1, 2027.

To assist broadcasters and other media employers in adapting their operations to these new salary thresholds, below is a brief overview of the exempt classifications for white collar employees and their respective “duties” requirements, broadcaster-specific insights for each classification, and a discussion of special exemptions that may be particularly helpful to broadcasters, including the statutory exemption for certain employees of small-market broadcast stations.

General Exemption Requirements

For an employee to be exempt from the FLSA’s overtime rules under the EAP test, the employer must pay the employee on a salary basis. This requires the employee be paid a predetermined and fixed salary that is not subject to reductions based on variations of quality or quantity of work performed. However, an employer is not required to pay an employee for workweeks in which the employee does no work for that employee to still be considered salaried under the EAP test.

As a result, EAP-exempt employees must receive their full salary for any workweek in which work is performed, regardless of the number of days or hours worked or the quality of the work product, although there are certain instances in which deductions from pay are permissible. For example, employers may make deductions from an exempt employee’s pay when an exempt employee misses work for one or more full days for personal reasons or for sickness or disability where the employee does not yet qualify for paid leave or has exhausted all available paid leave under the employer’s paid leave policies. Docking an exempt employee’s pay for a partial-day absence, however, would violate the salary basis test and negate the employee’s exempt status, resulting in the employer facing potential liability for back overtime pay. An

employer that regularly practices improper salary deductions may negate not only the exempt status of the employee from whom the improper deduction was made, but also the exempt status of any similarly-situated employees subject to that same policy.

Executive, Administrative, and Professional Exempt Status: Beginning July 1, 2024, to qualify for the EAP exemption, an employee must meet ALL of the following requirements:

1. Pursuant to the salary basis test, the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. The weekly salary paid must be at least \$844 (\$43,888 annually) as of July 1, 2024, and at least \$1,128 (\$58,656 annually) as of January 1, 2025; AND
2. The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations. The tests used to determine whether the duties an employee performs qualify as executive, administrative, or professional are discussed in more detail below.

Highly Compensated Employee Exempt Status: To qualify for the HCE exemption, an employee must meet ALL of the following requirements:

1. The employee must be paid total annual compensation of at least \$132,964 and receive a salary of at least \$844 per week beginning July 1, 2024, and be paid \$151,164 annually, including a salary of at least \$1,128 per week, beginning January 1, 2025. Note that this means a significant portion of the employee's compensation can come in the form of ad sales commissions or nondiscretionary bonuses;
2. The employee's primary duty involves performing office or non-manual work; AND
3. The employee must customarily and regularly perform one or more of the exempt duties or responsibilities of an EAP-exempt employee.

Duties Tests

Be aware that job titles do not determine whether an employee qualifies for exempt status. In addition to earning at or above the new minimum salary levels, an exempt employee must perform the duties or responsibilities of one or more of the following types of employees to qualify as an exempt EAP employee.

Administrative Employee (must satisfy ALL):

1. The employee's primary duty must be in the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; AND
2. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Note that the regulations emphasize duties that involve the exercise of discretion with respect to matters of significance. For example, administrative employees who have the discretion to commit the employer in matters of financial significance (such as through purchasing or budgeting) are generally classified as exempt.

Executive Employee (must satisfy ALL):

1. The employee must have a primary duty of managing the enterprise or a department or subdivision of the enterprise; AND
2. The employee must customarily and regularly direct the work of at least two employees and have the authority to hire or fire (or the employee's opinions on hiring, firing, or other status changes of employees must be given particular weight).

Remember that this is a conjunctive test. It is not enough for an employee to direct at least two other employees. Employers must consider factors such as an employee's position in management and the employee's role in retaining, releasing, or otherwise affecting the status of other employees.

Professional Employee (pick one):

1. **Learned Professional** – The employee's primary duty requires performance of work that is predominantly intellectual in character, which entails the regular exercise of discretion and judgment, and that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.
2. **Creative Professional** – The employee's primary duty requires work that is original and creative in a recognized field of artistic endeavor. This includes such fields as music, writing, acting, and the graphic arts. This exemption category tends to be particularly useful to broadcast stations given the amount of creative effort involved in running a broadcast business.
3. **Teachers and employees practicing law or medicine** – A class of employee not likely to be found at your average broadcast station or media business.

The Professional Employee classification provides many opportunities for qualifying a broadcast station employee as exempt. Common broadcast jobs that may fall within the Professional Employee category are photographers, designers, some forms of on-air talent, digital media creators, and investigative journalists. However, given the wide variety of job duties at a broadcast station, many of which involve creative effort, decisions should be made on a **case-by-case** basis. Factors to consider in making such decisions include:

- How much of the employee's work requires invention, imagination, originality, or talent?
- Does the employee offer a unique interpretation of news items, or is the employee's role closer to collecting, organizing, or recording information?

Relevant to broadcasting, reporters provide a good example of how case-specific the exempt classification can be. Nearly all reporters would say their job requires extensive originality and talent; but the Department of Labor and numerous courts tend to disagree. In discussing which employees may qualify as exempt, the Code of Federal Regulations states:

Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

The courts have echoed this approach, finding that reporters whose job consists primarily of "general assignment" work such as covering hearings, police activity, or local events are not "creative" (so as to be exempt from overtime rules) because their work relies on their ability to relay information in a quick and understandable way and depends primarily on their "intelligence, diligence, and accuracy," rather than on "invention, imagination, or talent."

However, this does not mean that reporters can never qualify as exempt under the FLSA. The courts have noted that reporters who develop their own stories or who work primarily on pieces that require original analysis or thought are

likely exempt from the FLSA's overtime rules. More specifically, a court found that, compared to local beat writers and producers, certain high-level news editors, producers, and writers for a major broadcast news organization were exempt from the FLSA's overtime provisions because developing story ideas, directing the shooting of news stories, or writing scripts and headlines requires creativity. Similarly, a court found that a reporter for a national newspaper was exempt under the FLSA because instead of covering a beat, he created his own story ideas, maintained his own network of sources, and offered "thoughtful analysis of complex issues".

The example of reporters illustrates how challenging categorizing a particular employee's job duties can be. Stations that attempt to apply a "one size fits all" approach to a group of employees merely because they all have the same job title are setting themselves up for future liability. In addition, if not carefully explained to the affected employees, categorization as exempt (or not) can create friction among employees who see others with the same job title receiving different pay treatment. It is therefore wise to consult experienced employment counsel when classifying employees, not just to find the right answer, but to provide support if an exempt classification is challenged.

Additional Provisions

Special Overtime Exemption for Small-Market Radio and Television Station Employees

The Final Rule's increased minimum salary thresholds for the overtime exemption does not affect the separate overtime exemption for small-market broadcasters that has been in place since 1961. Under this exemption, an employee must satisfy all of the following criteria to be deemed exempt from the FLSA's overtime requirements:

1. The employee must work at a radio or television station whose major studio is located in a city or town that, as determined by the Census Bureau, has a population of:
 - a. 100,000 or less, provided that the city or town is not within a larger metropolitan area that has a population greater than 100,000; OR
 - b. 25,000 or less, even if the city or town is within a larger metropolitan area that has a population greater than 100,000, provided that the smaller city or town is at least 40 miles (by air) from the principal city in the larger metropolitan area.
2. The employee must be primarily employed as an announcer, a news editor, or a chief engineer.
 - a. **An announcer** is an employee who appears before the microphone or camera to introduce programs, read news announcements, present commercial messages, station identifications, time signals, and similar routine on-air material. In small stations, an announcer may, in addition to these duties, operate the studio control board, give cues to the control room for switching programs, make recordings, make the necessary preparations for the day's programs, play records, or write advertising, promotional or similar type copy.
 - b. **A news editor** is an employee who gathers, edits and rewrites the news. A news editor may also select and prepare news items for broadcast and present the news on-air.
 - c. **A chief engineer** is an employee who primarily supervises the operation, maintenance, and repair of all electronic equipment in the studio and at the transmitter site and is licensed by the Federal Communications Commission as a Radio Telephone Operator First Class. In small stations, only one such engineer may be employed, and in some cases this employee may be assisted by part-time employees from other departments. Where two or more engineers are employed by a station, only one may qualify as chief engineer—the one who, on the basis of the factual situation, is in charge of the engineering work.

Note that this exemption applies only to an employee who is employed “primarily” as an announcer, news editor, or chief engineer. An employee that spends more than half of their hours in a particular role is likely primarily employed in that occupation. Employees of independent contractors and others who work for a radio or television station but who are not “employed by” such station are not eligible for this exemption even if they engage in the named occupation. For purposes of this exemption, a “major” studio is tantamount to the “main” studio of the radio or television station (as defined by the FCC until it eliminated the Main Studio Rule in 2018).

Computer Professionals

The existing exemption for computer-related employees, a classification that may apply to some broadcast station and media employees, can apply to both salaried and hourly employees who otherwise qualify. As with the EAP exemptions, the Final Rule increased the minimum salary needed for exempt status for computer professionals paid on a salary basis. It did not, however, affect the exemption test for computer professionals who are paid on an hourly basis. As a result, to qualify as exempt, computer professional employees must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled employee in the computer field and must be paid either (a) on a salary basis, in which case they must as of July 1, 2024 receive a weekly salary of at least \$844 per week (\$43,888 annually) and as of January 1, 2025, receive a weekly salary of at least \$1,128 per week (\$58,656 annually), or (b) on an hourly basis, provided they receive a minimum hourly wage of not less than \$27.63 an hour. To qualify for the exemption, the primary duty of such employees must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; OR
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Employees

The Final Rule **does not impact** the existing exemption for “outside sales employees,” a classification that may encompass account executives selling advertising time on broadcast stations depending on their exact duties. To fall within this exemption, a station employee must satisfy all of the following criteria:

1. The employee must have as their primary duty making sales or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; AND
2. The employee must be customarily and regularly engaged away from the employer’s place of business in doing that job.

As defined by the Department of Labor, “customarily and regularly” means “greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or onetime tasks.” Thus, sales employees who typically handle sales from the office by making phone calls, and employees who support the work efforts of those engaged in “outside” sales, generally do not qualify for this exemption.

Penalties

Broadcasters and other media employers found violating the FLSA pay requirements face the same penalties as other businesses, which can be painful. Non-complying employers risk civil penalties of well over \$2,000 per violation, and the FLSA authorizes the Department of Labor and aggrieved employees to bring suit for up to three years of back pay and liquidated damages. Employees that succeed in private litigation are also entitled to recover attorneys’ fees,

and there can be individual liability for decision-makers responsible for misclassifying an employee as exempt. Further, the FLSA authorizes class action lawsuits by multiple plaintiffs. Broadcasters and other media employers should examine their current pay structures as soon as possible to determine how best to bring them into compliance with the new requirements.

Finally, for strategies to comply with the new requirements while minimizing financial harm and the adverse impact on employee morale (many employees react poorly to being converted to non-exempt status regardless of overtime eligibility), please review our related Pillsbury publication, **The Department of Labor Significantly Increases Salary Thresholds for Overtime Exemptions.**