

More Employees Entitled to Overtime Beginning December 1, 2016

Kelly J. Long Pridgen

The Fair Labor Standards Act (FLSA) is a federal law that sets minimum wage, overtime pay, compensatory time (comp time), record keeping and child labor standards. It is enforced by the U. S. Department of Labor (DOL). A change by DOL that will give overtime (and comp time) protection to many more employees goes into effect on December 1, 2016.

Effective December 1, 2016, the minimum salary for employees not entitled to overtime or comp time is increasing to \$913 per week. Employees earning less than \$913 per week will be entitled to overtime or comp time for every hour worked over 40 each week (or 212 hours per 28 days for firefighters and 171 hours per 28 days for law enforcement). Effective December 1, 2016, the minimum salary for a “highly compensated individual” to be exempt from overtime or comp time will be \$134,004 per year. Beginning in January 1, 2020, these minimum salaries will be updated every three years.

Overtime Requirements Background. In general, the FLSA requires that employees be paid overtime pay (i.e., 1.5 times their regular pay) for each hour worked over 40 in a workweek. Unlike the private sector, county employees can agree to accept comp time (i.e., 1.5 hours of paid leave for each hour worked over 40 in a workweek) instead of receiving overtime pay. Except as explained below for firefighters and law enforcement, county employees may only keep a balance of 240 hours of comp time. If an employee reaches the 240-hour cap, then anytime they work more than 40 in a workweek, they must be paid at the overtime rate. When an employee resigns, retires or is fired, they must be paid for their unused comp time.

Certain public safety employees have special rules regarding overtime and comp time. Firefighters (in departments with at least five employees) must be paid overtime for each hour worked over 212 hours in a 28 day work period and law enforcement officers (in departments with at least five employees) must be paid overtime for each hour worked over 171 hours in a 28 day work period. Work periods for these public safety officials may be anywhere from seven to 28 days, as long as the ratio of hours to days remains the same for purposes of calculating overtime. Unlike regular employees, firefighters and law enforcement officers are allowed to keep a balance of 480 hours of comp time before having to be paid overtime.

FLSA rights to overtime and comp time may not be contracted away by employees. In other words, an employee cannot agree to waive their overtime or comp time. Supervisors may not tell the employees not to record overtime or comp time hours. If the employee actually works more than 40 hours in a workweek (or 171/212 per 28 day period), then they must receive overtime or comp time.

There are certain employees who are “exempt” from the FLSA overtime/comp time requirements (i.e., they do not have to be paid overtime or receive comp time when they work extra hours). The most common exemption in county government is for “white collar” employees. “White collar” exempt employees (i.e., certain executive, administrative, professional and computer employees) do not have to

be paid overtime/comp time, even if they work more than 40 hours per week – or 171/212 hours per 28 days for law enforcement and firefighters.

In order to establish whether the county may avoid paying overtime/comp time to an employee, the salary and duties of the employee must be in line with being a “white collar” employee. First, the employee must be paid a salary, not an hourly wage (except in certain cases with computer employees). Until December 1, 2016, the salary must be at least \$455 per week. After December 1, 2016, the minimum salary must be at least \$913 per week. Computer related employees do not have to be paid a salary if they are paid at least \$27.63 per hour.

Second, the regular duties performed by the employee must pass one of the following duties tests:

Executive Employee Duties Test. The primary duty of an executive employee must be to manage the county or a department or subdivision of the county. The executive employee must regularly manage at least two or more full time employees (or the equivalent of two full time employees). The executive must have the authority to hire or fire employees or his or her recommendation must carry weight in hiring and firing decisions.

Administrative Employee Duties Test. The primary duty of an administrator is office or non-manual work directly related to the management or general operations of the county. Administrators must use discretion and independent judgment in matters of significance to the county.

Professional Employee Duties Test. There are two types of professional employees: the learned professional and the creative professional. The primary duty of a learned professional employee is the performance of work that is predominantly intellectual in nature. Learned professionals must have advanced learning through a prolonged course of specialized intellectual instruction (e.g., law, medicine, accounting, actuarial computation, engineering, architecture, science, teaching, pharmacy, etc.). Learned professionals must consistently exercise discretion and judgment.

The primary duty of the creative professional is doing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (e.g., music, writing, acting and the graphic arts). The work of a creative professional cannot only be the type of work that depends on intelligence, diligence and accuracy.

Computer Employee Duties Test. The white collar exemption applies to computer systems analysts, computer programmers, software engineers and other similarly skilled workers in the computer field. The computer employee’s primary duty consists of the application of systems analysis techniques and procedures (including consulting with users to determine hardware, software or system functional specifications); the design, development documentation, analysis, creation, testing or modification of computer systems or programs (including prototypes based on and related to user or system design specifications); and/or the design, documentation, testing, creation or modification of computer programs related to machine operating systems.

Highly Compensated Individuals. Until December 1, 2016, employees who earn at least \$100,000 per year and perform at least one of the duties of the white collar exemption are not subject to the overtime requirements of the FLSA. After December 1, 2016, employees must earn at least \$134,004 per year and perform at least one of the duties of the white collar exemption to be qualified as a highly compensated individual.

Penalties. Failure to pay overtime or provide comp time can result in significant penalties. An employer can be required to pay twice the overtime or comp time owed to the employee. Willful violators may be prosecuted criminally and fined up to \$10,000.

What County Officials Should Do. County employers have three options: (1) pay overtime or provide comp time for hours worked over 40 in a workweek to employees earning less than \$913 per week; (2) increase salaries to at least \$913 per week; or (3) arrange job duties to limit the workweek to 40 hours (171/212 hours per 28 days for law enforcement and firefighters). In preparing for the implementation on the increase to the white collar salary minimum, county officials can take the following steps:

- Prepare the county's budget for the impact of the new minimum salaries. Make sure that overtime and comp time is budgeted for all employees who are subject to the FLSA. Be prepared that a significant portion of the county's workforce who is currently not subject to overtime and comp time will be in the not too distant future.
- If the county has not recently evaluated which county positions earn overtime/comp time (i.e., "non exempt" positions) and which positions do not earn overtime/comp time (i.e., "exempt" positions), it should do so now. All exempt positions should meet the requirements of one of the white collar tests.
- Job descriptions should be compared to the actual job duties performed by employees, especially the job descriptions/duties of exempt employees, to make sure that they align. If an employee is currently categorized as exempt from overtime, but their duties do not meet the white collar test, then the position needs to be reclassified as nonexempt – and the employee paid overtime/given comp time when they work more than 40 hours per week or 171/212 hours per 28 days.
- Educate managers and supervisors on the proper procedures for overtime and comp time. For instance, managers cannot allow employees to work extra hours but instruct them not to report the overtime hours.
- Require managers and supervisors to carefully monitor overtime and comp time accrual and usage.
- Determine if any employees have accrued comp time that exceeds the cap (i.e., 240 hours for regular employees and 480 hours for law enforcement and firefighters). Pay out any comp time accrued that exceeds the cap.
- Look carefully at the duties and work hours of the salaried employees who earn less than \$913 per week. Determine whether they should be reclassified to an hourly employee, remain salaried but subject to overtime/comp time, or have their salary increased by December 1, 2016.
- Be realistic before simply adopting a No Overtime Policy. If an employee works over time, then he or she is required to be paid overtime or receive comp time. If the duties given to the employee

cannot be completed within 40 hours and the employee is allowed or required to work extra to complete the duties, then the county must pay the overtime or award the comp time.

- Be sensitive to departments that have 24-hour operations. Oftentimes, particularly in public safety, the county must make the difficult choice between hiring enough employees to adequately cover all shifts and paying overtime/comp time to a smaller staff.

The [DOL's Wage and Hour Division Website \(www.dol.gov/whd/\)](http://www.dol.gov/whd/) has many excellent resources for employees and employers. Take advantage of their [fact sheets](#) and [elaws Advisor](#) or call their helpline at 866-4USWAGE (866.487.9243). If your county does not have human resource professionals on staff, then contact your regional commission to see if they can provide human resource assistance.