

# Understanding the New Overtime Rule

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## The session will begin shortly

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- Session phone number: **(877) 668-4493**
- Access code: **929 228 757**

A black and white photograph of a modern office interior. In the foreground, two men are looking at a laptop. In the background, two women are standing and looking at a large document or screen. The office has large windows with a grid pattern, and the scene is brightly lit from the windows. A green decorative shape is in the top right corner.

# Understanding the New Overtime Rule

June 2016

Presented by **Carrie May Poniewaz, Esq.**  
& **Juan Amado, Esq.**

**Kinloch**  
CONSULTING GROUP, INC.

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# Introduction

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# About the Presenters

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**Juan Amado, Esq.**

**Carrie May Poniewaz, Esq.**

- Employment and benefits attorneys
- Expertise in wage and hour issues, workplace safety
- Educate companies on compliance obligations and create educational materials and compliance resources

***Moderator: Erica Storm, Esq.***

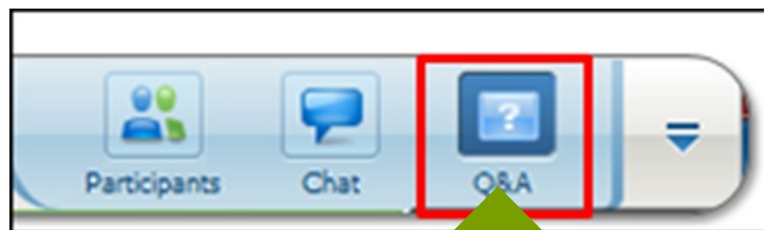
# Webinar Logistics

To call in to connect to audio:

- Phone number: **1-877-668-4493**
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We welcome your questions at any time!

Questions will be addressed at the end of the session.



Select Q&A and choose “Send to All Panelists” to submit your questions.

# Today's Agenda

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- FLSA Overview
- New Overtime Rule
- Impact of New Overtime Rule
- Employer Options
- Developing an Implementation Plan
- Training Considerations
- Employee Communications

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# **FLSA Overview**

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# Does the FLSA Apply?

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**Step 1: Does an Employment Relationship Exist?**



**Step 2: Is the employer or employee covered by the FLSA?**



**Step 3: Does a joint employment relationship exist?**



# FLSA Applicability

FLSA coverage is very broad: many employers and most employees are subject to the FLSA

## Enterprise

- At least **two** employees engaged in **commerce** with at least **\$500,000** in gross annual business
- Hospital, residential care facility or school
- Public agencies

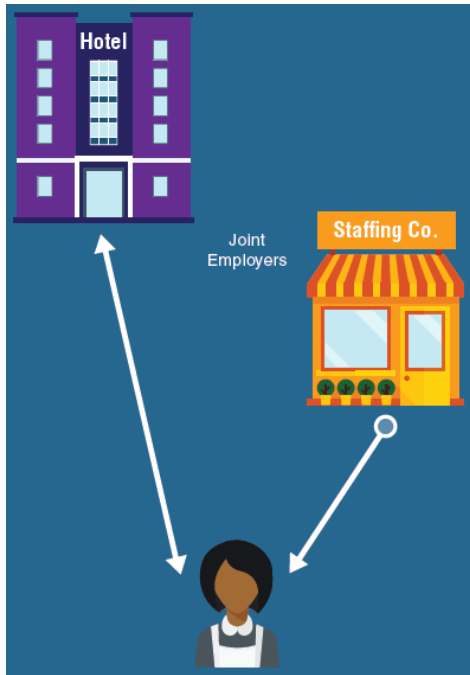
## Employees

- Involved in **interstate commerce**
- **Domestic service workers** may be covered (housekeepers, full-time babysitters, cooks)

*Covered even if employer is not a covered enterprise*

# Joint Employment

## Vertical Joint Employment



## Horizontal Joint Employment



- All employers in a joint employment situation are jointly and severally liable for compliance with the FLSA
- **Horizontal joint employment:** when an employee works for two or more sufficiently related or associated employers
- **Vertical joint employment:** when an employee is economically dependent on two or more employers that have a contractual labor arrangement

# Overtime Compensation

**One and a half** times the **regular wage rate** for any hours worked **over 40** during a **workweek**

## Regular wage rate

- Average – divide **entire compensation** by the number of hours worked during workweek

## Hours of work

- “Suffers or permits” employee to work
- On-duty
- “Engaged to wait”

## Workweek

- 7 consecutive 24-hour periods (168 hours)

# Common Overtime Mistakes

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## Classification

- Misclassifying employees
- Assuming salaried employees are exempt
- Failure to update status

## Hours of work

- Inadequate timekeeping
- Allowing “off-the-clock work”
- Automatic deductions for meals and rest breaks

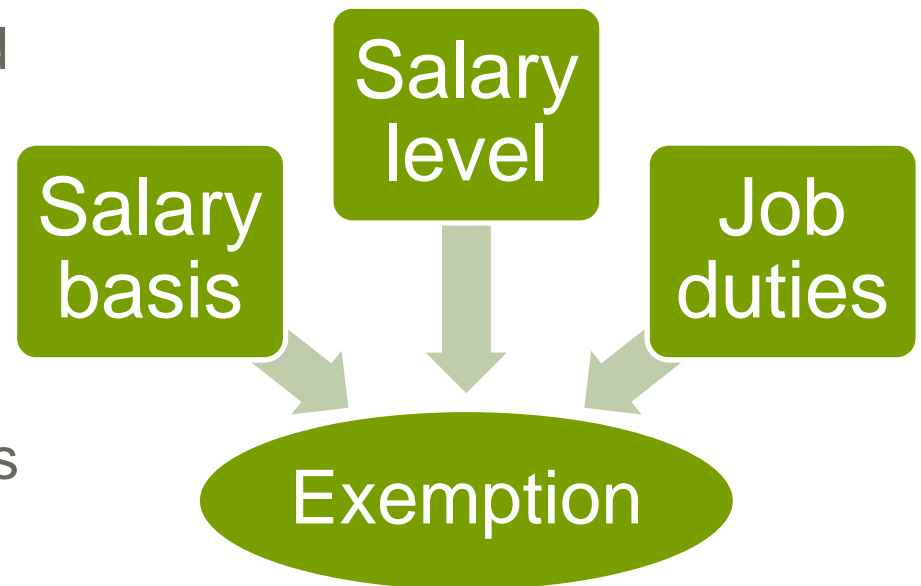
## Regular rate

- Miscalculating total compensation
- Compensatory time off (when not allowed)
- Paying “straight time” rates
- Allowing employees to waive right to overtime
- Refusing to pay unauthorized work

# White Collar Exemptions

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- Executive, administrative and professional employees
- Outside sales employees
- Employees in certain computer-related occupations
- Highly compensated employees (HCEs)



# Exemption Requirements

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## Salary Basis Test

Predetermined and fixed wages

Not subject to reduction due to quality or quantity of work

## Salary Level Test

Minimum salary threshold to qualify for exemption

## Duties Test

Based on the employee's actual job duties

Must match the duties defined by law

# Duties Test

## Executive

- Managing the enterprise
- Direct the work of 2 or more employees
- Authority to hire or fire

## Administrative

- Office or non-manual work
- Directly related to management or general business operations
- Exercise of discretion and independent judgment in matters of significance

## Professional

- Learned Professional-advanced knowledge in field of science or learning
- Creative professional-invention, imagination, originality or talent in recognized field of artistic or creative endeavor

## Computer

- System analyst, programmer, computer engineer and similarly skilled employees
- Does not apply to manufacture or repair of computer hardware, heavy use of computers

## Outside Sales

- Salary requirements do not apply
- Makes sales or obtains orders or contracts or services
- Customarily and regularly engaged away from the employer's premises or place of business

## Highly Compensated

- Must perform office or non-manual work
- Must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

# Ineligible for White Collar Exemptions

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## Blue Collar Workers

- Manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy
- Entitled to minimum wage and overtime premium pay under the FLSA
- Are not exempt no matter how much they are paid

## Emergency Personnel

- Includes police, fire fighters, paramedics, other first responders, correctional, parole or probation officers and hazardous materials workers
- Regardless of rank or pay level



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# **New Final Rule on White Collar Exemptions**

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# White Collar Exemption Final Rule – Effective Dec. 1, 2016

## Three major changes

### Salary Level Increases

- Increases the Standard Salary Level to \$913 per week (\$47,476 annually for a full-year worker)
- Increases the HCE Compensation Level to \$134,004 annually

### 10% Bonus/Commission Allowance for Standard Salary Level

- Allows employers to count non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new Standard Salary Level requirements.

### Automatic Future Salary Level Increases

- Provides for additional, automatic increases in the Salary Level requirements, effective every three years.

## Final Rule – New Salary Levels

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# Standard Salary Level

### Current

- \$455 per week  
(\$23,660 for a full-year worker)

### Effective Dec. 1, 2016

- \$913 per week (\$47,476 for a full-year worker)

# Final Rule – Bonuses/Incentive Payments

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## Up to 10 percent

- Non-discretionary bonuses and incentive payments (including commissions) may satisfy up to 10 percent of the Standard Salary Level.

## “Catch-up” payment

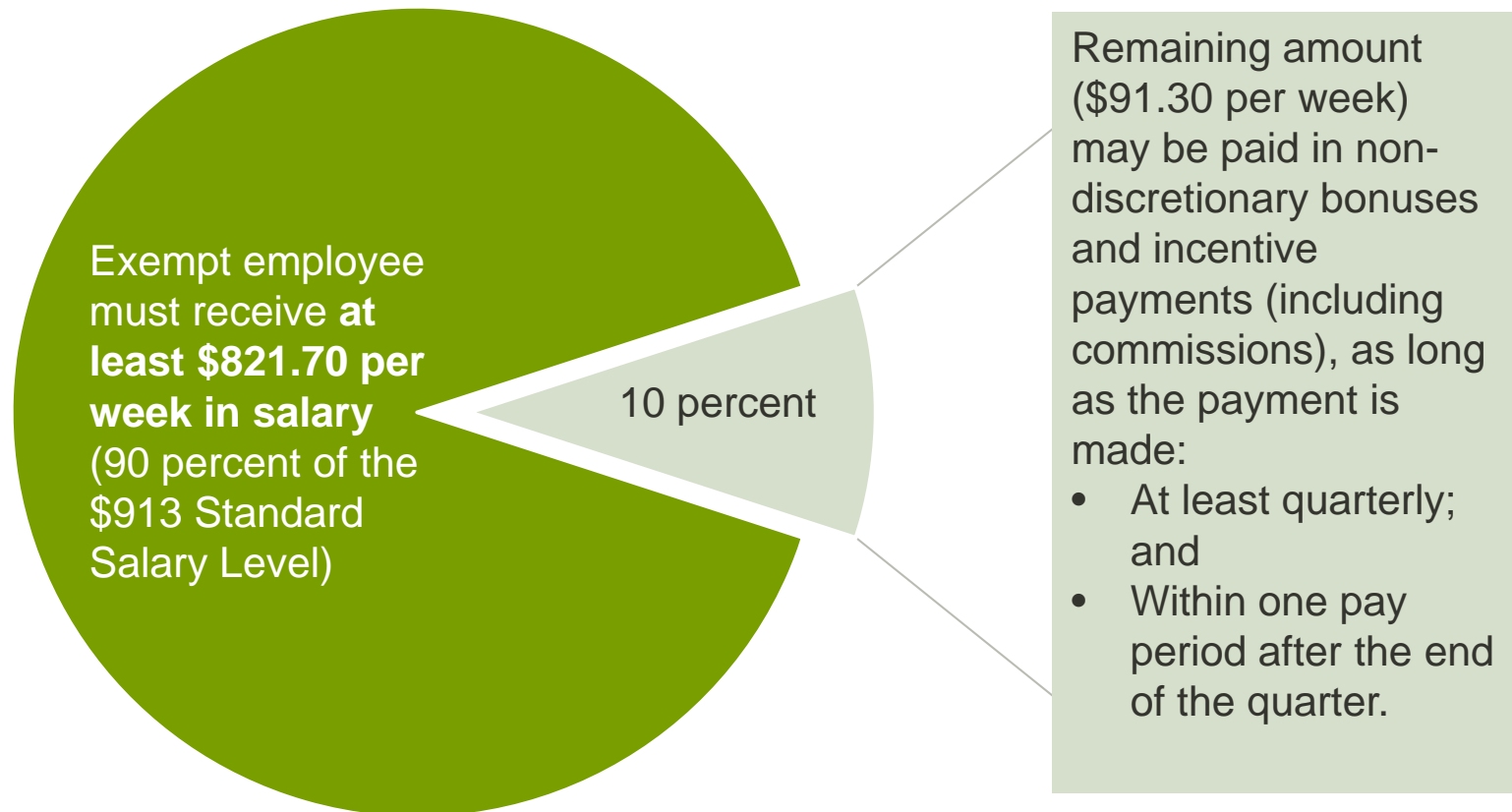
- Employers may make one catch-up payment at the end of each quarter to satisfy the Standard Salary Level.
- Payment must be made within one pay period after the end of the quarter.

## Standard Salary Level Exemptions only

- For HCE exemptions, the entire Standard Salary amount must be paid on a salary basis.

# Final Rule – Bonuses/Incentive Payments

## Using Bonuses/Incentive Payments to Satisfy the New Standard Salary Level



# Final Rule – Bonuses/Incentive Payments

## Quarterly Assessment

### Standard Salary Level: Quarterly Minimum

|          |   |                     |   |             |
|----------|---|---------------------|---|-------------|
| 13 weeks | x | \$913 weekly salary | = | \$11,869.00 |
|----------|---|---------------------|---|-------------|

### Catch-up Payment Option

|          |   |                        |   |             |
|----------|---|------------------------|---|-------------|
| 13 weeks | x | \$821.70 weekly salary | = | \$10,682.10 |
|----------|---|------------------------|---|-------------|

Difference (Must be paid within one pay period of the end of the quarter)

**\$1,186.90**

Maximum Amount Allowable in Bonuses/Incentive Payments to satisfy the Standard Salary Level in effect from Dec. 1, 2016 to Dec. 31, 2019

# Final Rule – Bonuses/Incentive Payments

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## Quarterly Assessment

- If paid salary plus paid nondiscretionary bonuses and incentive payments (including commissions) does not equal the Standard Salary Level for 13 weeks, employer has one pay period to make up for the shortfall (up to 10 percent of the Standard Salary Level).

## Catch-up Payment

- Amount only counts toward prior quarter's salary amount, not toward the salary amount in the quarter in which it was paid.

## Effect of No Catch-up Payment

- Employee is entitled to overtime pay for any overtime hours worked during the quarter.

# Final Rule – “Catch-up” Payment Example

**Step 1:**  
Quarterly  
Assessment

| Calculate Total Amount Paid During the Quarter |                          |                     |                    |
|--|--------------------------|---------------------|--------------------|
| January  | February                 | March               | Total              |
| 13 weeks x \$821.70 salary                     |                          |                     | <b>\$11,182.10</b> |
| \$300<br>Bonus paid                            | \$100<br>Commission paid | \$100<br>Bonus paid |                    |

**Step 2:**  
Determine  
Shortfall  
Amount

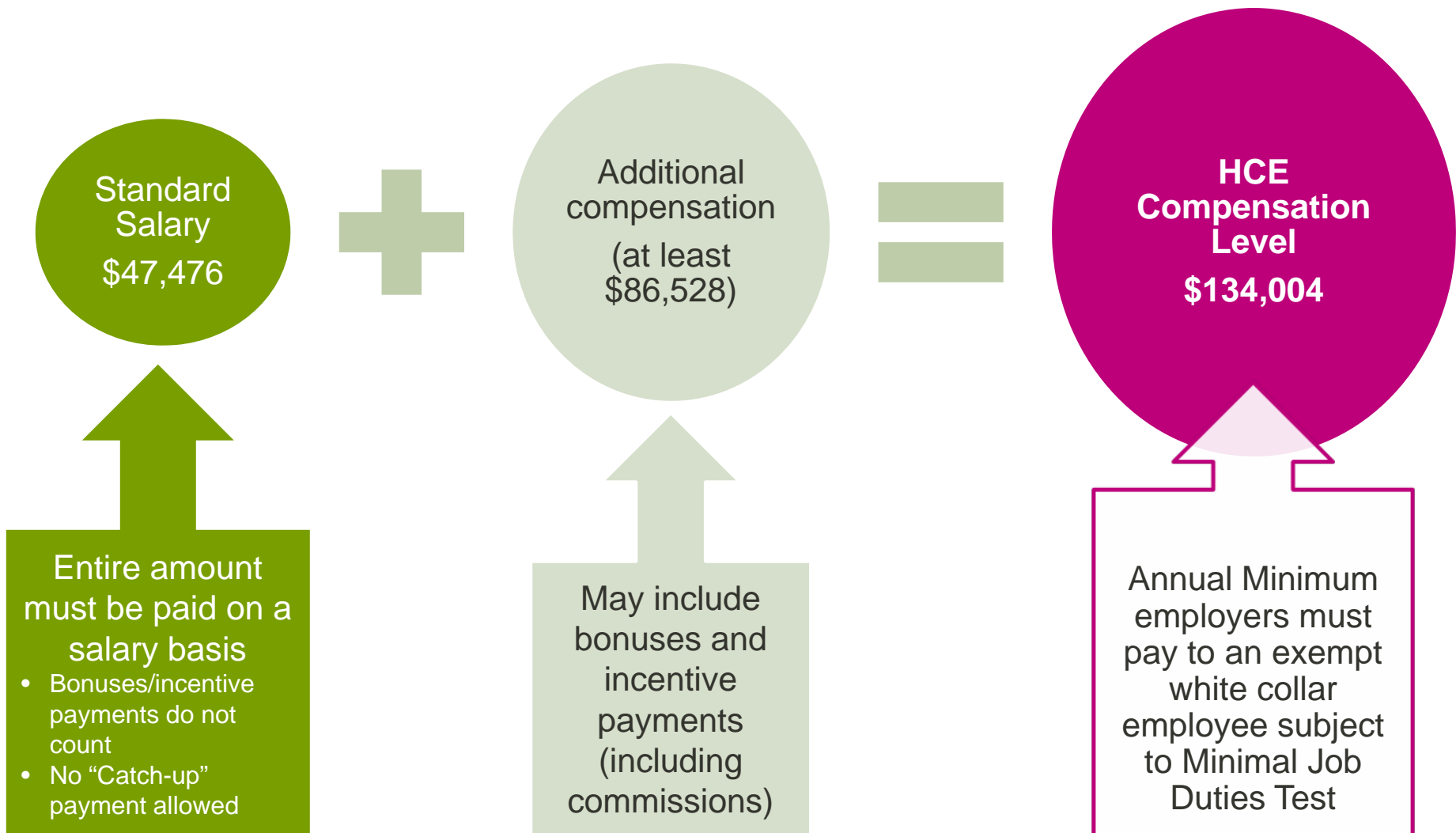
| Subtract Total Amount Paid During the Quarter from the Standard Salary Level Quarterly Minimum |                 |
|--|-----------------|
| Standard Salary Level Quarterly Minimum  | \$11,869.00     |
| Total Paid During Quarter  | -\$11,182.10    |
| <b>Difference</b>  | <b>\$686.90</b> |

**Step 3:**  
Make Catch-  
up Payment  
or Pay  
Overtime

| Option 1  | OR | Option 2  |
|---|----|---|
| <ul style="list-style-type: none"> <li>Pay the employee the difference (\$686.90 in the example) within one pay period of the end of the quarter</li> </ul> |    | <ul style="list-style-type: none"> <li>Pay the employee overtime for all hours he or she worked above 40 in each of the 13 workweeks</li> </ul> |



# Final Rule – New HCE Compensation Level



## Final Rule – New Salary Levels

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# HCE Compensation Level



Current

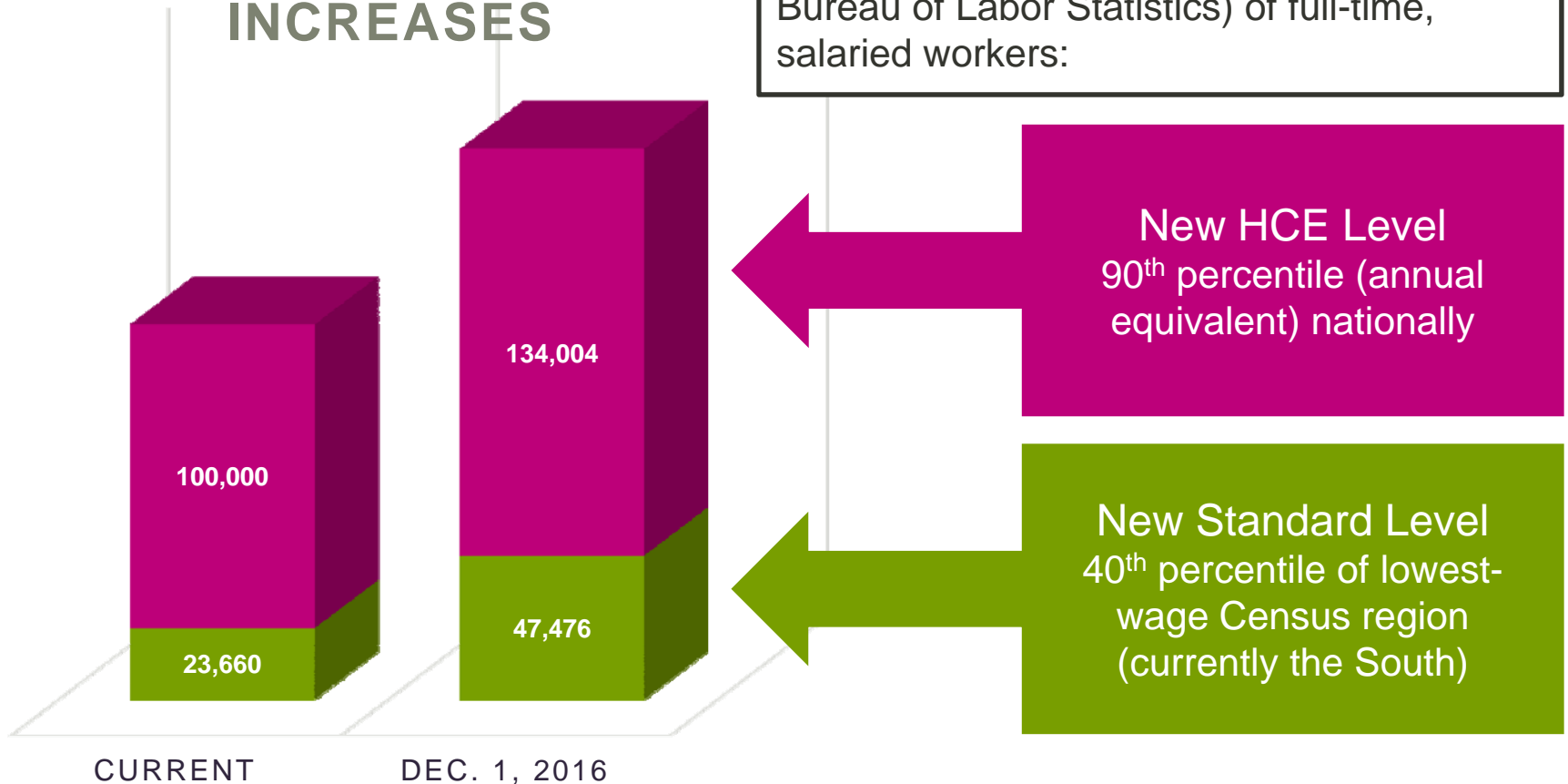
- \$100,000 per year

**Effective Dec. 1, 2016**

- **\$134,004 per year**

# Final Rule – New Salary Levels

## SALARY LEVEL INCREASES



# Final Rule – Automatic Salary Level Updates

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Every 3 years

- Automatic updates will occur **every three years**, effective on the first of the year.

Jan. 1, 2020

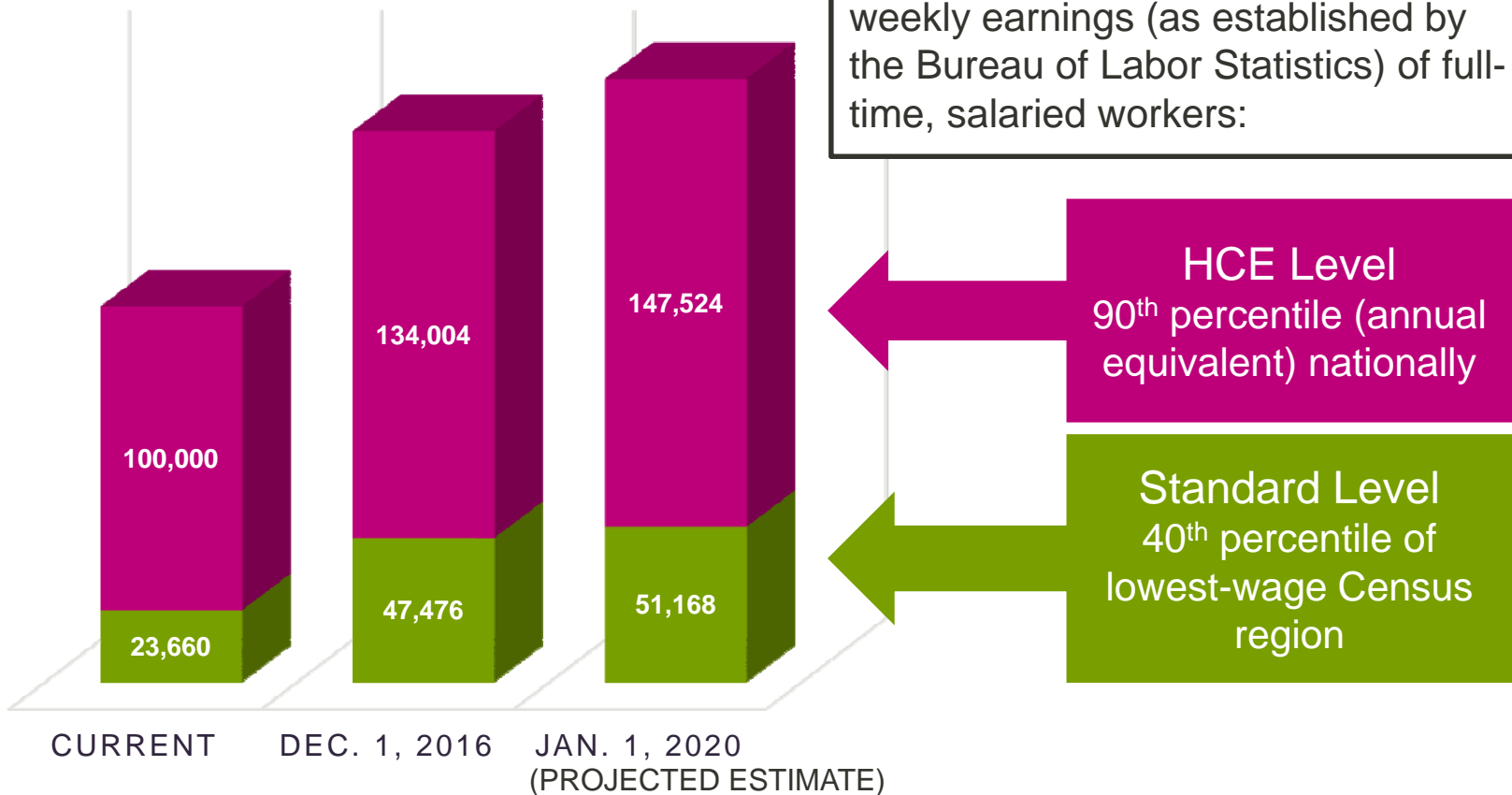
- The first automatic update will become effective on **Jan. 1, 2020**.

150 days  
before new  
effective dates

- DOL will publish updated levels **at least 150 days** before their effective dates.
  - Federal Register
  - Wage & Hour Division website

# Final Rule – Automatic Salary Level Updates

Salary levels will automatically update to the same fixed percentiles of the weekly earnings (as established by the Bureau of Labor Statistics) of full-time, salaried workers:



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# Impact on Employers

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# Employer Risk and Liability

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## Lawsuits

- Unpaid overtime
- Pay equity
- Retaliation claims

## NLRB Involvement

- Protected concerted activity

## Timekeeping

- Meal breaks and rest periods
- Working off the clock

## Remote work

- Checking email after work
- Employer-provided mobile devices

## Joint liability

- Are your joint employers affected?
- How are they complying?
- What is your risk?

## Employee morale

- Salary/work hour reductions
- Perceived demotion

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# Employer Compliance Options

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# Employer Compliance Options

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## Increase employee pay

- Increase employee pay to retain their overtime-exempt status

## Decrease work hours

- Decrease work hours of newly overtime-eligible employees to avoid paying overtime

## Redistribute hours

- Redistribute hours among the existing workforce

## Reclassify employees

- Reclassify employees to overtime-eligible status

## Pay overtime

- Pay overtime to newly overtime-eligible workers

## Hire new employees

- Hire more employees to work the hours that might otherwise be payable as overtime for existing employees

# Employer Compliance Options

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Consider Status of Currently Exempt Employees

Employees who  
work **40 or fewer  
hours** per week

Employees who  
work **more than 40  
hours** per week

- Occasionally
- Regularly

# Employer Compliance Options

Exempt employees who work 40 or fewer hours per week

- Reclassify the employee as overtime-eligible

Reclassify

Pay same wages

- Pay the same weekly earnings for the same number of hours worked

- No pay adjustments needed as long as employee's hours do not exceed 40 in a workweek

Maintain work time

# Employer Compliance Options

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Pay overtime for the current number of overtime hours based on current regular rate of pay

Exempt employees who work more than 40 hours per week

Increase salary to the new salary level

Reduce or eliminate overtime hours

Reduce regular rate of pay so total weekly earnings and hours do not change after overtime is paid

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# Implementation Plan

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# Implementation Planning

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## Involve Key Personnel

- Include C-suite, Legal, HR, IT, Payroll, Finance early on
- Create collaborative teams

## Consider Costs & Issues

- Analyzing salaries & duties
- Cost of increasing salary vs. reclassification (what to pay, how to pay it?)
- Employee morale
- Manager buy-in

# Develop a Timeline for Compliance

June – July 2016

Analyze data to identify affected employees

Review job classifications and duties to ensure exempt employees meet duties tests

Consult key personnel (HR, IT, Legal, etc.) to identify specific challenges and issues to consider

Calculate and compare costs of compliance options

August – September 2016

Determine compliance strategy (pay adjustments, job reclassifications, etc.)

Develop any new systems needed (timekeeping, management strategy, etc.)

Train managers and other key personnel on compliance strategy

October – November 2016

Communicate changes to affected employees

Implement wage/salary adjustments

Implement job reclassifications

Hire and train any additional employees needed for compliance

# Develop a Timeline for Compliance

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**Dec. 1, 2016  
(Thursday)**

- Consider implementing full compliance as of the beginning of the pay period that includes Dec. 1, 2016



**Full  
Compliance**



# Issues to Consider

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- Employee turnover and morale
- Manager buy-in
- Costs of managing and scheduling
- Calculation costs
- Automatic Salary Level Updates

# Employer Compliance - Automatic Updates

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## Automatic Salary Level Updates

- The final rule does **not** require automatic pay raises when the standard salary level increases.
- But employers should plan ahead to maintain any white collar exemptions

## Mark Calendar for Aug. 5, 2019

- Check Federal Register and Wage & Hour Division website for updated salary levels
- Plan ahead for salary changes, job reclassifications, etc.

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# FLSA Training

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## Employees

- Overtime policy
- Timekeeping practices



## Managers and Supervisors

- Employee classification
- Timekeeping issues
- Enforcing overtime policies
- Handling FLSA risks

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# Employee Communication

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# Effective Employee Communications

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Have a communication plan

Present to managers and supervisors

Designate spokespersons

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**Questions?**

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# Thank you

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