



# New Overtime Rule: What Small Business Needs to Know

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Presented by

Compliance **HR**



**Littler**<sup>®</sup>

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## Agenda

- FLSA Basics
- The New Overtime Rules
- Preparing for Change
- Questions and Answers

# FLSA Basics

- The FLSA requires employers to pay non-exempt employees:
  - ✓ At least the minimum wage for all hours worked
  - ✓ Overtime for all hours worked over 40 in a week at 1.5 times the employee's regular rate of pay
- Employers also must maintain accurate and complete time and payroll records



# Exempt v. Non-Exempt – THAT is the Question

- While most employees are eligible for overtime pay, some employees are “exempt” from the FLSA overtime requirements
- The most common exemptions are for “white collar” workers – executive, administrative, professional, outside sales, and computer employees

## 1 Salary-level test

Currently, employers must pay employees at least \$455 per week to qualify for the executive, administrative, and professional employee exemptions.

## 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

To qualify for an executive, administrative or professional exemption an employee must meet specific duties tests.



**30 DAYS to go!**

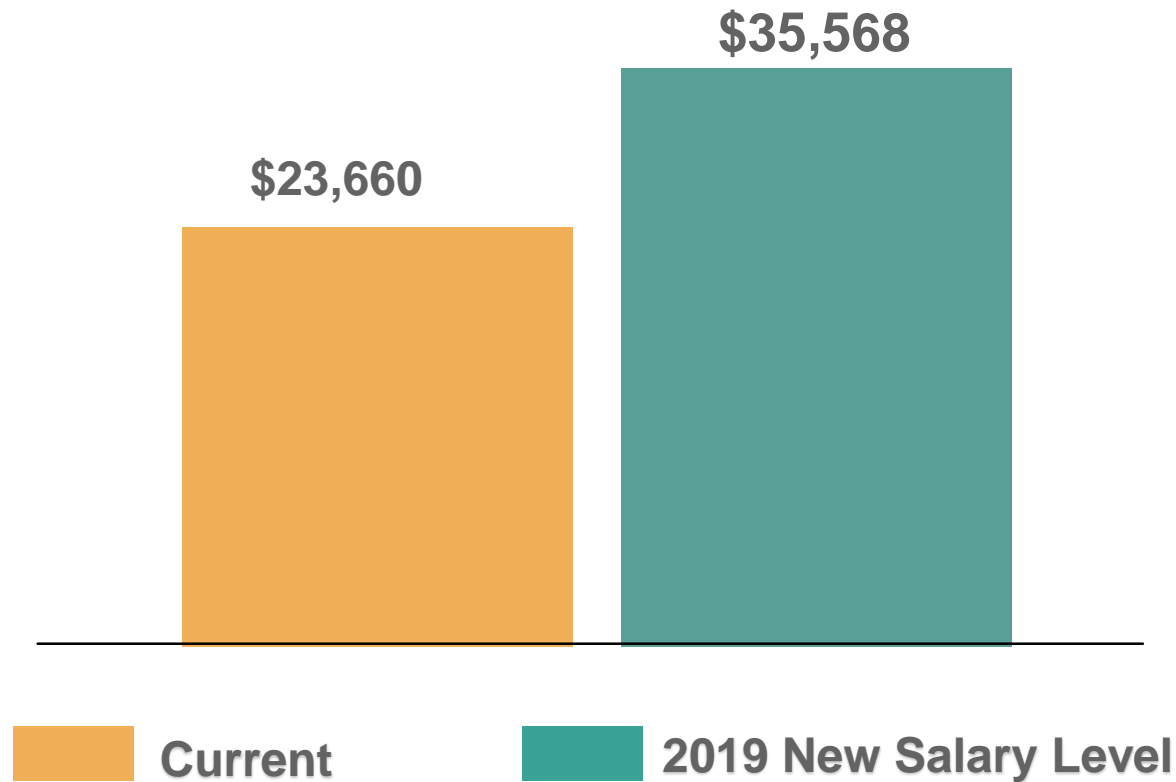
**The DOL's New Overtime  
Rules will Take Effect  
JANUARY 1, 2020**



CHANGE #

**Minimum Salary Level**

# New Minimum Salary Level as of JAN. 1



## Final Rule

- \$684 per week
- \$35,568 annualized




CHANGE #


# The 10% Rule

# Up to 10% of the Minimum Salary May Be Paid as Bonuses, Commissions, & Other Incentive Pay

## Counted

- 
- All commissions
  - Bonuses based on individual performance, productivity or hours worked
  - Bonuses based on company performance
  - Safety bonuses

## Not counted

- 
- Service awards
  - Employee-of-the-month awards
  - Spot bonuses / prizes
  - Holiday bonuses
  - Cost of meals, lodging, employee benefits

# The 10% Rule – Let's Do the Math

**\$684 weekly minimum  
minus 10% =**  
\$615.60 weekly guaranteed  
salary

**\$35,568 annual salary  
times 10% =**  
\$3,556.80 in commission or  
bonuses annually

## What happens if the incentive pay falls short?

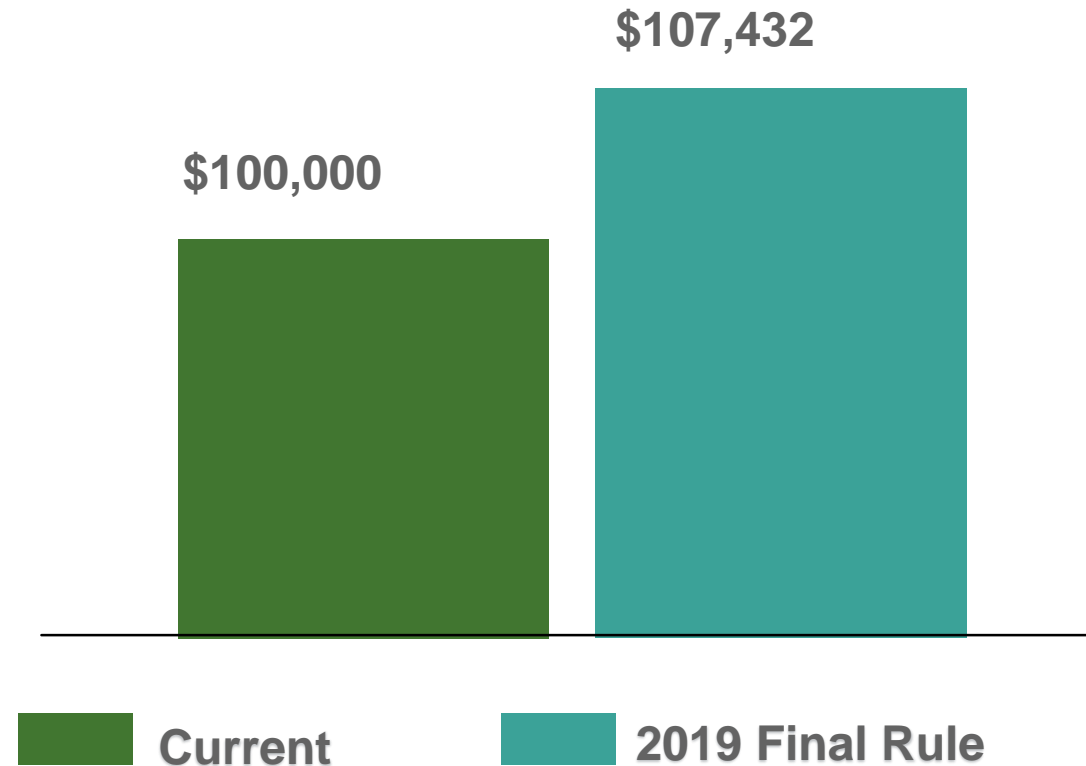
- Only one pay period for a make-up payment
- Employees paid even \$1 less than required are owed overtime for the entire prior year

CHANGE #

**Highly  
Compensated  
Level**

# Highly Compensated Level

- Total annual compensation of \$107,432
- Must include the minimum guaranteed weekly salary of \$684 (\$35,568 annualized)



CHANGE #

# Automatic Increases

# No Automatic Increases

DOL will not increase salary levels without notice and comment rulemaking



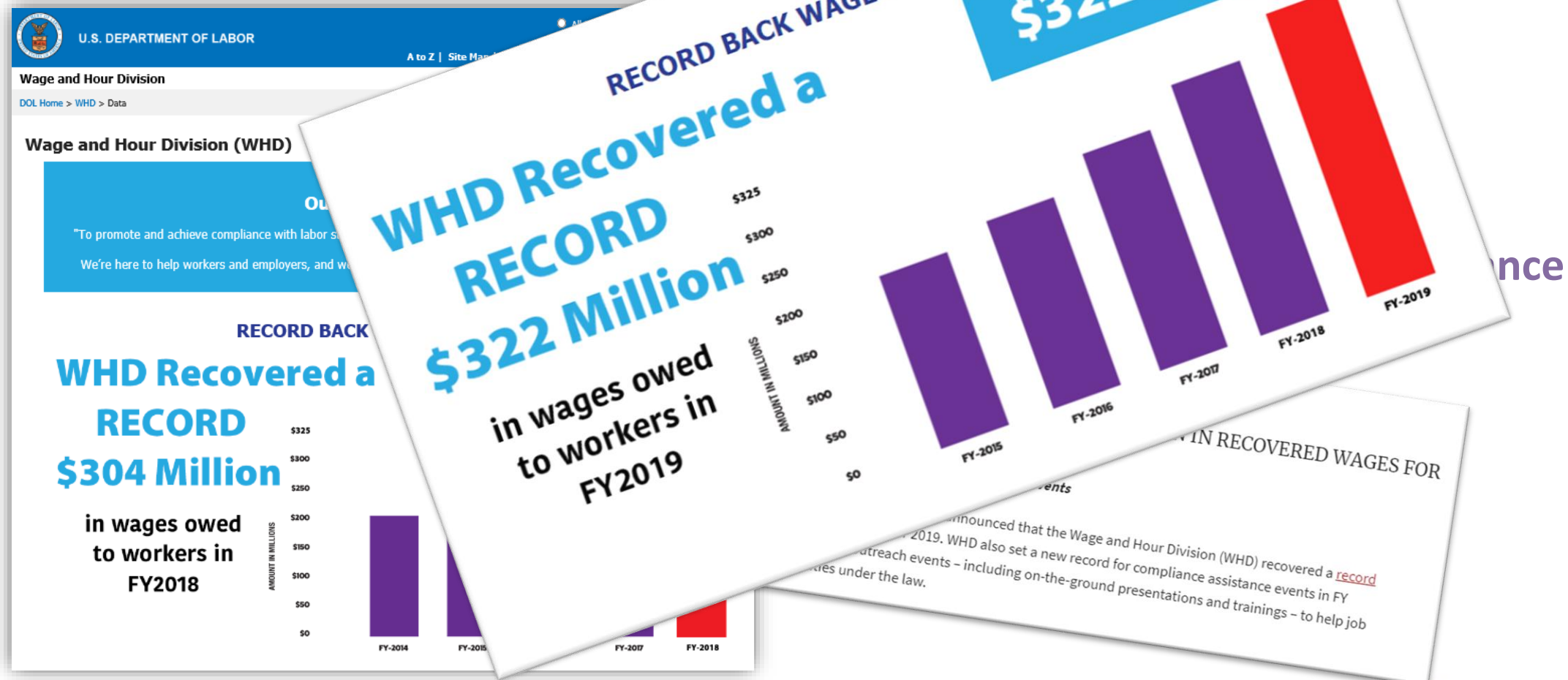
# Preparing for Change

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# Why Should We Care?



# The Key Decision



**Increase salary or  
reclassify?**

# Meet Sally

- Sally is an exempt accountant. She earns an annual salary of \$25,500
- Last year, she also received \$5,000 in incentive pay
- She generally works 50 hours each week, with 4 weeks vacation



# Cost of a Salary Increase

## Maintaining Incentive Pay

- Required minimum salary minus current salary
  - ✓  $\$35,568 - \$25,500 =$   
**\$10,068**

## Converting Incentive Pay to Salary

- 100% Conversion
  - ✓  $\$35,568 - (\$25,500 + \$5,000) =$  **\$5,068**
- 50% Conversion
  - ✓  $\$35,568 - (\$25,500 + \$2,500) =$  **\$7,568**

# Cost of Overtime

- Estimate number of overtime hours worked
- Determine number of weeks when overtime worked
- Calculate the cost of overtime:
  - ✓  $(\text{Weekly salary} / \text{Weekly hours}) \times 1.5 \times \text{expected weekly overtime hours} \times \text{expected overtime weeks}$
  - ✓ In most states, you can divide salary by 40 or by actual hours worked each week



# Estimating Work Hours

- Actual time records probably not available.
- Need to roll up your sleeves and do some fact finding.
  - Business hours, business practices, seasonal differences
  - Talk to managers regarding estimates including after hours work
  - Consider electronic data.
  - Consider sending out an “hours survey”



# Let's do the Math for Sally

1.  $(\$25,500 + \$5,000) / 52 \text{ weeks} = \$586.54/\text{week}$
2.  $\$586.54/50 \text{ hours} = \$11.73/\text{hour}$
3.  $\$11.73 \times 1.5 = \$17.60 \text{ overtime rate}$
4.  $\$17.60 \times 10 \text{ overtime hours} = \$176 \text{ per week}$
5.  $\$176 \times 48 \text{ weeks} = \$8,448 \text{ in annual overtime}$



# Don't Forget About Overtime on the Bonus



The formula to calculating overtime on bonuses, commissions:

- Incentive \$ / Total Hours in Bonus Period x 0.5 x Overtime Hours in Bonus Period

Let's calculate for Sally

- Total hours =  $48 \times 50 = 2,400$
- OT hours =  $48 \times 10 = 480$
- $\$5,000 / 2400 = \$2.08/\text{hour}$
- $\$2.08 \times 0.5 \times 480 = \$500$



# What to do about Sally?

## Let's Compare....

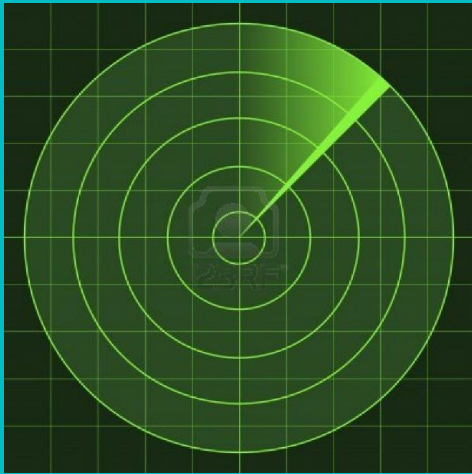
### Maintain the Exemption

- Convert 100% of incentives to salary – \$5,068
- Convert 50% of incentives to salary – \$7,568
- Do not convert any incentives to salary – \$10,068

### Reclassify

- Maintain current work hours – \$8,448
- Other options
  - ✓ Cost-neutral solution – \$0, maybe
    - $\text{Weekly salary} / (40 + (\text{OT hours} \times 1.5))$
  - ✓ Manage hours to under 40 – \$0

# What About Job Duties?



## No changes to the job duties tests

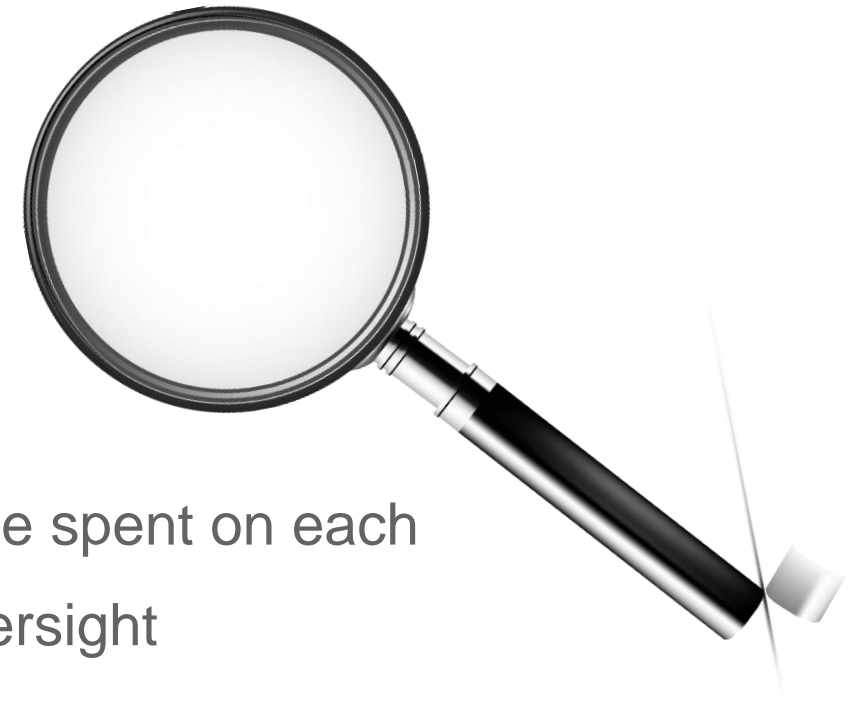
- But, even if salary level is not an issue, you may have employees who do not meet the duties requirements for exemption under the current regulations
- Rare opportunity to correct classification issues with reduced risk of triggering litigation
- With other employees being reclassified because of the salary issue, reclassifications because of job duties should fly under the radar

# What Jobs?

- Employees in same jobs with those currently earning below the new minimum of \$35,568
- Employees in high risk jobs
- Other jobs at high risk of misclassification:
  - ✓ Computer employees
  - ✓ Sales employees
  - ✓ Retail assistant managers
  - ✓ Entry-level accounting
  - ✓ Technicians



# How Do I Conduct a Job Duty Review?









- The goal of a job duty review is to uncover:
  - ✓ Primary responsibilities and the percentage of time spent on each
  - ✓ Decisions employees can make without direct oversight
  - ✓ Authority employees have to bind the company
  - ✓ Identify any manuals, checklists or other tools that instruct employees on how to do the job
  - ✓ Identify any repetitive and routine tasks the employees perform

# Do I Have Time?



1. Reviewing data & documents
2. Conducting manager interviews
3. Reviewing the legal standards
4. Making the call

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# Reclassification “To Do” List



1. Compensation plan redesign
2. Review policies and practices
3. Communicate the changes
4. Provide training

[www.dol.gov/whd/PAID](http://www.dol.gov/whd/PAID)

# Compensation Plan Redesign

- Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
- Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
- How will we calculate overtime for salaried non-exempt employees?
  - Divide salary by 40
  - Divide salary by actual hours worked
  - Fluctuating workweek
- Will we continue to provide incentive compensation?
- Do we need to make changes to any benefits?





# Review Practices and Policies



## Processes

- Timekeeping
- Payroll changes
- Controlling overtime hours

## Policies

- Off-the-clock work
- Meal and rest break
- Travel time
- Mobile devices

# Communicate the Changes

- Need to communicate with senior management, managers of reclassified employees, and the employees themselves
- Key decisions
  - Who will communicate the changes?
  - What will be communicated?
  - How will changes be communicated?
  - When will the changes be communicated
- Prepare talking points and FAQs



# Provide Training



Train the reclassified employees and their managers

- ✓ Wage & hour policies
- ✓ Timekeeping procedures
- ✓ Activities that are compensable work

Questions?

*Thank you!*

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# Top 10 FAQs

## #1

**Does this new overtime rule change our obligations as it relates to state minimum salary level?**

- No. To be classified as exempt, an employee must meet both federal and state requirements. Thus, you must pay exempt employees the federal or state minimum, which ever is higher.
- In 2020, the minimum salary levels in Alaska, California, Maine and New York will be higher than the new federal minimum salary for exemption of \$684 per week (\$35,568 annualized).

# Top 10 FAQs

## #2

**Can the new minimum salary level be pro-rated for part-time employees?**

- No, there is no such thing as a “pro-rated” minimum salary level. A part-time employee cannot be exempt is paid less than \$684 \$684 weekly.
  - Part-time employees shouldn’t work more than 40 hours per week (normally, no overtime would be due under the FLSA)
  - If part-time employees work 40+ hours regularly, may be vulnerable for benefit claims and actions for additional workers’ compensation premiums

# Top 10 FAQs

## #3

**Can employees be exempt without earning the new \$684 minimum on a salary basis?**

- There are a few categories of employees who can be exempt without being paid on a salary basis -- doctors, lawyers, teachers, and outside sales employees.
- Employees who perform high-level IT work may qualify for the computer exemption if paid the new \$684 per week on a salary basis or paid \$27.63 per hour.

# Top 10 FAQs

## #4

**Are religious organizations or non-profits exempt from the requirements of the FLSA?**

- No, if the FLSA applies, there are no statutory exceptions for religious organizations or non-profits.
- The FLSA applies to any organization that has \$500,000 in gross annual revenue per year, but also applies to any individual employee who is operating in interstate commerce.



# Top 10 FAQs

## #5

**If I'm considering converting a salaried employee to hourly, how can I estimate hours?**

- This requires some investigation as most exempt employees do not keep time records (not required)
- **Here are some ideas:**
  - Start with your organization's standard business or store hours
  - Interview their managers
  - Review the employees' electronic touches in the work place: badge swipes, computer logs, electronic calendars, GPS data
  - Consider sending an hours worked survey to the incumbent

# Top 10 FAQs

## #6

**If we reclassify,  
should we change an  
employee's title?**

- While this is not a legal requirement, you might consider whether you have both exempt and non-exempt employees sharing the same job title, which can lead to confusion and sometimes risk.
- Also, if you are reclassifying, differentiating by job title or creating a job ladder (Accountant I, Accountant II), and moving nonexempt job duties to the entry-level position, is a good way to create a defensible distinction between the classifications.

# Top 10 FAQs

## #7

We have many exempt employees making over \$23,660 but under \$35,568. Can we count bonuses and commissions to make it over the new threshold?

- Only up to 10% of the new \$35,568 minimum salary level (\$3,556.80) can be paid as bonuses, commissions & other non-discretionary incentives paid annually or less frequently.
- **Be cautious:** if your bonus and commissions come up short, you will have just one pay period after the end of your fiscal year for a make-up payment.
- **Remember:** The 10% rule is not available in states that have adopted their own minimum salary levels without adopting the FLSA regulations.

# Top 10 FAQs

## #8

**We pay annual bonus on the last week in December, but forfeited if the employees is not employed when the bonus is paid. How does that affect the 10% rule?**

- If you've used the 10% rule to pay a salary of \$615.60 per week (90% of \$684), and because of your bonus rule, the employee forfeits and receives no additional bonus or commission compensation, you haven't complied with the rule and the employee doesn't qualify for exemption.
- **To avoid this:** In the final employment week, you must pay the difference between \$615.60 and \$684 (\$68.40) for every week that employee performed any work before the termination.

# Top 10 FAQs

## #9

**Does the 10% rule apply to the highly compensated test?**

- No. A highly compensated employee must be paid a total annual compensation of \$107,432.
  - Must include the guaranteed minimum salary of \$684 weekly, without the weekly salary discount allowed under the 10% rule for the standard duties tests.
  - The delta between the \$684 per week (\$35,568 annual) & \$107,432 – that is, \$71,846 per year – can be any type of compensation (except the cost of lodging & other facilities, or the cost of employee benefits (health or life insurance premiums, contributions to retirement plans, and similar)).

# Top 10 FAQs

## #10

If we use Navigator OT and the DOL auditor questions the assessment it provides, will ComplianceHR help clients with their DOL audit?

- Yes. Although CHR itself does not practice law and cannot represent you before an agency or court, we can provide any information needed to defend the risk assessment produced by Navigator OT, including the underlying algorithms and logic.
- **BONUS:** Navigator OT was designed by Tammy McCutchen, a former DOL Wage and Hour Administrator who wrote the duties tests in the 2004 regulations (and not impact by the new rule). Tammy actively defends employers across the country.