

**November 23, 2016 update – A federal judge has issued a nationwide preliminary injunction preventing the new overtime rule from becoming effective on December 1, 2016.**

**North Dakota League of Cities  
New Fair Labor Standards Act (FLSA) Rules – Effective December 1, 2016  
August 2016**

**Summary**

The United States Department of Labor issued new FLSA overtime rules. The new rules go into effect on **December 1, 2016**. The new rules increase the minimum salary threshold from \$455 a week (\$23,660 a year) to \$913 a week (\$47,476 a year) for **exempt employees** that meet both the duties test and the salary basis test under the FLSA.

The FLSA requires cities to compensate non-exempt employees at a rate of time and one-half for hours worked over 40 in one week through comp time or pay.

**These new rules potentially affect city employees that are paid a flat salary regardless of whether they work over 40 hours in a one-week period.**

The new rules do not affect the following employees:

- Hourly workers. Generally, employees paid at an hourly rate are entitled to overtime pay or comp time regardless of how much they make if they work more than 40 hours. The new rule does not change that.
- Workers with regular work weeks of 40 or fewer hours. To the extent that employees work no more than 40 hours a week, the new rule will have no effect on their pay. Additionally, for law enforcement and fire protection employees who regularly work hours that conform to the longer work periods permitted for such employees, the new rule will also not change their pay.

Please continue reading for more information about the FLSA, including the duties test, the salary basis test and a suggested compliance analysis.

Employees that are exempt from the overtime rules under the FLSA must meet the requirements of both the duties test and salary basis test. In other words, only employees that are currently paid a minimum of \$455 a week (\$23,660 a year) and a minimum of \$913 a week (\$47,476 a year) after December 1, 2016, meet the duties test and meet the salary basis test do not need to be compensated with overtime pay or comp time for hours worked over 40 in a week.

## **Duties Test**

Only employees whose job duties meet certain criteria are qualified to be exempt from the overtime rules under the FLSA. Generally, if cities have exempt employees, they fit under one of four of the FLSA's exemptions - Executive, Administrative, Professional Employees, or Highly Compensated Employees. These four categories and the associated duties are listed below.

### **Executive Exemption<sup>1</sup>**

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

### **Administrative Exemption<sup>2</sup>**

- The employee's primary duty must be 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

### **Professional Exemption<sup>3</sup>**

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and

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<sup>1</sup> 29 CFR 541.1.

<sup>2</sup> 29 CFR 541.2.

<sup>3</sup> 29 CFR 541.3.

- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

#### **Highly Compensated Employees Exemption<sup>4</sup>**

- Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption. After December 1, 2016, the annual compensation threshold increases to a minimum of \$134,004.

#### **Salary Basis Test<sup>5</sup>**

Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work.

#### **Analysis for FLSA Compliance for Exempt Employees**

Cities are required to comply with the provisions of the FLSA. To ensure compliance for exempt employees, cities should conduct the following analysis:

1. Is the employee paid at least \$455 a week (\$23,660 a year) and at least \$913 a week (\$47,476 a year) after December 1, 2016?

**NO-** This is not an exempt employee and must be compensated at a rate of time and a half for hours worked over 40 hours, with the exception of police officers and firefighters whose schedules conform to longer work periods.

**YES –** Move on to question No. 2.

2. Duties Test Analysis - Does the employees’ duties meet the requirements of the Executive, Administrative or Professional Exemption, described on pages 2 and 3?

**NO-** This is not an exempt employee and must be compensated at a rate of time and a half for hours worked over 40 hours, with the exception of police officers and firefighters whose schedules conform to longer work periods.

**YES-** Move on to question No. 3.

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<sup>4</sup> 29 CFR 541.61.

<sup>5</sup> 29 CFR 541.602.

3. Salary Basis Analysis -

- a. Does the employee get paid by the hour?

**YES-** This is not an exempt employee and must be compensated at a rate of time and a half for hours worked over 40 hours, with the exception of police officers and firefighters whose schedules conform to longer work periods.

**NO** – Move on to question No. 3b.

- b. Does the employee get paid the same amount each pay period regardless of quality or quantity of work?

**NO-** This is not an exempt employee and must be compensated for hours worked over 40 hours, with the exception of police officers and firefighters whose schedules conform to longer work periods.

**YES-** Move on to question No. 3c.

- c. Does the employee receive full salary for any week in which any work is performed regardless of days or hours worked? (The law does allow for deductions for certain types of absences).

**NO-** This is not an exempt employee and must be compensated at a rate of time and a half for hours worked over 40 hours, with the exception of police officers and firefighters whose schedules conform to longer work periods.

**YES-** The employee is likely an exempt employee and the city is not required under the FLSA to compensate him or her for hours worked over 40 in a week.

## CONCLUSION

The new overtime rules have the potential to cause problems for cities. Below are a few solutions that cities should consider for complying with the new FLSA overtime rules:

- Pay employees that meet both the duties test and the salary basis test a minimum of \$455 a week (\$23,660 a year) and a minimum of \$913 a week (\$47,476 a year) after December 1, 2016.
- Limit employees to working only 40 hours a week and make sure a record is kept of their time.
- Compensate employees at a rate of time and one-half in comp time or pay for all hours worked over 40 hours in a week and make sure a record is kept of their time.

- Consider shifting duties between employees to ensure employees can complete their duties in 40 hours a week.

If you are having trouble determining whether an employee fits in one of the exemption categories, you should check with your city attorney or an employment law attorney. Attorney Rachel Bruner-Kaufman, the employment law attorney that presented on this topic at the Auditor's Workshop, has indicated that she is available for hire to help with this process. She can be reached at 701-223-2890.