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## A Broadcaster's Guide to the U.S. Department of Labor's New Overtime Exemption Requirements

By Julia E. Judish, Scott R. Flick and Jessica Nyman

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*On May 18, 2016, the U.S. Department of Labor published final regulations under the Fair Labor Standards Act ("FLSA") that more than double the minimum salary level necessary to be exempt from the Act's overtime rules. While the changes affect all business subject to the FLSA, broadcasters in particular may feel the impact of the changes given the staffing models used by many TV and radio stations. The new requirements will go into effect on December 1, 2016, and broadcasters need to take steps to adapt to, and minimize the impact of, those changes prior to that deadline.*

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The Fair Labor Standards Act ("FLSA") 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 the requirement. On May 18, 2016, the Department of Labor issued a Final Rule that effectively doubled the minimum salary threshold for certain types of employees to be exempt from the FLSA's overtime rules, and significantly raised the salary threshold for other types of employees. As a result, many currently exempt employees whose salaries are below the new thresholds will soon be eligible for overtime pay. The White House projects the change will impact over four million previously exempt American employees.

Although the FLSA applies to almost all employers, it contains exemptions for certain types of employees at small-market broadcast stations. The Final Rule does not affect these specific broadcast industry exemptions, but will affect many other currently exempt employees in the broadcast 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 meet specific “white collar” duties tests. The Department of Labor’s Final Rule increases the minimum salary necessary 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.

Beginning December 1, 2016, employees classified as exempt from overtime under the “executive”, “administrative”, or “professional” (“EAP”) exemptions must receive a guaranteed weekly salary of at least **\$913 (\$47,476 annually)** to continue to be exempt. The previous minimum salary to qualify as exempt was \$455 per week (\$23,660 annually). This salary level is tied to the 40th 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, incentives, and commissions to satisfy up to 10% of an employee’s salary level in order to reach the exemption threshold. Such payments must be made on a quarterly or more frequent basis. For EAP employees, employers may make one catch-up payment within one pay period of the end of a quarter to meet the required salary level for the EAP exemptions.

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 and is compensated at a specified higher minimum level. The minimum total annual compensation for the HCE exemption will be **\$134,004 annually**, effective December 1, 2016 (up from \$100,000 under the current regulations). This compensation level represents the 90th percentile of wages for full-time salaried employees nationally. Employers may make a yearly catch-up payment in order to meet the minimum annual compensation level for the HCE exemption.

After the Final Rule goes into effect on December 1, 2016, these minimum salary and compensation levels will automatically update every three years beginning January 1, 2020, with the new salary levels being announced 150 days prior to their effective date.

Below is a brief overview of each of the exempt white collar employee classifications and their respective “duties”, broadcaster-specific insights for each classification, and a discussion of some special exemptions that may be helpful to broadcasters, including the 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 exemptions, 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.

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 employers that maintain paid vacation and paid sick leave policies may make full-day deductions for personal or illness-related absences by exempt employees. 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 December 1, 2016, 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 amount of weekly salary paid must be at least \$913 (\$47,476 annually); AND
- (2) The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations. The tests used for determining whether the duties an employee performs qualify 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 \$134,004 and receive a salary of at least \$913 per week. Note that this means a significant portion of the employee's compensation could 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 level, 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.

The Professional Employee classification provides many options 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 tremendous 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 use 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 threshold 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 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).

### Computer Employees

The existing exemption for computer-related employees, a classification that may apply to some broadcast station employees, can apply to both salaried and hourly employees who otherwise qualify. As with the EAP exemptions, the Final Rule increased the minimum salary level 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 on a salary basis, in which case they must (as of December 1) receive a weekly salary of at least \$913 per week (\$47,476 annually), or 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 a 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 one-time tasks”. Thus, sales employees who typically make their 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 found violating the FLSA pay requirements face the same penalties as other businesses, which can be painful. Non-complying employers risk civil penalties of up to \$1,100 per violation, and the FLSA authorizes the Department of Labor and aggrieved employees to bring suit for 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 a misclassification. Further, the FLSA authorizes class action lawsuits by multiple plaintiffs. Fortunately, broadcasters have six months to study their current pay structures and bring them into compliance. For strategies to comply with the new requirements while minimizing the financial impact on your stations, please review our related publication, [\*U.S. Department of Labor More Than Doubles Minimum Salary Levels for FLSA Overtime Exemptions\*](#).

## Live Link

[U.S. Department of Labor, Wage and Hour Division, Overtime Pay, Final Rule: Overtime.](#)

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If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors of this Advisory.

Julia E. Judish [\(bio\)](#)  
Washington, DC  
+1.202.663.9266  
[julia.judish@pillsburylaw.com](mailto:julia.judish@pillsburylaw.com)

Scott R. Flick [\(bio\)](#)  
Washington, DC  
+1.202.663.8167  
[scott.flick@pillsburylaw.com](mailto:scott.flick@pillsburylaw.com)

Jessica Nyman [\(bio\)](#)  
Washington, DC  
+1.202.663.8810  
[jessica.nyman@pillsburylaw.com](mailto:jessica.nyman@pillsburylaw.com)

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