

Reminder - Changes to Federal Overtime Regulations Now in Effect

Prepared for the Massachusetts Municipal Association Meeting, January 2020

Last year, we advised you of important changes to the federal overtime regulations under the Fair Labor Standards Act (“FLSA”). Those changes include an increase to the salary threshold that an employee must be paid in order to be considered an “exempt” employee under the FLSA. As explained in our October 1, 2019 eUpdate, attached for your convenience, the revised regulations increase this salary threshold to \$684 per week (or \$35,568 annually), from the prior rate of \$455 per week. As a result, overtime pay protections are extended to a greater number of employees.

Thus, employees making less than \$684 per week on a salaried or fee basis will generally be eligible for overtime under the FLSA, regardless of whether they had previously been considered “exempt” from the FLSA’s overtime requirements. In addition, the new rule raises the threshold for so-called “highly compensated employees” from \$100,000 a year to \$107,432, of which \$684/week or the equivalent thereof must be paid on a salary or fee basis. Note that this new salary threshold does not impact the partial exemption under Section 207(k) of the FLSA for police officers and firefighters.

This is a reminder that the revised FLSA regulations took effect **January 1, 2020**. Please ensure that when you are classifying positions as “exempt” or “non-exempt” under the FLSA, you first consider this newly-increased salary threshold.

For your ease of reference, attached is a summary of the several “tests” to establish whether a position is eligible for exemption from the FLSA’s overtime requirements.

If you have any questions concerning the revised regulations or the FLSA in general, please contact any member of the firm’s Labor and Employment Practice Group at 617-556-0007. Access to this eUpdate, and many others, is found on our website under the “Resources” tab at www.k-plaw.com, or, to go directly to the eUpdate page, click [here](#).

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Tests For Determining Exemption from the Fair Labor Standards Act (FLSA) Overtime Requirements

Below is a brief overview of the federal FLSA regulations, as they pertain to determining which employees are exempt from the FLSA's overtime requirements and which are not. The FLSA generally requires that non-exempt employees be paid time and one half for all time worked over 40 hours per week. This includes all time actually worked, regardless of whether an employee was scheduled to work more or less than 40 hours per week, or whether the overtime work was approved in advance by the employer. Traditionally, there have been three general categories of exempt employees: executive, administrative, and professional. These exemptions are commonly referred to as "white collar" exemptions. Please note that this overview does not address industry-specific provisions (such as with respect to the motion picture industry) or other matters not commonly applicable to public sector employment in Massachusetts.

Salary Test

To qualify for one of the white collar exemptions, an employee must receive a minimum salary of \$684 per week. In the case of computer employees, that minimum salary may be either \$684 per week or \$27.63 per hour. 29 CFR §541.600(a)-(e).

Note that this minimum salary need not actually be paid every week. Rather, the \$684/week requirement will be met if the employee is compensated biweekly on a salary basis of not less than \$1,368, semimonthly on a salary basis of not less than \$1,482, or monthly on a salary basis of not less than \$2,964. However, the shortest period of payment that will meet the threshold compensation requirement is one week. 29 CFR §541.600(b).

For employees paid on a "fee basis," the amount paid will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$684 per week, if the employee worked 40 hours. 29 CFR §541.605(b).

"Highly Compensated" Employees

So-called "highly compensated" employees are not entitled to overtime if: 1) they perform office or non-manual work; 2) they are paid a total annual compensation of at least \$107,423 (including at least \$684 per week on a salary or fee basis); and 3) customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. 29 CFR §541.601(a). "Total annual compensation" may include nondiscretionary bonuses or compensation, but does not include board or lodging expenses paid or incurred by the employer, nor does it include payments made for medical insurance, life insurance, contributions toward retirement plans or the cost of other fringe benefits. 29 CFR §541.601(b)(1).

Executive, Administrative and Professional Duties Tests

The white collar exemption tests are outlined below. It is important to remember that these tests are in addition to the minimum salary requirement of \$684 per week. Thus, an employee who meets one of the below tests but

does not make at least \$684 per week on a salary or fee basis will not be exempt from the FLSA's overtime requirements.

Executive – to qualify for the executive employee exemption, the employee must: 1) have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; 2) customarily and regularly direct the work of two or more other employees (or the equivalent of two or more full-time employees); and 3) have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees. 29 CFR §541.100(a)(2)-(4).

Administrative – to qualify for the administrative employee exemption, the employee must: 1) have a primary duty of 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) have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance. 29 CFR §541.200(a)(2)-(3).

Professional – to qualify for the professional employee exemption, the employee must have a primary duty of performing office or non-manual work: 1) requiring knowledge of an advance type in the field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (the so-called "learned" professional); or 2) requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (the so-called "creative" professional). 29 CFR §541.300(a)(2).

Computer Employees

Computer employees will be exempt as professional employees if they earn at least \$27.63 per hour (or at least \$684 per week on a salary or fee basis), and has a primary duty 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 designs specifications; 3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4) a combination of the above duties, the performance of which requires the same level of skills. 29 CFR §541.400(a)-(b).

Public Safety Personnel/First Responders

Public safety employees who are "first responders" are not eligible for any of the white collar exemptions (and thus must be paid overtime). Seventeen different safety occupations are eligible for overtime, regardless of pay level or rank, including: police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, "and similar employees," regardless of rank or pay level, if these employees perform work such as "preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes...; pursuing, restraining and apprehending suspects...; preparing investigative reports; or other similar

work.” 29 CFR §541.3(b)(1). Typically, police and fire chiefs have been deemed exempt employees and therefore not entitled to overtime pay, despite being considered a “first responder.”

The FLSA has specific regulations that allow police and fire departments to set up work periods of 7 to 28 days. Departments which adopt such work periods have different requirements for determining when overtime pay is required. This summary does not address these situations. Fire or police departments with fewer than 5 full or part-time police officers or fire fighters are exempt from the FLSA’s overtime requirements (but not the minimum wage requirements). 29 U.S.C. §213(b)(20).

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Final Changes to Federal Overtime Regulations

Following a court challenge to a similar proposed change in 2016, the U.S. Department of Labor recently announced the publication of a final rule updating federal overtime regulations that will expand the number of employees eligible for overtime pay. The change, applicable to all public agencies and their employees, will go into effect on **January 1, 2020**.

The Fair Labor Standards Act (“FLSA”) entitles employees to pay at a rate of time-and-one-half when they work more than 40 hours in a week. However, this general rule has significant exceptions for salaried employees working in a bona fide executive, administrative, or professional capacity (sometimes referred to as the “white collar” exceptions). Employees in these categories are not entitled to additional pay beyond their regular salary regardless of the number of hours worked per week. Presently, and through December 31, 2019, to qualify for any of these exceptions, employees must be paid on a salary basis and earn at least \$455 week (\$23,660 annually). In other words, employees earning below the \$455/week threshold are entitled to overtime pay even if they are working in an executive, administrative or professional capacity.

The new rule increases this salary threshold to \$684 per week (or \$35,568 annually), thus extending overtime pay protections to a greater number of employees. No changes have been made, however, to the “duties tests” used to classify executive, administrative and professional employees. Note that the new rule will not impact the partial exemption under Section 207(k) of the FLSA for police officers and firefighters.

In the coming weeks and months, it will be useful to identify salaried employees in exempt positions currently earning less than \$684 per week and determine whether to: a) increase their salary beyond the newly-increased threshold; or b) reclassify them as non-exempt employees and begin monitoring their hours and overtime to ensure compliance with the FLSA. As always, employers have an affirmative obligation to ensure that their employees are properly classified.

Be aware that it is possible this new rule will be challenged. We will keep you informed of any additional developments.

In the meantime, if you have any questions concerning these upcoming changes or the FLSA in general, please contact any member of the firm’s Labor and Employment Practice Group at 617.556.0007. Access to this eUpdate, and many others, is found on our website under the “Resources” tab at www.k-plaw.com, or, to go directly to the eUpdate page, click [here](#).

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