

# The DOL's Final Overtime Rule

## What Employers Need to Know

June 10, 2024

# Today's Webinar Host:

**Stephanie Zielinski**

Marketing Director

ComplianceHR



# Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

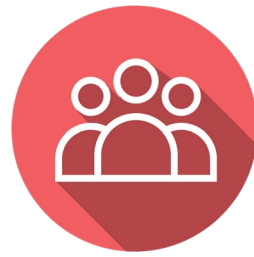
What we do:  
Deliver expert guidance in a fraction of time and cost vs traditional methods

## Simplify the complexity of employment law



### **PolicySmart™**

Create and maintain an up-to-date and legally compliant employee handbook



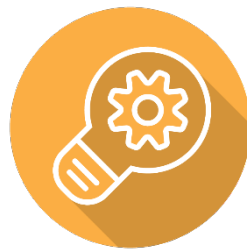
### **Navigator Independent Contractor**

Remove risk in determining Independent Contractor status



### **Navigator Overtime**

Determine if an employee is exempt or non-exempt



### **The Reference Center**

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



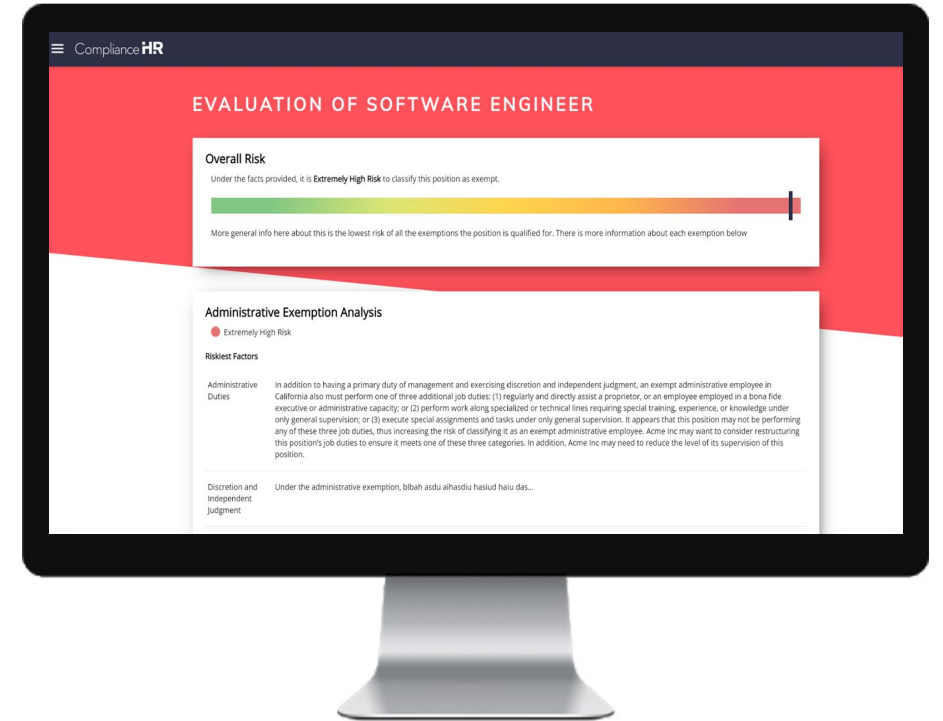
### **The Document Center**

Efficiently generate state and federal compliant documents throughout the employee lifecycle



# Navigator Overtime

- Determines employee as exempt or non-exempt
- Applies all applicable federal and state tests
- Draws from a proprietary engine of 2,400+ reported court decisions and DOL opinion letters
- Delivers reasoned suggestions on how to lower the risk of misclassification
- Provides the risk result, a summary of relevant federal & state exemption standards, and a transcript of answers





# Sign Up for a Demo

## Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link in the Resources panel
3. Visit to [www.compliancehr.com/demo/](http://www.compliancehr.com/demo/)

## Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

### ComplianceHR Demo & Free Trial:

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#### Resources

[Compliance HR - Demo & Free Trial](#)

[State-by-State CLE Guide](#)

[BeaconLive - How to Access Certificates](#)

# EVALUATION OF MANAGER C



## Report Summary

This is an evaluation of **Manager C in California** based on the questionnaire submitted by **worth+demo@compliancehr.com**.

## Overall Risk

Without taking compensation into account, it is **Moderately High Risk** to classify this position as exempt.



This is the lowest risk of all the exemptions the position is qualified for. Learn more about compensation requirements and each exemption below.

## Overall Compensation Requirements

### Compensation Requirements Met

This position meets the relevant compensation requirements.

## Analysis of the Administrative Exemption

### Moderately High Risk

### Compensation Requirements Met

### Riskiest Factors

**Discretion and Independent Judgment** To qualify for the administrative exemption, a position must exercise discretion and independent judgment on matters of significance. The exercise of discretion and independent judgment involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. The exercise of discretion and independent judgment implies the position has authority to make an independent choice, free from immediate direction or supervision. Discretion and independent judgment does not require that the decisions made by a position have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that a position's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the position is not exercising discretion and independent judgment. However, the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques,

## Presented by:



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# The EAP or “White Collar” Exemptions

Since it was enacted in 1938, the FLSA has included exemptions from the minimum wage and overtime provisions for individuals employed in a bona fide:

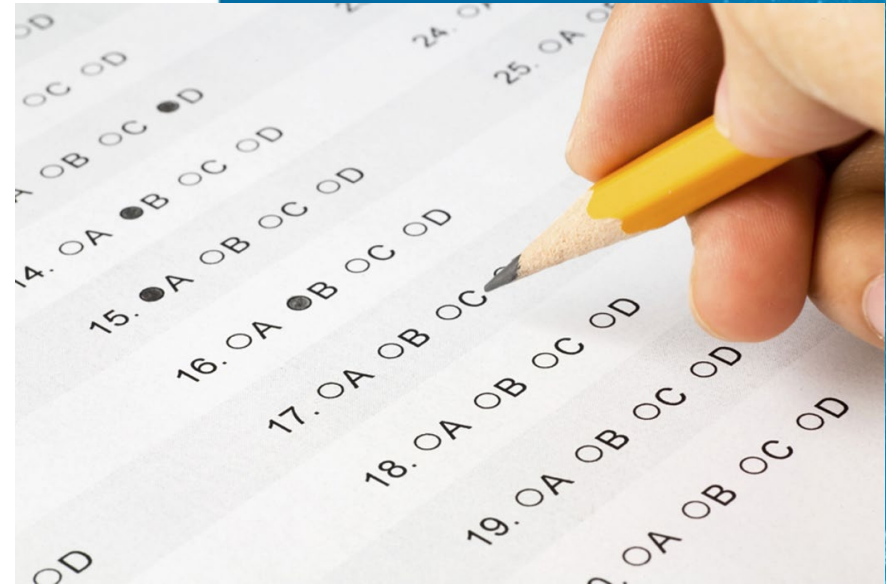
- **E**xecutive,
- **A**dministrative, or
- **P**rofessional

capacity, “as such terms are defined and delimited from time to time by regulations of the Secretary.”



# Three Tests for Exemption

- Salary Basis
- Duties
- Salary Level



# Salary Basis Test

Distinct from salary **level** test.

Exempt employees must be paid their full salary in any week during which they perform any work

- Predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Limited exceptions

**Salary basis test not impacted by Final Rule**



# Duties Test

**Executive:** Primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise; must regulatory direct the work of two FTEs; must have the authority to hire and fire or at least “particular weight.”

**Administrative:** 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 include the exercise of discretion and independent judgment with respect to matters of significance.

**Professional:** primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment; advanced knowledge must be in a field of science or learning; and advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

**Duties test not impacted by Final Rule**



# Salary Level Test

- Provided “a ready method of screening out the **obviously nonexempt** employees, making an analysis of duties in such cases unnecessary.”

Harry Weiss, Report and Recommendations on Proposed Revisions of Regulations (1949)

- Assisted in demarcating bona fide EAP employees “without disqualifying any substantial number of such employees.”

Harry S. Kantor, Report and Recommendations on Proposed Revisions of Regulations (1958)

(acknowledging salary level “may result in loss of exemption for a few employees who might otherwise qualify for exemption”)

# Regulatory History – Salary Level

In 2004, DOL:

- Eliminated the “long” and “short” tests
- Adopted one standard duties test for each EAP exemption, with a salary level of \$455/week (\$23,660/year)
- Adopted a streamlined test for “highly compensated employees” (“HCE”) paid at least \$100,000/year

## How Did DOL Pick the 2004 Salary Level of \$455/Week?

- Approximately 20th percentile of weekly earnings of full-time salaried workers:
  - in the lowest-wage Census Region (the South); and
  - in the retail industry nationally
- Comparable to what the salary level for the “long test” would have been in 2004 had it been updated
  - continued function of screening out “obviously nonexempt” employees

## 2016 Final Rule

- Increased salary level for EAP exemptions to \$913/week (\$47,476/year)
  - 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South)
- Increased salary level for HCE test to \$134,004/year
- Allowed certain bonuses and commissions to count towards 10% of the minimum salary level
- Provided for automatic increases every three years



# Challenge to 2016 Final Rule

- Rule was scheduled to take effect December 1, 2016
- Preliminary injunction issued November 22, 2016
- Permanent injunction granted August 31, 2017
- DOL appealed to the Fifth Circuit
  - Fifth Circuit stayed the appeal  
pending further rulemaking
  - Subsequently dismissed

## Why Did Court Invalidate the \$913/Week Salary Level?

“[T]he Department exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it **supplants the duties test.**”

“Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption.”

*Nevada v. U.S. Dep't of Labor,*  
218 F. Supp.3d 520 (E.D. Tex. 2016)

# 2019 Final Rule

- Rescinded 2016 Final Rule
- Increased salary level for EAP exemptions to \$684/week (\$35,568/year)
- Increased salary level for HCE test to \$107,432/year
- Up to 10% of salary may be satisfied with non-discretionary bonuses, commissions and other incentive pay that are paid annually or more frequently
- No automatic increases

# How Did DOL Pick the 2019 Salary Level of \$684/Week?

- 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally
  - **Same as 2004 method**
- Raised HCE level from \$100,000 to \$107,432
  - 80th percentile of annual earnings of full-time salaried workers nationwide



# New Rule



# Final Rule Announced April 23, 2024

- Increases salary level for EAP exemptions:
  - **July 1, 2024: \$844/week** (\$43,888/year)
  - **January 1, 2025: \$1,128/week** (\$58,656/year)
- Increases salary level for HCE test:
  - **July 1, 2024: \$132,964/year**
  - **January 1, 2025: \$151,164/year**

# Final Rule Announced April 23, 2024

- Automatic increases every 3 years
  - Beginning July 1, 2027
  - Test used to set January 1, 2025 salary levels
  - To be announced at least 150 days in advance
  - Based on most recent four quarters of earnings data
- Employers may satisfy up to 10 percent of the standard salary requirement (\$68.40 per week) with nondiscretionary bonuses, incentive payments, and commissions (same as current law).
- Severability clause

# Proposed Regulations Not Included in Final Rule

Final rule does not change salary level for:

- Employees in territories subject to the federal minimum wage (including Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands): remains \$455/week
- Employees in American Samoa: remains \$380/week
- Employees in motion picture producing industry: remains \$1,043 per week



# How Did DOL Pick These Salary Levels?

- **July 1, 2024:**
  - EAP Salary Level: 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally
  - HCE Salary Level: 80th percentile of full-time salaried workers nationally
  - **Same as 2004 & 2019 methods**

# How Did DOL Pick These Salary Levels?

- **January 1, 2025:**
  - EAP Salary Level: 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region
  - HCE Salary Level: 85th percentile of full-time salaried workers nationally

## New Rationale for Salary Level Test

“[T]he Department has long recognized that the salary level test is a useful criterion for helping identify bona fide EAP employees and provides a practical guide for employers and employees.”

(DOL 4/23/24)

# New Rationale for Salary Level Test

“Key provisions of the final rule include ... Giving more workers pay or valuable time back with their family.”

(DOL Press Release 4/23/24)



## Severability Clause

“The Department intends for the **initial update** of the standard salary level and the HCE total annual compensation requirement, using current earnings data applied to the 2019 rule methodologies, to be **severable** from **future** triennial updates ... as well as from the [January 1, 2025] revision to the methodologies for the standard salary level and the HCE total annual compensation threshold.”



# Bonuses/Example

- **Facts:** Employee A meets the duties test for an executive employee. Employee A receives a **salary of \$616** per week and two production bonuses; **\$1300 in June** and **\$2500 in December**. As a result, Employee A's total salary for the year is:
  - $\$616 \text{ (salary)} \times 52 \text{ weeks} = \$32,032$  amount paid in salary on a weekly basis.
  - $\$32,032 \text{ (salary paid)} + \$3,800 \text{ (Bonuses earned)} =$
  - **$\$35,832$  (salary plus nondiscretionary bonuses paid).**
- **Analysis:** Employee A received \$616 per week on a salary basis, which exceeds \$615.60 (90 percent of the standard salary level required). Employee A's salary and nondiscretionary bonuses total \$35,832, which exceeds the standard salary level of \$35,568 ( $\$684 \times 52 \text{ weeks}$ ) for that period. Because the employee meets the duties test for an exempt executive and met the salary level requirements, Employee A is exempt from overtime pay for the year.



# Challenges

- Litigation filed May 22, 2024 – Eastern District of Texas
- Challenges reminiscent of 2016 litigation:
  - Subverts duties test by excluding bona fide EAP employees
  - Automatic increases require notice and rulemaking
- Potential additional challenges:
  - No authority for any salary level (or salary basis) test
- Timing?

# What Employers SHOULD (and Should Not) Do Now



# What Should Employers Do Now?

1. Identify exempt employees who earn less than \$844/week (\$43,888/year)
2. For each such employee:
  - a. Identify applicable exemption(s)
  - b. Evaluate strength of exemption(s)
  - c. Assess “need” for exempt status
  - d. Ascertain hours worked
    - i. Average per week
    - ii. Predictability / Variability



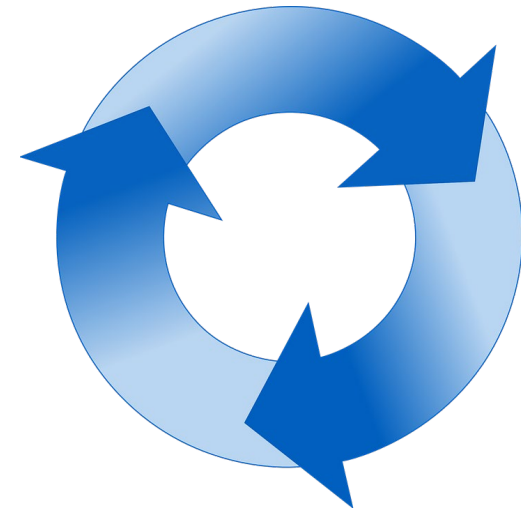
# What Should Employers Do Now?

3. For each such employee:
  - a. Decide whether to reclassify or raise salary
  - b. If decision is to reclassify:
    - i. determine new compensation arrangement
    - ii. develop / implement new policies
  - c. If decision is to raise salary:
    - i. consider impact of salary compression
  - d. Decide timing (before or after challenge to Final Rule is resolved)



# What Should Employers Do Now?

4. Repeat Steps 1 – 3 for each employee
  - a. Who is paid less than \$1,128/week (\$58,656/year)
  - b. Who is paid less than \$132,964/year and employer relies on HCE test
  - c. Who is paid less than \$151,164/year and employer relies on HCE test
5. Communications and Training



# Final Rule as Opportunity

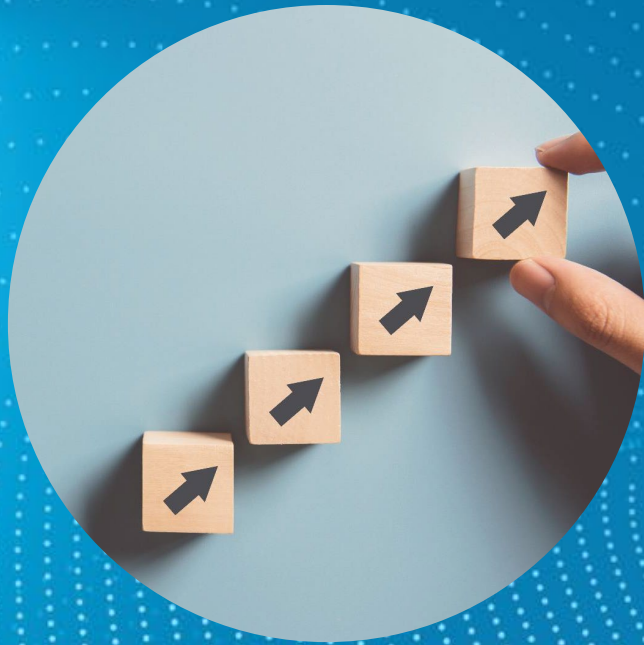


Don't forget the duties test!

Depending on **strength** of exemption and **need** for exemption, employers may want to reclassify certain positions **without waiting** for legal challenges to the Final Rule to be resolved.



# Next Steps



# Communicate the Changes

- Need to communicate with senior management, managers of reclassified employees and the employees themselves
- Protecting Attorney-Client Privilege
- 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



# Training

- Train the reclassified employees and their managers
  - Wage and hour policies
  - Timekeeping procedures
  - Activities that are compensable work





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# Questions?

Please add any additional questions to the Q&A box



**Thank you!**

