

7 ways healthcare employers should prepare for the new overtime rules

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The US Department of Labor in May finalized a rule that will expand overtime payment protection to more than 4.2 million workers, including about 370,000 in Texas, many of whom are employed in the healthcare industry. About 200,000 hospital workers and 300,000 nonhospital healthcare workers will be directly affected. Healthcare professions likely affected by the overtime threshold include certain nurses, medical and physical therapist assistants, medical and pharmacy technicians, and paramedics.

The rule will go into effect Dec. 1, except for a special enforcement suspension until March 17, 2019, granted to providers of Medicaid-funded services in certain small residential homes and facilities for those with particular disabilities.

What has changed?

The DOL has updated the salary level above which certain “white collar” workers may be exempt for overtime pay requirements under the Fair Labor Standards Act. The new rule nearly doubles the minimum salary threshold required to qualify for the white collar exemption from \$23,660 per year (\$455 per week) to \$47,476 per year (\$913 per week). Similar to the current rule, the new rule has duties requirements in order for a healthcare employer to claim a professional white-collar exemption for an employee. Under the new rule, employers must pay at least 90 percent of the salary level on a salary basis or a fee basis; the other 10 percent can be satisfied by nondiscretionary bonuses or incentive payments.

This salary basis test does not apply to physicians. They are in an exempt classification which allows healthcare employers to pay salary or

hourly compensation, without having to meet federal overtime requirements. “Physicians” also includes other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term “physicians” includes medical doctors (general practitioners and specialists), osteopathic physicians, podiatrists, dentists, and optometrists. The DOL consistently has declined to expand its interpretation to include physician assistants in its definition of “practitioners.”

Some healthcare professionals, such as physician assistants and registered nurses, may be exempt from overtime as a learned professional employee. To qualify, the employee must be paid above the minimum salary threshold and meet three main duties: (1) the employee’s primary duties must require advanced knowledge, which comprises work that largely is intellectual and includes a frequent use of discretion and independent judgment; (2) the advanced knowledge must be in the field of science or learning, such as medicine or pharmacy; and (3) the advanced knowledge must have been acquired through a prolonged course of specialized intellectual instruction. For healthcare employees to be exempt, they must be

working under a license or certification and engaged in work related to such licensure. Additionally, employees who hold academic degrees for the general practice of medicine are exempt if they are engaged in an internship or residency program for the medical profession.

The regulations contain special rules for highly compensated employees (HCEs), which are deemed exempt if they earn \$100,000 per year or more, which includes at least \$455 per week paid on a salary or fee basis. Under the new rule, HCEs must earn a minimum of \$134,000 per year to be exempt, with minimum payments of \$913 per week. Nondiscretionary bonuses and incentive payments may be counted toward the \$134,000 total annual compensation requirement for HCEs, but 100 percent of the professional salary level (\$913 per week) must be paid on a salary basis or fee basis for the HCE to qualify as exempt. Primary duties must comprise office or nonmanual work, but the HCE needs to customarily and regularly perform only one of the learned professional employee duties.

Further complicating the analysis, to account for inflation, all salary levels will automatically be updated every three years, beginning Jan. 1, 2020 — requiring employers to revisit these issues every three years.

How do I prepare?

Although the new rule does not go into effect until Dec. 1, healthcare employers should make adjustments now to ensure full and timely compliance. Legal counsel can help navigate the new requirements and ensure that any analysis is protected from being discovered in subsequent litigation.

1. Reassess employee classifications.

The DOL has not directed one particular method for compliance with the new overtime rule, and employers have full discretion to formulate new methods. The employer can combine any of the options to frame a practice that best achieves the goal.



- An employer may make no changes to an employee's classification, and continue to pay an employee the same salary and, if necessary, overtime. This option is most effective if the employee already meets the new salary requirement to be exempt or if the employee works 40 hours or fewer a week with rare overtime.
- An employer may increase salaries to maintain an employee's exempt status. This option is most effective if the employee already earns close to the new salary level and regularly works overtime.
- An employer may change its salaried employees to hourly employees. This option is most effective if the employee frequently works overtime, and the facility's timekeeping methods assure accuracy. Be cognizant that some employees consider it a demotion to go from salaried to hourly pay, even if their compensation is greater when paid hourly.
- An employer could hire more employees to alleviate current employees from having to work overtime. This option is most effective if current employees frequently work overtime, and the duties can be fulfilled by workers who are lesser paid entry-level, part-time or temporary.

2. Rethink timekeeping methods.

When exempt employees are converted to hourly, nonexempt employees, it is crucial that they and their supervisors are trained regarding effective and accurate timekeeping methods. Employers may use any timekeeping method, including using a time clock (which many employers find the most accurate method to track time), having a timekeeper keep track of employees' work hours, and telling workers to track their own time. Any timekeeping plan is acceptable if it is complete and accurate.

3. Readjust schedules.

The easiest way to eliminate overtime without increasing salaries is to limit work weeks to 40 hours. Employers should mandate that employees receive a supervisor's approval before working overtime. This prior approval process is especially important when salaried employees work double shifts or pick up shifts for coworkers. Employers should closely monitor reasons for absenteeism, including personal illness, personal days, family issues, stress, vacations, and holidays, and should examine the workload of facilities. For example, a hospital may note how many patients come into the emergency department by the hour to

determine how to appropriately staff the ED with nonexempt personnel. Over time, monitoring workloads allows an employer to match staffing levels with the fluctuating demands of a facility.

4. Revise policies, procedures and employee handbooks.

Company policies, procedures and employee handbooks should cover the new overtime rule, timekeeping methods, schedules, paid and unpaid time, and other wage and hour issues. Having these policies and procedures in writing eliminates ambiguity, and results in more efficient training of new and existing employees. Cross-training is most effective for executive and administrative salaried employees who, essentially, have identical salary requirements. When only a small percentage of employees are capable of completing a task, overtime hours can quickly rise.

5. Reassure employees.

When employees see a chance of future demotion or layoff, employers risk employees resigning and subsequently having facilities short-staffed, which ultimately leads to overtime. If the employer changes the classification of an

employee from nonexempt to exempt or from salaried to hourly, employees likely will consider these changes as demotions. Open communication about the financial impacts of the new rule will help stem rumors about raises, bonuses, layoffs, and cutbacks. Employers should address employees' questions and prepare for these discussions to reassure their employees that the changes are not a reflection on their work, but only a change in the law.

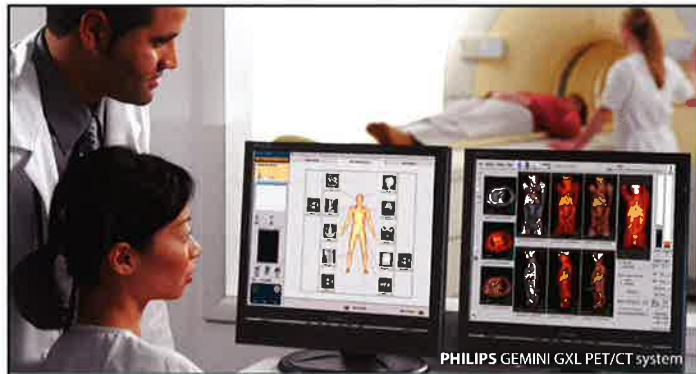
6. Re-examine facility costs.

As costs for overtime increases for healthcare employers, it is imperative to eliminate unnecessary costs incurred elsewhere. Companies may save by negotiating discounts with vendors, suppliers and billing services, or by taking these services in-house where possible.

7. Remain in compliance with federal and state law.

Before the law goes into effect, healthcare employers should hire outside experts or assign in-house HR personnel to ensure that the company's policies and procedures comply with the new rule. Employers should remember that all employees must meet both the salary tests and the duties tests to be exempt. When in doubt, employers should seek legal advice. DMJ

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