UNITED STATES DEPARTMENT OF LABOR

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. This approach works for employees who

usually do not work overtime, but have occasional "spikes" or periods that require overtime hours. State and local government employers can either plan and budget the extra pay during those periods or provide comp time.

- For an employee who works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule.
- For an employee with a flexible schedule, an employer does not need to require an employee to sign in each time she starts and stops work. The employer must keep an accurate record of the number of daily hours worked by the employee. So an employer could allow an employee to just provide the total number of hours she worked each day, including the number of overtime hours, by the end of each pay period.

- *Evaluate and realign employee workload*: Employers can limit the need for employees to work overtime by ensuring that workloads are distributed to reduce overtime, that staffing levels are appropriate for the workload, and that workers are managing their time well.
- *Utilize comp time*: State and local government employers—unlike private sector employers—can provide comp time rather than cash overtime payments in appropriate circumstances.