



Passing the Test for Exempt Employees Part 2: The Salary Tests

Presented on Thursday, January 26, 2017

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Today's
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Our Focus For Today

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- ❖ What salary levels must be paid to qualify for exempt status
- ❖ \$100,000 rule
- ❖ Salary basis
- ❖ Docking from wages correctly
- ❖ Results of docking incorrectly

About the Speaker

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Vicki M. Lambert, CPP, is President and Academic Director of *The Payroll Advisor*[™], a firm specializing in payroll education and training. The company's website www.thepayrolladvisor.com offers a subscription payroll news service which keeps payroll professionals up-to-date on the latest rules and regulations.



Three Tests for Exemption

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- ❖ **Salary Level**
- ❖ **Salary Basis**
- ❖ **Job Duties**



Three Tests for Exemption

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- ❖ **Salary Level**
 - ❖ **Salary Basis**
 - ❖ **Job Duties**
- Our Focus for This Webinar**



Secretaries of Labor

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WAS: Thomas E. Perez. Civil rights lawyer



Pending: Andy Puzder
CEO of CKE Restaurants (Carl's Jr.)





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Salary Level Test

\$

Current Salary Level

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- ❖ For most employees, the minimum salary level required for exemption is \$455 per week
- ❖ Must be paid “free and clear”
- ❖ The \$455 per week may be paid in equivalent amounts for periods longer than one week:
 - ❖ Biweekly: \$910
 - ❖ Semimonthly: \$985.83
 - ❖ Monthly: \$1,971.66



Salary Level

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- ❖ For most employees, the current minimum salary level required for exemption is \$455 per week
- ❖ Must be paid “free and clear”

- ❖ New level if law prevails
 - ❖ \$913 per week
 - ❖ Based on 40th percentile of salaries in lowest region (south)



Proposed Salary Levels

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Used national averages to determine amounts

New level reflects the 40th percentile of earnings for full-time salaried employees

Highly compensated reflects level at 90th percentile for full-time salaried employees

Different rates will be used in American Samoa and for motion picture industry



Proposed Salary Levels

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American Samoa

- Current: \$380
- 12/1: \$767

Motion Picture

- Current: \$695
- 12/1: \$1,397



Scope of Proposal

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Does not apply to
outside sales

Does not apply to
computer employees
paid hourly at \$27.63
per hour

Do not affect other
exemptions not
based on section
13(a)(1) of FLSA...



Does Not Apply To...

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Section 7(i) commissioned employees (retail or service)

Seasonal amusement or recreational establishment employees

Motor Carrier Act exemptions (section 13(b)(1))

Certain employees of rail and air carriers sections 13(b)(2) & (b)(3)



New Nondiscretionary Bonus Rule

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- ❖ Nondiscretionary bonus or other incentive pays such as commissions are forms of compensation promised in advance to employees
- ❖ Can include bonuses for meeting production schedules or goals, retention bonuses, and commission payments on a fixed formula
- ❖ New rules allow these types of bonuses to be applied to satisfy a portion of the salary level test



New Nondiscretionary Bonus Rule

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- ❖ Can be used to satisfy up to 10% of standard salary level
- ❖ Minimum of approx. \$822 or 90% of standard salary level must be paid as weekly salary
- ❖ Payments of the bonuses or other payments must be made a minimum of quarter or on a more frequent basis
- ❖ Bonus must usually be at least \$1,183 to make up the 10% of the salary not paid



New Nondiscretionary Bonus Rule

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- ❖ If employee fails to earn enough from nondiscretionary bonus or incentive payment in a given quarter the employee may make “catch-up” payment within one pay period at the end of the quarter
- ❖ This “catch-up” payment will only count towards the prior quarter’s salary amount and not toward salary in the quarter in which it is paid.
- ❖ If payment not paid employee is entitled to overtime for the quarter



Examples for 2017

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- ❖ Qtr 1: January – March paid \$822 per week with \$2,000 bonus—meets salary level
- ❖ Qtr 2: April – June paid \$822 per week with \$600 bonus--\$583 short for meeting salary level for quarter—employee gets overtime
- ❖ Qtr 3: July – September paid \$822 per week with \$2,000 bonus—meets salary level
- ❖ Qtr 4: October – December paid \$822 per week with \$500 bonus--\$683 short—employer makes catch-up payment 1st pay period in January



Automatic Updates

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- ❖ Every three years starting in January 1, 2020
- ❖ Standard salary and annual compensation levels will be automatically updated
- ❖ Published in Federal Register at least 150 days prior to effective date by Secretary of Labor—2nd Qtr of preceding year
- ❖ DOL will publish and maintain on its website
- ❖ Standard salary lever will be 40th percentile of weekly earnings for full-time salaried employees working in the southern region (lowest)



Automatic Updates

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- ❖ Also starts in January , 2020 and every three years from then on
- ❖ American Samoa: updated to maintain the ratio of the standard salary level of 84%
- ❖ Motion picture industry: updated by increasing the base rate proportionately to the change in the standard salary level
- ❖ Highly compensated employees will be updated to equal 90th percentile of annualized earnings of full-time salaried workers nation-wide



Current Status of Updates

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- ❖ 21 states & U.S. Chamber of Commerce have entered into lawsuit to stop the salary level update
- ❖ Lead by Nevada and filed in Texas court
- ❖ Suit claims new rules contradicts statutory text of the exemption as well as Congressional intent
- ❖ Tom Perez says no it doesn't!



Current Status of Updates

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- ❖ Stay has put the new rules on hold
- ❖ New Secretary of Labor unlikely to appeal any rulings
- ❖ BUT AFL-CIO has requested to take up the banner on behalf of DOL...that is pending
- ❖ What should employers do?
- ❖ Depends on what you have already done
- ❖ 3 scenarios are available



#1: Reclassified Employees to Nonexempt

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Option #1:

Reclassify back to exempt if they earn >\$455 per week

Company will save money

Employee may be unhappy about losing overtime

If injunction is lifted and retro back to 12/1 company out of compliance

Option #2:

Leave employee as is and continue to pay overtime

Employee happy about earning overtime

Company must work to curtail overtime costs

Moral issues may arise for employees who lost exempt status

If rules apply going forward then company in compliance



#2: Increased Salaries to \$913 per Week

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Option #1:

Leave increased salaries as is, keep employees exempt

Company prepared if rules go into effect

Company paying more than it must

No need to pay overtime to these employees

Option #2:

Lower salaries back down to >\$455 per week

Company saves money

May create major employee relations problems

If rules go into effect retro back to 12/1 company has compliance problem

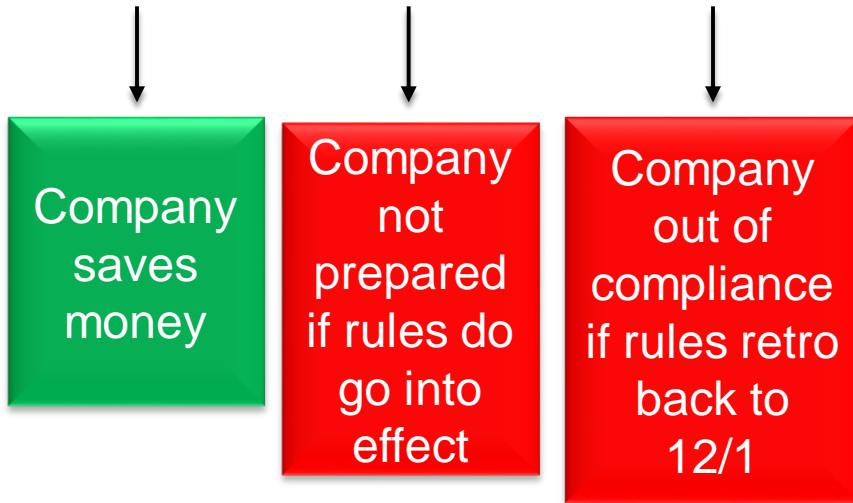
If rules apply going forward then company in compliance



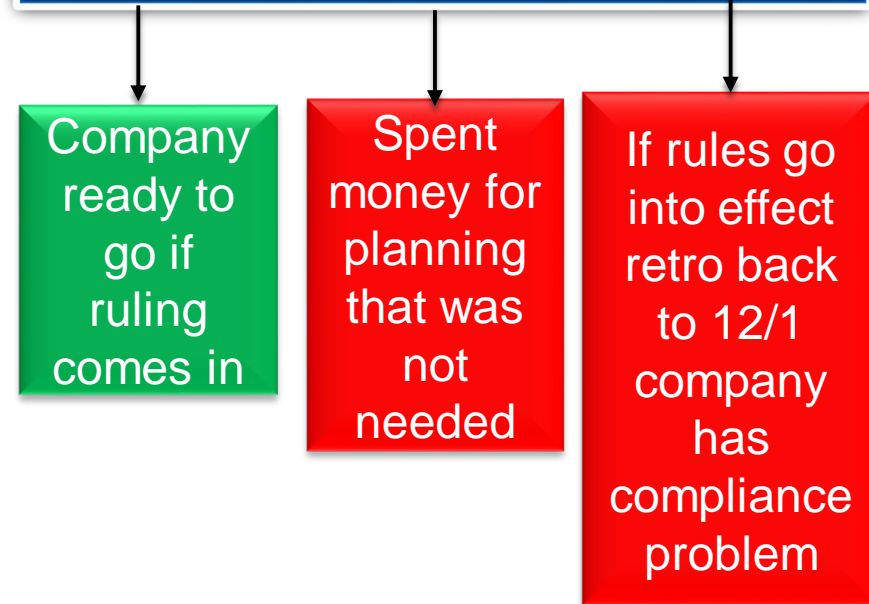
#3: No changes Were Made for 12/1 Deadline

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Option #1:
Leave as is until final ruling is in



Option #2:
Leave as is, but prepare if final ruling comes in



If rules apply going forward then company in compliance



Highly Compensated Test

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- ❖ Total annual compensation of at least \$100,000 (new rules will increase to \$134,004)
- ❖ At least \$455 per week paid on a salary or fee basis—cannot use new 10% rule for bonuses
- ❖ Perform office or non-manual work
- ❖ Customarily and regularly perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions



Total Annual Compensation

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- ❖ Total annual compensation includes:
 - ❖ Commissions
 - ❖ Nondiscretionary bonuses
 - ❖ Other nondiscretionary compensation earned during a 52-week period
- ❖ Total annual compensation does not include:
 - ❖ Credit for board, lodging or other facilities
 - ❖ Payments for medical or life insurance
 - ❖ Contributions to retirement plans or fringe benefits



Make-Up Payment & Pro-Rating

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- ❖ If an employee's total annual compensation does not equal \$100,000 by the end of the year:
 - ❖ The employer may, within one month after the end of the year, make one final payment to reach the \$100,000 level; or
 - ❖ The employee will be tested for exemption under the standard duties tests
- ❖ The \$100,000 may be pro-rated for employees who do not work the full year
- ❖ The employer may use any 52-week period as the year



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Salary Basis Test

Payroll

Salary Basis Test

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- ❖ Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- ❖ The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- ❖ Must be paid the full salary for any week in which the employee performs *any* work
- ❖ Need not be paid for any workweek when no work is performed



Deductions From Salary

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- ❖ An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- ❖ If the employee is ready, willing and able to work, deductions may not be made for time when work is not available



Full Day Increments

Deductions are allowed for certain types of absences are for “one or more full days.” This means a deduction may be taken from the salary under this language only in full-day increments. Deductions for partial-day absences violate the salary basis rule generally, except those occurring in the first or final week of someone’s employment or for unpaid leave taken under the Family and Medical Leave Act. So, for example, if an employee is absent for one and a half days to handle personal affairs, the employer may only deduct for the one full-day absence. The employee must receive a full day’s pay for the partial day worked to meet the salary basis rule.



Permitted Salary Deductions

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Seven exceptions from the “no pay-docking” rule:

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay



Permitted Salary Deductions

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Seven exceptions from the “no pay-docking” rule:

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act



Clearly Communicated Policy

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- ❖ The best evidence of a clearly communicated policy is a written policy distributed to employees prior to the improper pay deductions by, for example:
 - ❖ Providing a copy to the policy to employees at the time of hire
 - ❖ Publishing the policy in an employee handbook
 - ❖ Publishing the policy on the employer's Intranet



Safe Harbor

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- ❖ The exemption will not be lost if the employer:
 - ❖ Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
 - ❖ Reimburses employees for any improper deductions; and
 - ❖ Makes a good faith commitment to comply in the future
- ❖ *Unless* the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints



Payroll Practices That Do Not Violate the Salary Basis Test

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- ❖ Taking deductions from exempt employees accrued leave accounts
- ❖ Requiring exempt employees to keep track of and record their hours worked
- ❖ Requiring exempt employees to work a specified schedule
- ❖ Implementing bona fide, across-the-board schedule changes
- ❖ Giving additional compensation
- ❖ Paying on an hourly, shift or daily basis



Improper Deductions - Examples

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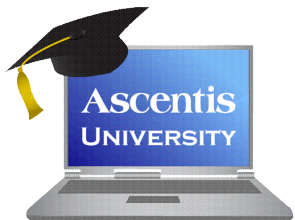
- ❖ Deduction for a partial-day absence to attend a parent-teacher conference
- ❖ Deduction of a day of pay because the employer was closed due to inclement weather
- ❖ Deduction of three days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty
- ❖ Deduction for a two day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences



Effect of Improper Deductions

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- ❖ An actual practice of making improper deductions from salary will result in the loss of the exemption:
 - ❖ During the time period in which improper deductions were made
 - ❖ For employees in the same job classifications
 - ❖ Working for the same managers responsible for the actual improper deductions
- ❖ Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee

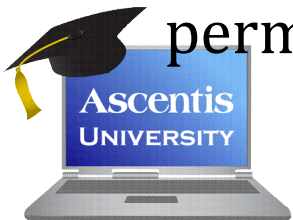


Actual Practice

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Factors include, but are not limited to:

- ❖ The number of improper deductions, particularly as compared to the number of employee infractions warranting discipline
- ❖ The time period during which the employer made improper deductions
- ❖ The number and geographic location of both the employees whose salaries were improperly reduced and the managers responsible
- ❖ Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions

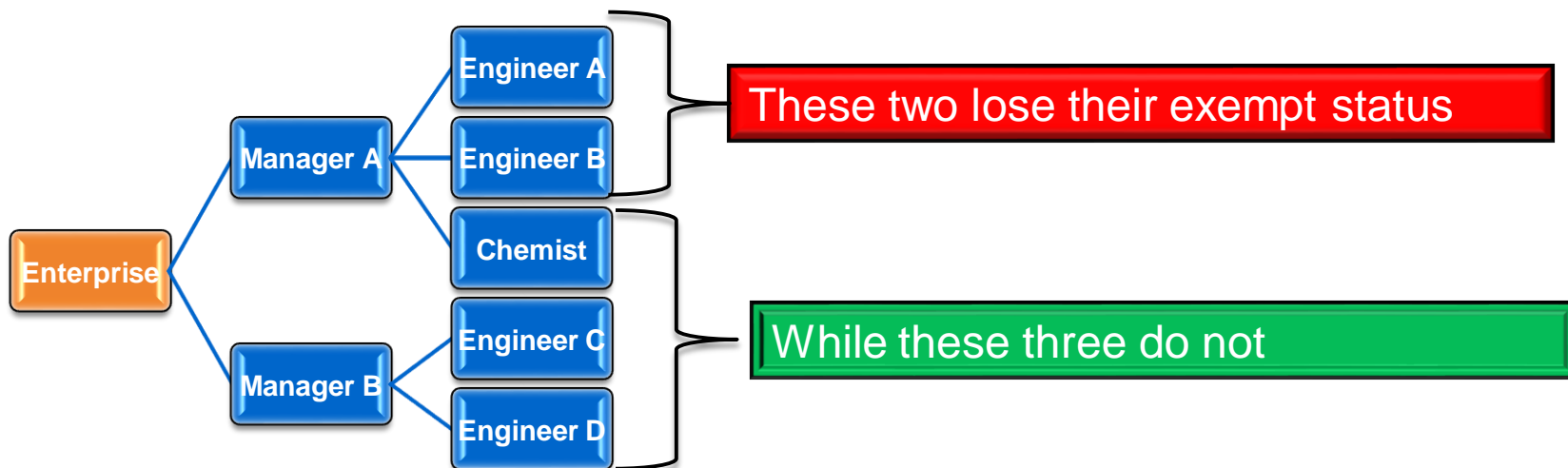


Example:

Effect of Improper Deductions

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If Manager A has docked the pay of Engineer A on each of 12 days when Engineer A arrived late for work during the last 3 months, then the exemption could be lost for Engineer A and Engineer B during that 3 months, but could not be lost for the Chemist or Engineers C and D



Additional Compensation

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- ❖ An employer may provide compensation in addition to the \$455 minimum guaranteed weekly salary, such as:
 - ❖ Commissions
 - ❖ Bonuses
 - ❖ Additional pay based on hours worked beyond the normal workweek



Hourly, Daily or Shift Basis

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- ❖ The regulations also allow an employee's earnings to be computed on an hourly, daily or shift basis, if the employer:
 - ❖ Guarantees at least \$455 per week paid on a salary basis, regardless of the number of hours, days of shifts worked; and
 - ❖ A reasonable relationship exists between the guaranteed amount and the amount actually earned



Reasonable Relationship

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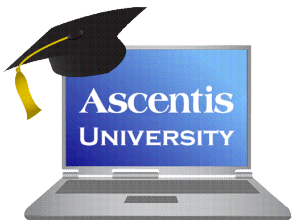
- ❖ “Reasonable relationship” means the weekly guarantee is roughly equivalent to the employee’s usual earnings at the assigned hourly, daily or shift rate for the employee’s normal scheduled workweek
- ❖ For example, an exempt employee guaranteed at least \$500 per week and who normally works four or five shifts each week, may be paid \$150 per shift without violating the salary basis requirement



Fee Basis

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- ❖ Administrative and professional employees also may be paid on a “fee basis”
- ❖ An employee is paid on a “fee basis” if the employee is paid an agreed sum for completing a single job, regardless of the time required to complete the work
- ❖ Payment on a “fee basis” is not available for a series of non-unique jobs repeated an indefinite number of times for which payment on an identical basis is made over and over again



Fee Basis

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- A fee payment meets the minimum salary level required for exemption if, based on the time worked to complete the job, the fee is at a rate that would amount to at least \$455 per week if the employee worked 40 hours
- Example:
 - An artist is paid \$250 to paint a portrait that took 20 hours to complete, the equivalent of \$12.50 per hour
 - Because working 40 hours at this \$12.50 per hour rate would yield the artist \$500, the fee payment meets the salary requirements for exemption



No Salary Requirements

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- ❖ The salary level and salary basis tests do not apply to:
 - ❖ Outside Sales Employees
 - ❖ Doctors
 - ❖ Lawyers
 - ❖ Teachers
 - ❖ Certain computer-related occupations paid at least \$27.63 per hour



Where the States Stand

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If they address the issue they can....

**1. follow new
2004 federal
rules... or**

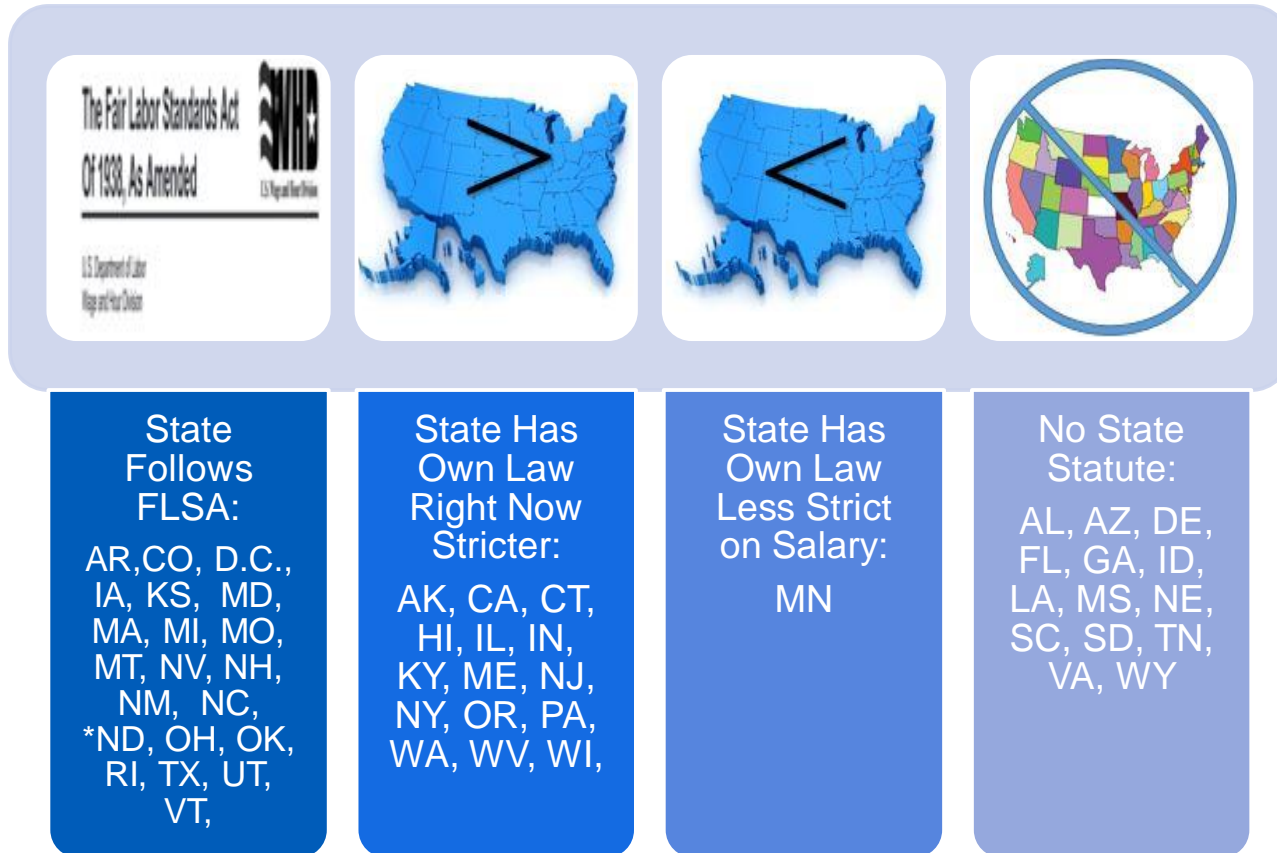
**2. Follow old rules
pre-2004
exactly...or**

**3. Follow either
but have a
different salary
level or different
job duties tests**



Where the States Stand

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* Some parts are stricter

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For Example: CA

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- ❖ Follows FLSA rules with the following exceptions:
- ❖ Monthly salary 2 times state minimum wage for full time employment eff. 1-1-17: \$3,640
- ❖ Computer professionals for 2017: \$42.35 per hour, the minimum monthly salary exemption of \$7,352.62, and the minimum annual salary exemption of \$88,231.36
- ❖ Physician Employee for 2017 \$77.15 per hour



White Collar Exemptions to Overtime

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- ❖ Special care needed for if fed rules change to \$913 per week.
- ❖ Fed equals \$47,476 per year or \$3956.33 per month—fed will be higher in 2017
- ❖ CA gets a minimum wage hike on Jan 1, 2017 to \$10.50 for big businesses = \$3640 per month-fed still higher
- ❖ 1/1/2019: CA minimum wage now \$12 = \$4160 per month—CA now higher
- ❖ 1/1/2020: both have increase pending so we will see



For Example: Connecticut

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Executive Exemption The employee's primary duty must consist of the management of the enterprise or department in which employed.

- ❖ The employment must customarily and regularly direct the work of two or more other employees.
- ❖ The employee must be paid a salary basis of \$475.00 per week (\$455.00 under FLSA).
- ❖ But if you lower salary to match FLSA they have to spend more time doing exempt work...

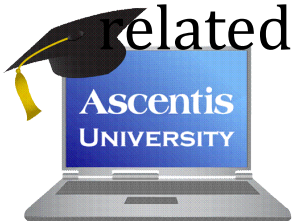


For Example: Connecticut

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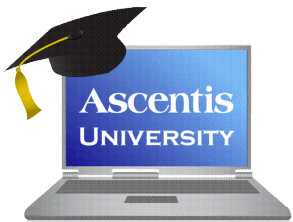
If an employee does not meet these requirements then the following criteria must be met:

- ❖ All the above and a salary of \$400.00 per week.
- ❖ The employee either must have the authority to hire or fire employees or make recommendation regarding hiring, firing, promotion or other changes in the status of employees.
- ❖ The employee must customarily and regularly exercise discretionary powers.
- ❖ The employee must not devote more than 20% (or 40% in the case of a retail or service employee) of his hours in the workweek to activities that are not directly and closely related to the performance of the work described above.



Are There Any Questions?

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How Can Ascentis Help Me?

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Do you have salaried non-exempt employees? Ascentis Timekeeper and Payroll can help you determine which hours qualify for overtime pay

- Do you have salaried non-exempt employees? Ascentis Timekeeper and Payroll can help you determine which hours qualify for overtime pay
- Hours over standard salary hours for a pay period can be automatically calculated, and all hours worked in excess of the regular pay period hours can be paid as overtime
- Hours can be posted to a different general ledger account for accurate liability reporting purposes
- Ascentis Timekeeper offers a number of configuration options based on your own tracking needs



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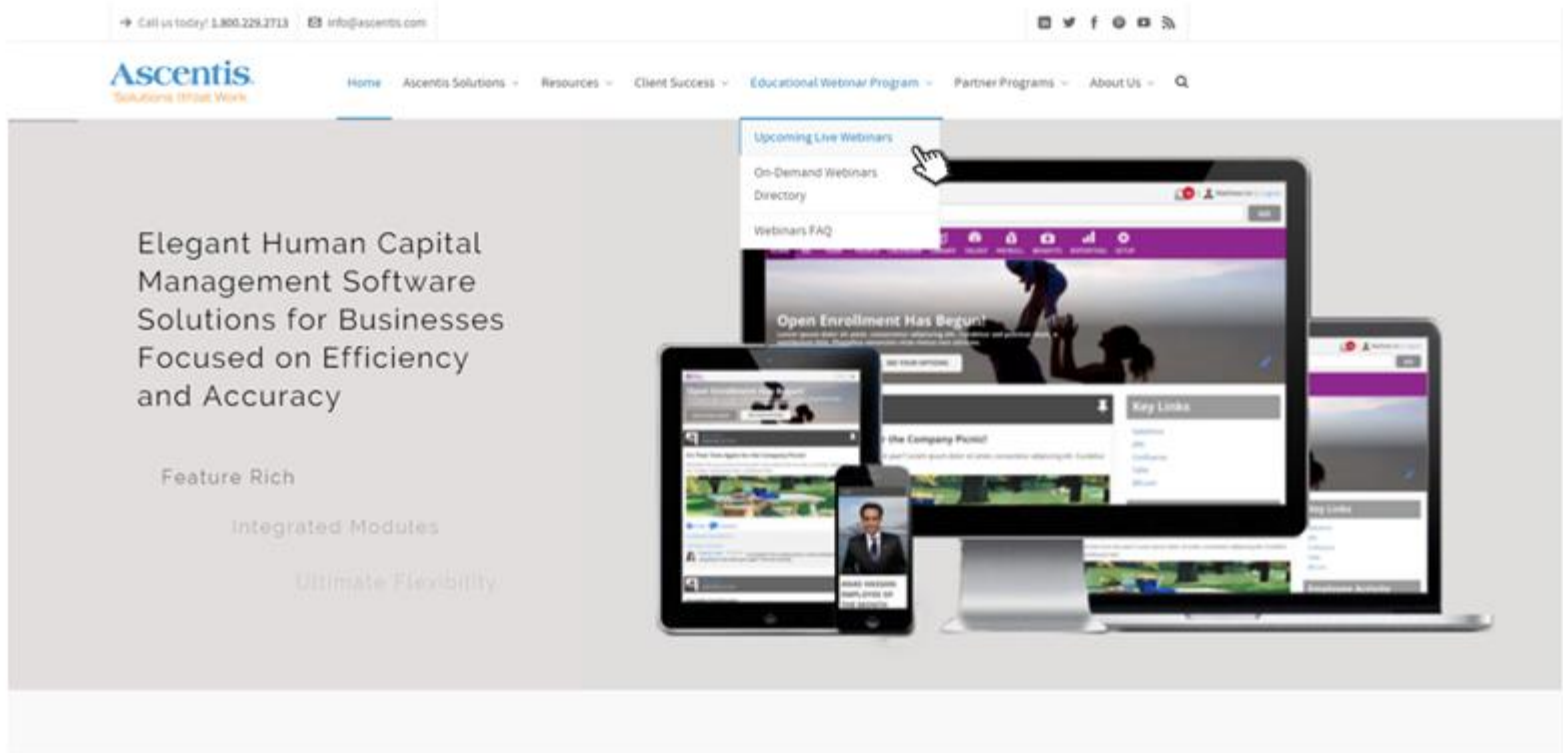
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