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# Employer Toolkit

## Proposed Changes to the FLSA White Collar Exemptions

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This content provides practical information concerning the subject matter covered and is provided with the understanding that ADP is not rendering legal advice. You should consult experienced counsel for legal advice.

## Overview

On March 13, 2014, President Barack Obama directed the Secretary of Labor to modernize and streamline the existing Fair Labor Standards Act ("FLSA") overtime regulations for exempt executive, administrative, and professional employees ("the white collar exemptions"). President Obama said the compensation paid to these employees has not kept pace with America's modern economy since the Department of Labor ("DOL") last revised the pertinent regulations in 2004. The President noted that the minimum annual salary level for these exempt classifications under the 2004 regulations is \$23,660, which is below the poverty line for a family of four.



Since the President issued his memorandum, the DOL has held meetings with a variety of stakeholders, including employers, workers, trade associations, and other advocates. The DOL has raised questions about how the current regulations work and how they can be improved. The discussions have focused on the compensation levels for the exempt classifications as well as the duties required to qualify for exempt status. The [Notice of Proposed Rulemaking \("NPRM"\)](#) represents the culmination of this initial phase of the regulatory process.

### The NPRM

The NPRM expressed the DOL's intention to increase the salary basis threshold for the white-collar exemptions from \$455 a week (or \$23,660 a year) to \$921 a week (\$47,892 a year), which the DOL expects to revise to \$970 a week (\$50,440 a year) when it issues its Final Rule. The NPRM acknowledges that roughly 25 percent of all employees currently exempt and subject to the salary basis requirement will be rendered non-exempt under the proposed regulations.

Related changes in the regulations include increasing the annual compensation threshold for exempt highly compensated employees from the present level of \$100,000 to a proposed \$122,148, as well as raising the exemption threshold for the motion picture producing industry from the present \$695 a week to a proposed \$1,404 a week for employees compensated on a day-rate basis. In addition, the NPRM proposes an increased salary level for exempt employees in American Samoa of \$774 per week (\$40,248 a year).

The DOL is also considering, a wide range of other topics, including:

- Whether to allow nondiscretionary bonuses to satisfy some portion of the required salary level (the DOL suggests up to 10 percent), including the appropriate frequency of such bonuses (the DOL suggests not less than monthly);
- Whether to allow commissions to satisfy some portion of the required salary level;
- Whether to modify the current duties tests for exempt status, including the “primary duty” standard, by such means as:
  - Adopting the California model requiring that exempt employees spend more than half of their working time on exempt tasks;
  - Placing quantitative limits on the amount of time exempt employees may spend on non-exempt duties; or
  - Modifying or eliminating the concept of concurrent duties whereby exempt employees can maintain exempt status when performing exempt and non-exempt activity simultaneously; and
- The best way to determine annual updates to the salary levels in the regulations.

### **What Comes Next?**

The proposed regulations were subject to a 60-day public comment period which expired on September 4, 2015. The DOL has put the regulated public on notice that it is considering sweeping changes to the regulations not described specifically in the proposed regulatory text, such as altering the duties tests for exempt status as mentioned above. Following the public comment period, the DOL will issue a Final Rule that may add, change, delete, or affirm the regulatory text of the proposal. The Office of Management and Budget will review the Final Rule before publication. This process is likely to take at least six to eight months. A Final Rule is not expected before 2016.

The DOL has issued a Fact Sheet and FAQs on the proposed regulations which can be accessed by [clicking here](#).

As a trusted compliance partner, we are committed to helping our clients comply with the new regulations and will update clients on any new developments as appropriate. As a part of that commitment we have developed this toolkit. As always, please contact your Human Resources Business partner if you have any questions.

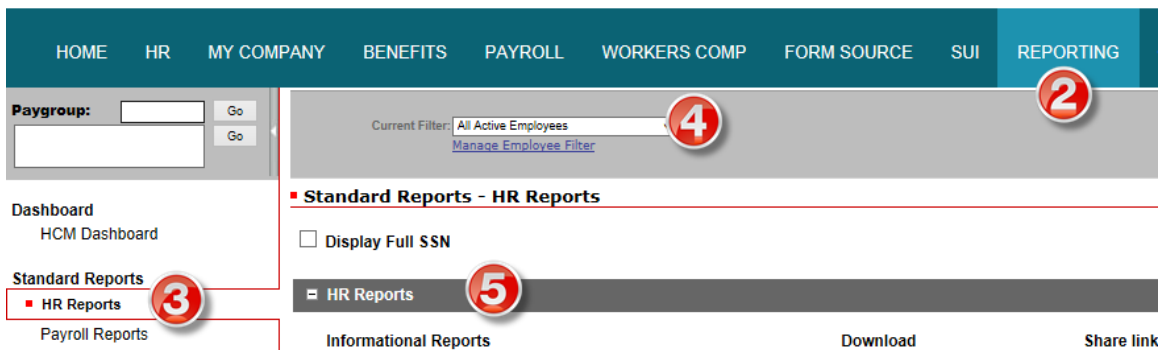
## Overtime Exemption Rules Readiness Checklist

The checklist below can be used to help your Company prepare for the DOL's changes to the White Collar exemptions.

√	<b>OVERTIME EXEMPTION RULES READINESS CHECKLIST</b>
<input type="checkbox"/>	<p>Identify Employees that are salaried exempt making less than \$50,440/year</p> <ul style="list-style-type: none"> <li>• Run exempt Employee Report on page 6 (ADP TotalSource) and page 7 (ADP Resource).</li> </ul>
<input type="checkbox"/>	<p>Identify highly compensated employees earning between \$100,000 and \$122,148/year</p> <ul style="list-style-type: none"> <li>• Use the same report described above.</li> </ul>
<input type="checkbox"/>	<p>Motion Picture Industry Only: Identify employees earning between \$694/week and \$1,404/week for employees compensated on a day-rate basis.</p> <ul style="list-style-type: none"> <li>• Use the same report described above.</li> </ul>
<input type="checkbox"/>	<p>Consider reviewing job duties of current positions using the existing regulations to determine which border-line positions may likely need to be reclassified under the pending regulations.</p> <ul style="list-style-type: none"> <li>• Review <i>FLSA Overtime Exemptions Flowchart</i> on page 8.</li> </ul>
<input type="checkbox"/>	<p>Develop a strategy for reclassifying workers</p> <ul style="list-style-type: none"> <li>• Review <i>Re-Classifying Employees</i> on page 9.</li> </ul>

## ADP TotalSource Exempt Employee Report Instructions

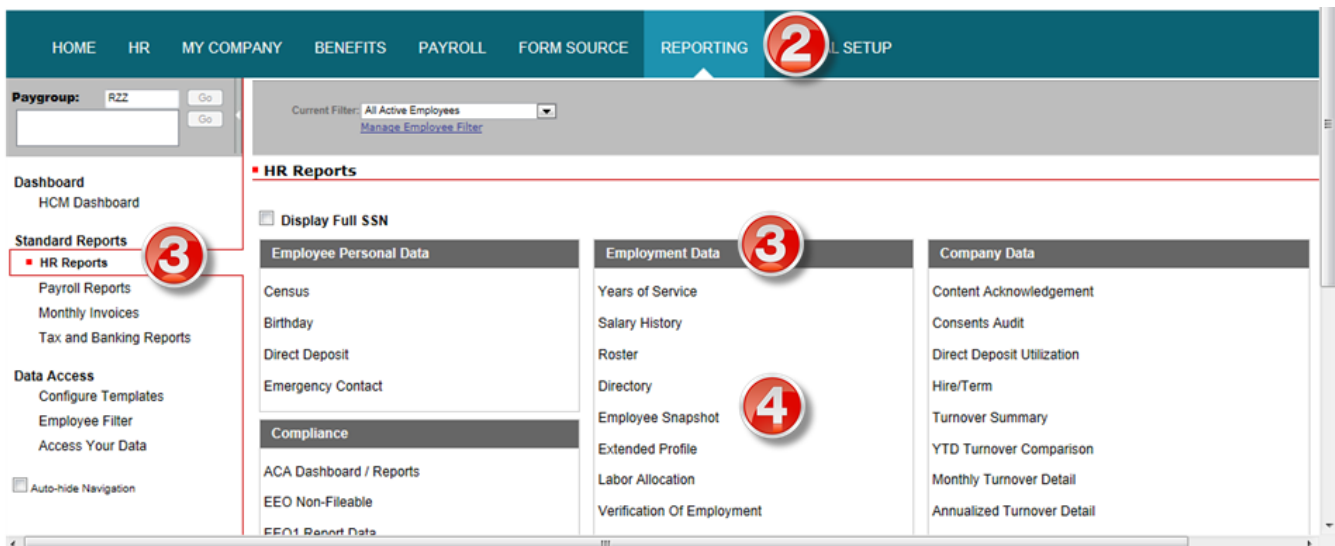
1. Log into MyTotalSource<sup>1</sup>
2. Click the Reporting tab
3. Click on HR Reports to access standardized report
4. At top, change your current filter to "All Active & LOA Emp" to be sure to capture all employees who may need adjusting.
5. Click on "Indicative Employee Download" from the list of informational reports.
6. The report will generate as a .csv file.
7. Locate the column headers titled "FLSA Status" (column AO) listing exempt and/or non-exempt status and "rate" (column BC).
8. The report may be saved as an excel document and any unnecessary columns may be deleted



<sup>1</sup> The individual accessing reports must have practitioner access rights. Note that this report captures all employees you have listed as exempt (it is not limited to those who must be paid on a guaranteed salary basis in order to maintain exempt status). As discussed in this toolkit, there are several exemptions that do not require payment on a salary basis.

## ADP Resource Exempt Employee Report Instructions

1. Log into My Resource<sup>2</sup>
2. Click the Reporting tab
3. Click on HR Reports and Employment Data
4. Select the employee snapshot.
5. Click on the spread sheet icon.
6. The report will generate as a .csv file.
7. Locate the column headers titled "FLSA Status" (column AO) listing exempt and/or non-exempt status and "rate" (column BC).
8. The report may be saved as an excel document and any unnecessary columns may be deleted



<sup>2</sup> The individual accessing reports must have practitioner access rights. Note that this report captures all employees you have listed as exempt (it is not limited to those who must be paid on a guaranteed salary basis in order to maintain exempt status). As discussed in this toolkit, there are several exemptions that do not require payment on a salary basis.

## FLSA Overtime Exemptions Flow Chart

The FLSA requires that covered employees in the United States be paid at least the [Federal minimum wage](#) for each hour they work and overtime pay at one and one-half the employee's regular rate of pay for all hours worked over 40 in a workweek. The flow chart attached below covers the overtime exemption requirements for bona fide executive, administrative, professional and outside sales employees as well as certain employees in computer-related occupations. The FLSA contains several other [exemptions](#) from the minimum wage and/or overtime pay protections which are not covered in this flowchart.

For the current FLSA exemptions above to apply, an employee generally must be paid on a salary basis of no less than \$455 per week and perform certain types of work that:

- is directly related to the management of his or her employer's business, or
- is directly related to the general business operations of his or her employer or the employer's clients, or
- requires specialized academic training for entry into a professional field, or
- is in the computer field, or
- is making sales away from his or her employer's place of business, or
- is in a recognized field of artistic or creative endeavor.

FLSA Section 13(a)(17) exempts hourly paid employees who perform certain types of work in the computer field if they are paid at a rate of not less than \$27.63 per hour.

Job titles alone do not determine the exempt or non-exempt status of any employee. Each determination is based on the specific job duties performed and compensation received. Therefore, an individualized assessment of the specific employee's compensation and day to day job duties is critical.

A number of states have also enacted minimum wage and overtime pay laws, some of which provide greater worker protections than those provided by FLSA. In those situations where an employee is covered by both Federal and state wage laws, the employee is entitled to the greater benefit or more generous rights provided under the different parts of each law. Learn more about state laws by [clicking here](#) and contact your Human Resources Business Partner for assistance.



FLSA White Collar  
Exemptions Flow Char



## Reclassifying Employees

From time to time, an employer may find that it needs to reclassify certain of its employees. For example, a change in classification may become necessary if there has been a change in an employee's job duties and responsibilities. Other times employers will base a classification on an outdated job description and not on the tasks actually performed by the employee or employees who hold a particular job title. In this case, a self-audit may reveal that a reclassification is warranted.

On other occasions, an employer may need to correct a prior inadvertent misclassification but is concerned that in doing so, it will raise a red flag, and subject it to audit by the DOL. In light of the DOL's proposed changes to the exemption regulations, it is clear that employers will need to conduct an audit of their workforce, and to reclassify employees either based on the new salary threshold, the new duties test, or possibly both.

Below you will find practical guidance to consider when reclassifying employees.

### **Changing an Employee's Classification from Non-Exempt to Exempt**

When changing an employee's classification from non-exempt to exempt, employers should consider the following steps:

- **Apply federal and state tests first.** First and foremost, employers should ensure the employee qualifies as exempt under federal and applicable state laws. As discussed in previous sections, exempt employees must generally be paid a predetermined salary regardless of the quantity or quality of work and must meet the minimum salary and duties requirements for the exemption. If there is doubt as to whether the employee qualifies for exemption, the employee should remain classified as non-exempt.



- **Communicate the change in advance.** Once it is determined that an employee's status will change, employers should notify employees in advance and in writing, and should explain how the change will impact the employee. For example, employers should explain that, as an exempt employee, the employee will receive a set salary for each week worked (assuming the exemption is one requiring payment on a guaranteed salary basis) and will not be entitled to overtime pay. Employers should also communicate any procedures or policies for absences and deductions in pay that might be newly applicable to the employee.
- **Avoid improper deductions.** Employers are limited in the types of deductions they may make from an exempt employee's salary. While employers may deduct from the employee's salary in the first or last week of work if the employee did not work the full week, or when an exempt employee is absent for one or more *full* days for personal reasons, other deductions are generally prohibited.

### **Changing an Employee's Classification from Exempt to Non-Exempt**

Assuming that an employee was properly classified as exempt initially, below are some considerations for when and how to change an exempt employee's classification to non-exempt.

- **Review classifications regularly.** Employers should audit their employees' classifications to determine whether each employee still qualifies for the exemption. As stated above, too often employers will associate a job title with a particular classification, and neglect to audit the tasks of the position to determine if the actual responsibilities continue to warrant that classification. A change in an employee's job duties should also prompt a review. If an exemption no longer applies, the employee should be reclassified as non-exempt and paid overtime in accordance with federal and state law.
- **Communicate the change promptly and properly.** As with any change in employment status, employers should notify employees in advance and in writing, explaining the impact of the change. Employees might perceive a change in classification from exempt to non-exempt as a demotion of sorts. Employers should address this perception head-on by explaining, in detail, some of the benefits of being classified as non-exempt, such as receiving overtime pay whenever the employee works more than 40 hours in a workweek. As with any change in classification, employers should also communicate any procedures or policies for absences and deductions in pay that might be newly applicable to the newly classified employee.

- **Be ready for questions.** Employees may have questions about timekeeping, benefits, and other issues related to the new classification.

When notifying the employee of this change, provide the employee with the name and contact information of the person he/she can contact with questions. Some questions employees may ask can be found in the *Frequently Asked Questions* section below.

### **Changing a Classification to Correct Previous Misclassifications**

If an audit reveals that an employee has been misclassified as exempt, the employer should consult legal counsel to discuss its options for how best to address the misclassification. Indeed, the DOL (which enforces the FLSA) may require the employer to pay overtime owed to the misclassified employee as well as other damages and penalties.

For this reason, many employers may be hesitant to change an employee's classification for fear that they are calling attention to a misclassification. It is generally considered a best practice for employers who find themselves in this situation to do the following: (1) time your notification to the affected employees in conjunction with changes in other workplace policies or procedures, rather than isolating the change incident; and (2) proactively determine the amount of overtime the affected employee worked, and notify the affected employee that he/she will receive back pay for overtime due for that period of time (if that is the company's position after consulting with legal counsel). Remember, employees cannot waive their right to pursue overtime violations of the FLSA absent DOL or court involvement.

**Note:** If employers do not track the hours of their exempt employees, it can be more difficult for an employer to determine how much overtime is due to the employee if the employee is later found to be misclassified. For this reason, as well as for more efficiently administering paid time off and other benefits, employers may want to consider tracking exempt employees' hours, provided it does not affect their pay.

## **Frequently Asked Questions about Re-Classification**

When an employee is reclassified, he or she may have questions about what the change means for the employee. The following are some common questions about reclassification:

- **Will my pay decrease now that I'm exempt?** To be considered exempt, subject to certain exceptions, an employee must receive a set salary each week. Often, employers will take the employee's existing hourly rate and multiply it by 40 hours to arrive at the weekly rate of pay. The weekly rate of pay can then be multiplied by 52 to arrive at the employee's annual salary. However, exempt employees should be aware that they are no longer eligible for overtime pay.
- **Now that I'm non-exempt, will I have more timekeeping responsibilities?** Non-exempt employees often use a timekeeping system in order to track their hours. It is important to let newly classified non-exempt employees know that it is their responsibility to track all hours worked using company approved systems and procedures.
- **Can I still be paid a "salary" now that I am non-exempt?** Non-exempt employees can be paid a salary or can be paid hourly. It is important to remember that, even if a non-exempt employee is paid a fixed salary, they are still entitled to overtime for all hours worked over 40.
- **Will my benefits change?** A reclassification typically does not impact benefits. Generally, part-time or full-time status dictates benefit eligibility. Employers should communicate the number of hours that an employee must work per week to be eligible for benefits.