

**STATE BOARD of ACCOUNTS  
COUNTY AUDITORS FALL CONFERENCE**

**INDIANAPOLIS, INDIANA**

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**NEW FAIR LABOR STANDARDS ACT (FLSA)  
OVERTIME AMENDMENT**

*Presenter*

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Kent Irwin is a management consultant to dozens of Indiana public sector employers. His firm assists local government in preparing and administering personnel policies, job descriptions, and conducting job classification and compensation studies.

Kent frequently speaks to professional associations about the challenging personnel issues facing local government. He assists the (AIC) the Indiana State Board of Accounts in developing and presenting human resources programs.

He is a graduate of Ball State University, where he received his B.S. and MAE. Degrees; and has taught public administration at Ball State University.

Kent is a former City of Muncie Community Development Director. He was appointed to the Indiana State Advisory Board for Human Services Programs by former Governor Otis Bowen.

Kent is qualified as an expert witness and provides research and testimony in behalf of management in state and federal employment complaints and lawsuits.

In 1989 Kent was appointed to Indiana Governor Evan Bayh's transition committee. He served with a team of experts who conducted an efficiency audit of State government operations. Kent is a recipient of the Sagamore of the Wabash.

Kent is a member of the Human Resource Management Advisory Board at the Ball State University Miller College of Business. This Board is responsible for providing advice on human resources curriculum, and developing employment opportunities and internships for students majoring in human resources.

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# Overtime Final Rule and State and Local Governments

**State and local governments:** The Fair Labor Standards Act ("FLSA") has long applied to state and local governments. The FLSA and the Department's regulations, however, contain some unique provisions applicable only to public sector workers, notably the permitted use of compensatory time off, under certain conditions. These provisions will help state and local governments adapt to the overtime final rule. **Overtime Final Rule:** The Department of Labor's final overtime rule updates the salary level required for the executive, administrative, and professional ("white collar") exemption to ensure that the FLSA's intended overtime protections are fully implemented, and it provides greater clarity for white collar workers and their employers, including for state and local governments. The rule also will lead to better work-life balance for many workers, and it can benefit employers by increasing productivity and reducing turnover. The final rule updates the salary threshold under which most white collar workers are entitled to overtime to equal the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census region, currently the South. The final rule raises the salary threshold from \$455 a week (\$23,660 for a full-year worker) to \$913 a week (\$47,476 for a full-year worker) effective December 1, 2016.

## The FLSA and State and Local Governments

Neither the FLSA nor the Department's regulations provide a blanket exemption from overtime requirements for state and local governments, nor for public sector workers. However, the FLSA contains several provisions unique to state and local governments, including compensatory time ("comp time").

Comp time: Pursuant to an agreement with employees or their representatives, state or local government agencies may arrange for their employees to earn comp time instead of cash payment for overtime hours. Any comp time arrangement must be established pursuant to the applicable provisions of a collective bargaining agreement, memorandum of understanding, any other agreement between the public agency and representatives of overtime-protected employees, or an agreement or understanding arrived at between the employer and employee before the performance of the work. This agreement may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay (for example, providing the employee a copy of the personnel regulations). The comp time must be provided at a rate of one-and-one-half hours for each overtime hour worked. For example, for most state government employees, if they work 44 hours in a single workweek (4 hours of overtime), they would be entitled to 6 hours (1.5 times 4 hours) of compensatory time off. When used, the comp time is paid at the regular rate of pay. Most state and local government employees may accrue up to 240 hours of comp time. Law enforcement, fire protection, and emergency response personnel, as well as employees engaged in seasonal activities (such as employees processing state tax returns) may accrue up to 480 hours of comp time. An employee must be permitted to use comp time on the date requested unless doing so would "unduly disrupt" the operations of the agency. Fire and police small-agency exemption: The FLSA also provides an exemption from overtime protection for fire protection or law enforcement employees, if they are employed by an agency that employs fewer than five fire protection or law enforcement employees, respectively.

"Work periods" rather than "workweeks" for fire protection or law enforcement employees: Employees engaged in fire protection or law enforcement may be paid overtime on a "work period" basis, rather than the usual 40-hour workweek of the FLSA. A "work period" may be from 7 consecutive days to 28 consecutive days in length. Overtime compensation is required when an employee's hours worked in the work period exceed the maximum hours outlined in a formula in the Department's regulations. For example, for a law enforcement employee who works a 14-day work period, the Department's regulations provide that she must receive overtime compensation after working 86 hours in the work period. See FLSA Fact Sheet #7 and Fact Sheet #8 for more information. **Impact Is Limited by Other Rules and Exemptions:** Many employees of state and city governments won't be affected by the final rule. • *Hourly workers:* The new threshold will have no impact on the pay of workers paid hourly. Generally, all hourly workers—including those employed by state and local government—are entitled to overtime pay or comp time regardless of how much they make if they work more than 40 hours. Nothing in the new rule changes that. • *Workers with regular workweeks of 40 or fewer hours:* To the extent that many salaried white-collar staff in state and local government have office jobs where they work no more than 40 hours, the changes to the overtime rules 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 changes will also not impact their pay. • *Workers who fail the duties test:* Salaried workers who do not primarily perform executive, administrative, or professional duties are not eligible for the white collar overtime exemption and therefore are not affected by the final rule. Those employees already should be getting paid overtime for any hours they work over 40 in one week (or the applicable work period maximum for fire protection and law enforcement employees), as long as comp time is not available. • *Highly compensated workers:* White collar workers who fail the standard duties test but are "highly compensated"—earn more than \$134,004 in a year—are almost all ineligible for overtime under the highly compensated employee exemption, which has a minimal duties test. This exemption would cover some high-level managers in state and local government. (You can see more information on HCE duties in WHD Fact Sheet #17H.) • *Police and fire employees in small agencies:* Fire protection or

law enforcement employees in public agencies with fewer than five fire protection or law enforcement employees respectively will continue to be exempt from overtime. • *Elected officials, their policymaking appointees, and their personal staff and legal advisors who are not subject to civil service laws:* These state and local government employees are not covered by the FLSA and will not be impacted by the rule. • *Legislative branch employees who are not subject to civil service laws:* These state and local government employees are not covered by the FLSA and will not be impacted by the rule. • *Public employees who have a comp time arrangement:* By agreement, public sector employers can satisfy their overtime obligation by providing comp time rather than paying a cash overtime premium. State and local government employers may continue to use comp time to satisfy their overtime obligations to employees who have not accrued the maximum number of comp time hours.

### **State and Local Government Employers Have Discretion to Choose Between Several Options for Complying with the Final Rule**

The Department does not dictate what option employers should use to comply with the revised regulations. In fact, many options are available to employers for complying with the new salary threshold. These options include: • *Raise salaries:* For workers whose salaries are close to the new threshold and who pass the duties test, employers may choose to raise these workers' salaries to meet the new threshold and maintain their exempt status. • *Pay overtime above a salary:* State and local government employers also can continue to pay newly-eligible employees a salary and pay overtime, or provide comp time for overtime hours in excess of 40 per week. The law does **not** require that newly overtime-eligible workers be converted to hourly pay status.

## FLSA Exemptions

Employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

### Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- **The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week (\$23,663 per year) to \$913 per week (\$47,476) effective on December 1, 2016.**
- 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

To qualify for the administrative employee exemption, all of the following tests must be met:

- **The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week (\$23,663 per year) to \$913 per week (\$47,476) effective on December 1, 2016.**
- 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

To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- **The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; (\$23,663 per year) to \$913 per week (\$47,476) effective on December 1, 2016.**
- 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
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

## Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- **The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week ; (\$23,663 per year) to \$913 per week (\$47,476) effective on December 1, 2016 OR if compensated on an hourly basis, at a rate not less than \$27.63 an hour;**
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
  - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - 2) 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;
  - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

- 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

## FLSA Exclusions

### §553.10 General.

Section 3(e)(2)(C) of the Act excludes from the definition of "employee", and thus from coverage, certain individuals employed by public agencies. This exclusion applies to elected public officials, their immediate advisors, and certain individuals whom they appoint or select to serve in various capacities.

In addition, the 1985 Amendments exclude employees of legislative branches of State and local governments. A condition for exclusion is that the employee must not be subject to the civil service laws of the employing State or local agency.

### §553.11 Exclusion for elected officials and their appointees.

(a) Section 3(e)(2)(C) provides an exclusion from the Act's coverage for officials elected by the voters of their jurisdictions. Also excluded under this provision are personal staff members and officials in policymaking positions who are selected or appointed by the elected public officials and certain advisers to such officials.

**(b) The statutory term "member of personal staff" generally includes only persons who are under the direct supervision of the selecting elected official and have regular contact with such official. The term typically does not include individuals who are directly supervised by someone other than the elected official even though they may have been selected by the official. For example, the term might include the elected official's personal secretary, but would not include the secretary to an assistant.**

**(c) In order to qualify as personal staff members or officials in policymaking positions, the individuals in question must not be subject to the civil service laws of their employing agencies. The term "civil service laws" refers to a personnel system established by law which is designed to protect employees from arbitrary action, personal favoritism, and political coercion, and which uses a competitive or merit examination process for selection and placement.**

Continued tenure of employment of employees under civil service, except for cause, is provided. In addition, such personal staff members must be appointed by, and serve solely at the pleasure or discretion of, the elected official.

(d) The exclusion for "immediate adviser" to elected officials is limited to staff who serve as advisers on constitutional or legal matters, and who are not subject to the civil service rules of their employing agency.

### **Compensatory Time:**

Under certain prescribed conditions, employees of State or local government agencies may receive compensatory time off, at a rate of not less than one and one-half (1 ½) hours for each overtime hour worked, instead of cash overtime pay. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to (480) hours of comp time; all other state and local government employees may accrue up to (240) hours. An employee must be permitted to use compensatory time on the date requested unless doing so would "unduly disrupt" the operations of the agency.

### **Enforcement**

WHD's enforcement of the FLSA is carried out by investigators stationed across the U.S., regardless of immigration status. As WHD's authorized representatives, they conduct investigations and gather data on wages, hours, and other employment conditions or practices, in order to determine compliance with the law.

Where violations are found, they also may recommend changes in employment practices to bring an employer into compliance.

It is a violation to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the FLSA.

Willful violations may be prosecuted criminally and the violator fined up to \$10,000. A second conviction may result in imprisonment.

Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,100 for each such violation.

### **Recovery of Back Wages**

Listed below are methods which the FLSA provides for recovering unpaid minimum and/or overtime wages.

1. WHD may supervise payment of back wages.
2. The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages.
3. An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs.



4. The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

An employee may not bring suit if he or she has accepted back wages under the supervision of WHD or if the Secretary of Labor has already filed suit to recover the wages.

A 2-year statute of limitations applies to the recovery of back pay, except in the case of willful violation, in which case a 3-year statute applies.

### **FLSA RECORDKEEPING**

The FLSA requires employers to keep records on wages, hours, and other items, as specified in DOL recordkeeping regulations.

Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The records do not have to be kept in any particular form and time clocks need not be used.

With respect to an employee subject to the minimum wage provisions or both the minimum wage and overtime pay provisions, the following records must be kept:

1. personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age;
2. hour and day when workweek begins;
3. total hours worked each workday and each workweek;
4. total daily or weekly straight-time earnings;
5. regular hourly pay rate for any week when overtime is worked;
6. total overtime pay for the workweek; deductions from or additions to wages;
7. total wages paid each pay period; and
8. date of payment and pay period covered.

### **State of Indiana Forms; Records Requirements**

Sec. 4. (a) The state board of accounts is hereby authorized to prescribe the forms of accounts and vouchers provided for by sections 1 and 2 of this chapter.

**(b) The state board of accounts shall require that records be maintained showing which hours were worked each day\* by officers and employees:**

- (1) covered by section 1 or 2 of this chapter; and
- (2) employed by more than one (1) public agency or in more than one (1)

position by the same public agency described in section 1 or 2 of this chapter.  
(Formerly: Acts 1947, c. 14, s. 4.) As amended by P.L. 52-1983, SEC. 3; P.L. 44-1986, SEC. 1.

\*(Note: Time worked is all time that is actually spent on the job performing assigned duties).

**THE COUNTY BULLETIN  
and Uniform Compliance Guidelines  
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**RECORD OF HOURS WORKED**

IC 5-11-9-4 provides that records be maintained showing which hours were worked each day by officers and employees of the county.

This requirement can be met by preparing an endorsement on the payroll claim form showing the general work schedule and listing the specific employees who worked hours different from that general work schedule. Each elected officer or head of each department would be responsible for preparing such endorsement on the payroll claim for their office or department.

If an employee is employed by more than one (1) public agency or in more than one (1) position within that public agency, it is also essential that an accurate record of hours worked be maintained. In these instances we recommend that each agency and department records reflect hours worked in both positions.

**IC 35-44-2-4  
STATE of INDIANA GHOST EMPLOYMENT STATUTE**

Sec.4. (a) A public servant who knowingly or intentionally:

- (1) hires an employee for the governmental entity that he serves; and
- (2) fails to assign to the employee any duties, or assigns to the employee any duties not related to the operation of the governmental entity;  
commits ghost employment, a Class D felony.

(b) A public servant who knowingly or intentionally assigns to an employee under his supervision any duties not related to the operation of the governmental entity that he serves commits ghost employment, a Class D felony.

(c) A person employed by a governmental entity who, knowing that he has not been assigned any duties to perform for the entity, accepts property from the entity commits ghost employment, a Class D felony.

(d) A person employed by a governmental entity who knowingly or intentionally accepts property from the entity for the performance of duties not related to the operation of the entity commits ghost employment, a Class D felony.

(e) Any person who accepts property from a governmental entity in violation of this section and any public servant who permits the payment of property in violation of this section are jointly and severally liable to the governmental entity for that property. The attorney general may bring a civil action to recover that property in the county where the governmental entity is located or the person or public servant resides.

(f) For the purposes of this section, an employee of a governmental entity who voluntarily performs services:

(1) that do not:

(A) promote religion;

(B) attempt to influence legislation or governmental policy; or

(C) attempt to influence elections to public office;

2) for the benefit of:

(A) another governmental entity; or

(B) an organization that is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code;

(3) with the approval of the employee's supervisor; and in compliance with a policy or regulation that:

(A) is in writing;

(B) is issued by the executive officer of the governmental entity; and

(C) contains a limitation on the total time during any calendar year that the employee may spend performing the services during normal hours of employment; is considered to be performing duties related to the operation of the governmental entity. *As added by Acts 1977, P.L.340, SEC.58. Amended by P.L.68-1998, EC.1.*

## FLSA COMPLIANCE CHECKLIST

- \_\_\_\_\_ 1. Develop salary administration policies that are compliant with the FLSA wage and hour laws. Specifically include policies that define:
  - Workweek
  - Work Hours
  - Work Time Restricted
  - Timekeeping
  - Excluded positions
  - Exempt positions
  - Non-Exempt positions
  - Overtime Pay - terms, conditions, and calculations
  - Compensatory Time (if used)
  - Flex Time (if used)
  - Multiple Positions
  - Pay Days
  - Pay Corrections
- \_\_\_\_\_ 2. Prepare comprehensive job descriptions that are accurate and comprehensive.
- \_\_\_\_\_ 3. Use job descriptions to designate FLSA exempt or non-exempt status and treatment under employer FLSA policies.
- \_\_\_\_\_ 4. Provide employees with copies of employer FLSA policies, job descriptions with employee acknowledgement statements.
- \_\_\_\_\_ 5. Establish and maintain timekeeping records that are compliant with FLSA and Indiana wage statute requirements.
- \_\_\_\_\_ 6. Monitor and ensure management and employee compliance with FLSA policies, timekeeping and payroll procedures.
- \_\_\_\_\_ 7. Conduct periodic FLSA self-audits of policies, job descriptions, timekeeping and payroll procedures; and make necessary modifications as needed.

## FAIR LABOR STANDARDS ACT (FLSA) QUIZ

### True or False

- F 1. Longevity pay or other extra pay such as performance bonuses, on-call pay, or shift differential does not need to be added to the straight-time hourly rate when calculating overtime.
- F 2. The FLSA requires that non-exempt employees be paid at the rate of (1 ½) for all time worked over (8) hours in a workday.
- T 3. If a full-time Jailer in the Sheriff's department works (40) hours in a workweek, and in the same week works (12) hours as a Security Officer in the Community Corrections program; he/she is entitled to overtime at the rate of (1 ½) for the (12) hours over (40).
- T+F 4. Salaried employees are not entitled to overtime pay and compensatory time for time worked over (40) hours in a workweek.
- T 5. Employers are required to establish a (7)-day workweek for the purposes of calculating overtime.
- F 6. Employees have sole discretion in deciding when they take compensatory time off.
- T 7. Under the FLSA non-exempt, non-public safety employees may accrue (240) compensatory hours before monetary payment is required.
- F 8. Canine officers in the Sheriff's department are not entitled to any additional compensation for the care, grooming, and training of the dog during non-duty hours.
- T 9. The FLSA requires employers to maintain timekeeping records.
- F 10. Under the FLSA paid vacation, holiday, sick, and personal leave hours must be counted as hours worked in a workweek when calculating overtime at (1 ½).