

Overtime Pay & Early Learning Programs: 2016



Important Note:

This article has been compiled to provide a basic summary of the FLSA changes and its impact on child care, preschool, and early childhood programs. You will notice that the issue is quite complicated. As such, programs may want to consult the Department of Labor or an attorney or CPA with a background in labor law regarding specific questions related to their program.

The Fair Labor Standards Act requires covered employers to pay “nonexempt” employees at least the minimum wage for each hour worked as well as overtime pay for all hours worked in excess of 40 in a workweek. While most employees are non-exempt, the FLSA includes exemptions for certain administrative, professional, executive, highly compensated, outside sales, and computer professional employees.

Currently, to be considered “exempt,” employees must generally satisfy three tests:

- 1) Salary-level test: Employers must pay employees at least the current minimum salary per week.
- 2) Salary-basis test: With very limited exceptions, the employer must pay employees their full salary in any week they perform work, regardless of the quality or quantity of the work.
- 3) Duties test: The employee’s primary duties must meet certain criteria.

The Department of Labor (DOL) recently issued changes that substantially increase the minimum salary requirement for certain exemptions under the FLSA. The final rule will take effect on **December 1, 2016**. These changes have the potential to affect any child care business that has paid staff.

Key Fact #1: Salary Thresholds Increased

Under the new rule the salary threshold for the executive, administrative, and professional employee exemptions was set at the 40th percentile of earnings of full-time salaried workers in the lowest wage Census Region (currently the South). This is \$913 per week (or \$47,476 per year). The salary threshold for highly compensated employees was also increased. The new rule raised the salary threshold for highly compensated employees to the 90th percentile of full-time salaried workers nationally, or \$134,004.

Key Fact #2: Automatic Updates to Salary Requirements

The new rule established automatic increases to the two salary thresholds every 3 years beginning January 1, 2020. The DOL wants to make adjustments that would keep the salary requirements fixed at the 40th and 90th percentiles. The Department will publish all updated rates in the Federal Register at least 150 days before their effective date, and also post them on the Wage and Hour Division’s website.

Key Fact #3: No Changes to Duties Tests

The DOL did not make any changes to the duties test for the administrative, executive, professional, or highly compensated employee exemptions.

Now is the time to evaluate your systems to help you manage your overtime costs and compliance.

If you currently have overtime policies that pay at least time and a half for hourly staff who work more than 40 hours in any defined 7 day week, you will probably be in compliance with the new regulations. On the other hand, if you have *salaried* employees currently exempt from overtime you need to look at the new regulations very carefully and consider their effect on your budget, personnel policies, and work schedules. It is better to be prepared than to face penalties or the need to later pay back overtime pay.

The current threshold rate, set over a decade ago, is \$23,660 per year (about \$11.37 an hour). Most workers under that level have been eligible for overtime pay. To qualify for exemption, a white collar employee *generally* must be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"). They must primarily perform executive, administrative, or professional duties, as provided in the Department's regulations (the "duties test"). They also must be paid at least at or above a specific salary threshold (the salary test). For an exemption to apply, an employee's specific job duties **and** salary must meet all of the applicable requirements provided in the Department's regulations.

The new salary threshold rate, which goes into effect December 1st, 2016, is \$47,892 (about \$22.83 an hour). This is actually determined by a weekly amount which is \$913. This is double the old rate and based on the 40th percentile of weekly earnings for full-time salaried workers in a grouping of the lower wage states in the union. It will also increase every 3 years to reduce the size of threshold increases in the future. The new rule's impact on child care providers will vary, but will most likely impact Directors and other administrative and supervisory staff that are now classified as full-time, exempt (salaried), but are paid less than the new minimum threshold.

What you need to do by December 1st is to review your personnel policies and budget to make sure you conform to the new rules regarding overtime and who is exempt. One thing to keep in mind is the labor market in your community. **The new rules affect all businesses not just child care.** As a result, programs and businesses with staff in exempt positions will be competing with other businesses that pay overtime, thus offering employees an opportunity for higher earnings. So there are market factors as well as legal ones to consider when deciding how your program will handle overtime under the new regulations.

Start by looking at how the new rule could impact your business:

- ➔ How many of your currently salaried/exempt employees make less than \$913 per week or \$47,476 per year?
- ➔ How many "real" hours do you or your exempt employees work each week? Don't forget to include professional development taken outside of business hours, as well as classroom planning, email checking, and phone calls.
- ➔ What approach will you take in setting nonexempt pay rates for employees currently exempt? Will you simply divide the current weekly salary by 40? Or lower the hourly rate to account for the possibility of overtime compensation? Or increase salaries above the \$47,476 annual threshold so they may "retain" their exempt status?
- ➔ How will the new rules impact your budget, not only the immediate roll-out, but also future years as a result DOL threshold increases every three years?
- ➔ How will you make sure that formerly exempt employees properly track their work time, do not work over lunch, do not use their cellphones for business when they are not scheduled to work, etc.?

What are Your Options: Increase Salary or Pay Overtime?

If staff salaries are below the new threshold of \$913 per week/\$47,476 annually;, employers have three primary options:

- 1) Require and ensure that staff do not work more than 40 hours;
- 2) Increase salaries above the new threshold; or
- 3) Pay overtime to those staff whose salaries are below the threshold when overtime occurs.

Paying Staff for Attending Training

The DOL rule changes should also raise red flags for employers who are not complying with the FLSA rule around staff training. Attendance at lectures, meetings, training programs and similar activities are viewed as *working time* unless ALL of the following criteria are met:

- Attendance is outside of the employee's regular working hours;
- Attendance is in fact voluntary;
- The course, lecture, or meeting is not directly related to the employee's job; and
- The employee does not perform any productive work during such attendance.

Whether having staff attend training to meet the minimum training requirements for licensing or to meet a higher standard, employers must count time in training as working hours. This applies to both in-person and online training. Staff must be compensated for their time. If time spent in training increases their work hours to over 40 hours in a week, staff are entitled to overtime pay.

FLSA Compliance

It is important to remember that the Department of Labor Wage & Hour Division (WHD) conducts audits of businesses to assure compliance with the FLSA. In addition to responding to complaints, WHD selects certain types of businesses or industries for investigation. The WHD does target low-wage industries, for example, because of the high rates of violations or egregious violations, their employment of vulnerable workers, or rapid changes in an industry such as growth or decline. Occasionally, a number of businesses in a specific geographic area will be examined. Georgia child care programs have been audited in the past.

For more information, visit DOL's Wage and Hour Division Website:

<http://www.wagehour.dol.gov> and/or call their toll-free information and helpline, available 8 a.m. to 5 p.m. at 1-866-4USWAGE (1-866-487-9243).

Other Potentially Helpful Resources:

FLSA: FairPay UPDATE Teacher Exemptions in Child Care, Law Offices of Ronald V. McGuckin and Associates
<http://www.childproviderlaw.com/wp-content/uploads/2012/10/TeachersExemptionFLSAAug2006.pdf>

PAC CA Special Issue: Employers & Employees- New Department of Labor Rule on Overtime Will Impact Child Care
<http://www.pccy.org/wp-content/uploads/2016/07/New-Overtime-Rule-Impacts-Child-Care.pdf>

Includes a chart that provides a good example for determining which route you will take if you have exempt employees that no longer meet the salary threshold.