



MEMO

To: All USA Swimming Member Clubs
From: Pat Hogan, Club Development Managing Director
RE: New Department of Labor Overtime Regulations
Date: August 26, 2016

On May 18, 2016, President Obama announced the publication of the Department of Labor's final rule updating overtime regulations. This new rule, which goes into effect December 1, 2016, will automatically extend overtime pay protections to over 4 million workers. This action will impact nearly every employer in America, including USA Swimming member clubs.

An overview and summary of the new overtime rule can be found at this link:
<https://www.dol.gov/sites/default/files/overtime-overview.pdf>

In an effort to assist USA Swimming clubs' understanding of and compliance with this rule, we have created the attached information packet with these objectives in mind:

- Provide clubs basic information regarding exempt and non-exempt employees and the new rule regarding overtime pay;
- Suggest some potential strategies – both general and specific to swimming – to help clubs address the new rule; and
- Develop a FAQ document that will help clubs answer common questions – both general and specific to swimming - regarding the new rule.

In addition to generating many questions regarding the overtime rule changes, the Department of Labor announcement is also causing employers to revisit longstanding Federal Labor Standards Act (FLSA) provisions for classifying employees as overtime-exempt or non-exempt.

Because we are a membership organization, USA Swimming cannot provide legal or human resources advice to member clubs. State laws governing compensation differ, clubs have many different ownership and employment models, and staffing at every club is structured differently. Consequently, we provide this information packet with the following disclaimer ...

References contained within this document provide information on general employment issues and are not intended to provide advice on any specific employment or legal matter or factual situation. This information is not intended to create, and receipt of it does not constitute, a lawyer-client or other professional-client relationship. Readers should not act upon this information without seeking professional counsel.

We strongly recommend that clubs seek local expertise and counsel to answer questions regarding the new overtime rules. It may be possible in some situations for clubs to partner together to share the expense of engaging professional assistance.

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New Department of Labor Overtime Regulations and Potential Strategies for Clubs to Consider

I. Basic Information regarding the New Overtime Rule

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Employers should be aware that the salary threshold for salary exemption will increase from \$455 per week to \$913 per week, or \$47,476 per year. This means that some exempt employees may no longer qualify as exempt and may be entitled to overtime compensation. Alternatively, an employer could raise these employees' salaries to meet the new threshold.

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II. Suggested Strategies from a General Business Perspective

Employers have a range of options for responding to the updated minimum salary threshold. For each employee that may now be entitled to overtime pay, employers may (one or more options may apply):

1. Increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status.
2. Pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked.
3. Reduce or eliminate overtime hours.

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4. Reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and account for overtime hours and rate of pay to hold total weekly pay constant.

III. Suggested Strategies Specific to USA Swimming Clubs

1. All club leaders should review the rules for exempt and non-exempt employees. Are coaches being properly classified? (See # 1 in Section IV.)
2. Create a job description for all coaches and other staff members. USA Swimming's Swim Staff Select application has a module to assist with creating job descriptions. Click on this link: <http://www.swimstaffselect.org/> and choose "Create."
3. Start tracking hours for salaried staff to monitor the potential increases created by the new overtime rule. This will also allow clubs to analyze possible adjustments to work schedules and re-align employee workload.
4. Balance hours. Prior to a weekend swim meet, plan to give employees time-off to help balance the total number of hours for that work week. (Note: For example, teams that have more than one coach covering a practice group may be able to balance hours by having one of the coaches step off the deck once a week to reduce hours.)
5. Limit non-essential, non-coaching time such as teaching swim lessons, coaches' office hours, or administrative duties that volunteers can perform.
6. Consider what non-coaching duties volunteers can do that coaches might currently be paid to do.
7. Have parents transport to and supervise swimmers at all swim meets. Utilize parents as chaperones on travel trips.
8. Explore the cost of raising key full-time staff to the \$47,476 threshold to negate overtime pay. That step might be less expensive than paying overtime to that employee or hiring part-time staff to cover hours that would otherwise create overtime for key staff positions.
9. Limit attendance by coaches at meets to only those sessions at which their athletes compete; try to organize coaches' meet assignments according to the age groups they serve and the sessions those age groups typically swim in at meets.

IV. Frequently Asked Questions – General Business

For a full list of FAQ's please visit

<https://www.dol.gov/WHD/overtime/final2016/faq.htm>

1. What is the purpose of the "Overtime" Final Rule?

This Final Rule updates the regulations for determining whether white collar salaried employees are exempt from the Fair Labor Standards Act's minimum wage and overtime pay protections. They are exempt if they are employed in a bona

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vide [executive, administrative, or professional](#) (EAP) capacity, as those terms are defined in the Department of Labor's regulations at [29 CFR part 541](#). This exemption from the FLSA is sometimes referred to as the "white collar" or "EAP" exemption.

2. What is "overtime"?

Unless specifically exempted, employees covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half their regular rates of pay. This is referred to as "overtime" pay.

3. What determines if an employee falls within one of the white collar exemptions?

To qualify for exemption, a white collar employee generally must:

- Be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
- Be paid more than a specified weekly salary level, which is \$913 per week (the equivalent of \$47,476 annually for a full-year worker) under this Final Rule; and
- Primarily perform executive, administrative, or professional duties, as defined in the Department's regulations (the "duties test").

4. Why is the Department revising its overtime regulations for white collar workers now?

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department to update and modernize the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards. The salary level test is supposed to help identify salaried workers who are entitled to overtime pay when they work long hours. The current salary level is outdated and no longer does its job of helping to separate salaried white collar employees who should get overtime pay for working extra hours from those who should be exempt. Through this Final Rule, the Department is updating these regulations to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of overtime-eligible workers, thus making the exemption easier for employers and workers to understand and apply. These revisions will also help ensure that in the future the regulations continue to appropriately separate workers who are entitled to overtime protections and those who may be exempt.

5. When did the Department last revise its overtime regulations for white collar workers?

The Department last updated the white collar overtime regulations in 2004. That update set the standard salary level at \$455 per week (\$23,660 annually for a full-year worker).

6. What are the significant changes to the overtime regulations for white collar salaried workers?

The Final Rule increases the standard salary level from \$455 per week (\$23,660 for a full-year worker) to \$913 per week (\$47,476 for a full-year worker).

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In order to prevent the salary level requirements from again becoming outdated and ineffective, the Department is establishing mechanisms for automatically updating the salary and compensation levels every three years to maintain them at the levels set in this rulemaking.

Finally, for the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided these payments are made on a quarterly or more frequent basis.

7. When will these changes take effect?

The effective date of this Final Rule is December 1, 2016. On that day, the new standard salary level (\$913 per week or \$47,476 per year). Future automatic updates to these thresholds will occur every three years, beginning on January 1, 2020.

8. Is the Department making any adjustments to the standard duties tests?

The Department is not making any changes to the standard duties test.

9. Is there an exemption for non-profit organizations from either the FLSA or the Department's overtime regulations governing white collar workers?

Neither the FLSA nor the Department's regulations provide an exemption from overtime requirements for non-profit organizations. Non-profit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities. For more information on enterprise and individual coverage for non-profit organizations, see [Fact Sheet 14A: Non-Profit Organizations and the Fair Labor Standards Act \(FLSA\)](#).

10. How do I know if the Fair Labor Standards Act (FLSA) applies to me?

There are two ways in which an employee can be covered by the law and entitled to its protection: "enterprise coverage" and "individual coverage".

Enterprise Coverage

Employees who work for certain businesses or organizations or "enterprises" are protected by the FLSA. These enterprises, which must have at least two employees, are:

- Those that have an annual gross volume of sales made or business done of at least \$500,000.
- Hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies.

Individual Coverage

Even when there is no enterprise coverage, employees are protected by the FLSA if their work regularly involves them in commerce between States ("interstate commerce").

If your business or enterprise does less than \$500,000 in gross revenues and does not conduct interstate commerce, you might not be protected by FLSA requirements. You should seek legal advice to determine if you are covered. For more information, see Fact Sheet #14: <https://www.dol.gov/whd/regs/compliance/whdfs14.pdf>

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11. I'm paid a salary. Am I exempt from overtime pay?

The fact that an employee is paid on a salary basis is not alone sufficient to exempt that employee from the FLSA's minimum wage and overtime requirements. For the EAP exemption to apply, a white collar employee's specific job duties and salary must meet all of the applicable requirements provided in the Department's regulations. Accordingly, the duties test must be met even if the employee's salary exceeds the standard salary level. See [Fact Sheet 17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#).

12. Do I need to track my hours?

All nonexempt employees need to track hours for overtime purposes. Even the nonexempt employees who are paid a salary must track their hours. Hours can be tracked electronically or via a paper timesheet. Both Microsoft Word and Microsoft Excel have timesheet templates that you can research or you can view the following examples: <https://www.redcort.com/Timesheet-Templates>

13. How important are Job Descriptions?

Job Descriptions are needed for all positions. If your company is ever audited, a job description is the first item the auditor will ask for to verify if a position is nonexempt or exempt. Some items to make sure are included when doing a job description:

- *Job Identification*: Provides basic information about the job title, department, supervisor, and date prepared or reversed.
- *Position Purpose*: Describes the general purpose of the job; why the job exists.
- *Job Duties*: A description of typical duties and responsibilities of the job.
- *Job Qualifications*: Also known as the job specifications; this section outlines the knowledge, skills, abilities, and equipment required to perform the job as well as the working conditions.

It is a good idea to review job descriptions every year to every two years and make updates as needed.

V. Frequently Asked Questions – Specific to Swimming

1. How should teams account for hours that coaches work during a swim meet? What about the time between sessions of the meet?

In most circumstances, the clock begins when coaches begin coaching and ends when they complete their duties for that session. At a prelims and finals meet, they should not be paid for “free time” between sessions. However, if some or all of that time was spent feeding and/or supervising athletes or engaging in other professional responsibilities, the clock continues to run.

2. Are teams responsible for compensating coaches for hours traveled to out-of-town meets and for overnight stays?

For out-of-town and overnight travel meets, coaches would be on the clock while traveling to the event (e.g. a 3-hour trip to the host city). Once at the pool, the clock starts when they begin coaching and ends when they complete their duties for that

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session. If coaches have chaperone duties, they would be off the clock from curfew to wake-up and back on again for any time devoted to athletes during the night such as assisting a sick athlete.

3. Should coaches be paid for attendance at coaches' clinics or educational conferences?

Yes, these activities would be treated the same as a swim meet. If attending a local clinic is required, then coaches would be on the clock for the hours spent attending the clinic. If out-of-town, they would also be on the clock for the time traveled to the host city. If a coach chooses to attend a clinic or conference of his/her own volition, then payment may not be required.

4. In hiring personal trainers, some health clubs utilize independent contractors to avoid FLSA rules. Is the independent contractor concept a potential strategy for clubs to consider?

Independent contractors, by definition, are self-employed and because they are not employees, independent contractors are not covered by employment, labor, and related tax laws. The Department of Labor (DOL) uses 6 factors to help determine whether or not someone is an employee or independent contractor. Our experience is that, when the factors are considered, most USA Swimming coaches are employees. More information is available at this link:

<https://www.dol.gov/whd/regs/compliance/whdfs13.pdf>.

5. It is very common for developing swimming coaches to volunteer to assist the head coach on deck with the club's top practice group. This is considered a valuable professional development opportunity much like a Volunteer Assistant at a Division I NCAA program. Do FLSA rules allow developing coaches to volunteer some of their time in addition to the hours they are paid to coach?

The Fair Labor Standards Act (FLSA) has stringent requirements with respect to the use of volunteers. In general, [nonexempt](#) workers have to be paid at least the minimum wage and cannot volunteer their services. In this situation, the coach wishing to volunteer can observe practices but not actually participate in the coaching unless he/she is paid.

6. Can teams pay a separate stipend for swim meets instead of having to pay overtime?

No. As stated in #5, non-exempt workers have to be paid at least the minimum wage and are eligible for overtime pay if they work in excess of 40 hours per week.

Much of the information above came from the Department of Labor website. Additional information can be found: <https://www.dol.gov/featured/overtime>.

Consult a local expert to assist you with questions you may have and/or differences in state or local rules.