



# Virginia Association of Broadcasters Legal Review



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## Legal Memorandum

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### Changes to Federal Minimum Wage and Overtime Pay Rules Coming January 1, 2020; Stations May be Affected

Changes coming soon to federal “minimum wage” and “overtime pay” rules may have an impact on radio and television station budgets and work schedules. The U.S. Department of Labor (“DOL”) recently released a [Final Rule](#) (the “Final Rule” or “Rule”)—which is set to take effect January 1, 2020—that will raise the salary threshold level for certain white collar employees to be considered “exempt” (from receiving minimum wage and overtime pay) under the Fair Labor Standards Act (“FLSA”).

When the Rule takes effect, some station employees who are currently “exempt” may become eligible for minimum wage and overtime pay. Application of the Rule is very fact-specific, and stations should consult with their employment counsel to understand how it impacts their employees. That said, the Rule could directly affect many newsroom positions—including, perhaps, news directors, executive producers, chief photographers, chief engineers, and operations managers, to name a few.

While we do not endeavor to explain all the contours of the minimum wage and overtime pay exemptions here, below we aim to provide a brief overview of some exemptions that might be applicable to broadcast employees—and of which broadcast employers ought to be aware. Then, we discuss the impact the Rule will have, as a practical matter, when it comes to those exemptions.

*General Background.* The FLSA generally requires that all covered employees be paid the statutory minimum wage for the first forty hours worked each week, followed by at least time and one-half their regular hourly wage for all additional hours worked. Employees may be exempt from these general requirements, however, if they meet certain conditions. There are a number of different categories of exemptions. Below, you’ll see mention of the “threshold minimum salary”; we explain what that is in our discussion (later in this memo) of the new, Final Rule.

*Statutory Exemptions from Overtime Pay & Minimum Wage.* Exemptions most likely to apply to the broadcast industry include:

**Executive, Administrative, or Professional (“EAP”) Employees.** An EAP employee is exempt from being paid minimum wage and overtime if the employee:

- Makes the threshold minimum salary; and
- Has primary job duties that are executive (managerial), or administrative (office work directly related to the management or general operations of the business, with the opportunity to exercise discretion and independent judgment as to matters of significance), or professional (i.e., uses advanced education or invention, imagination, or originality to perform these duties).

**Highly Compensated Employees.** A Highly Compensated employee is exempt from being paid minimum wage and overtime if the employee:

- Makes the threshold minimum salary; and
- Customarily and regularly performs at least one EAP duty.

**Outside Sales Employees.** An Outside Sales employee is exempt from being paid minimum wage and overtime if:

- The employee’s primary duty consists of making sales or obtaining orders or contracts for services or facilities; and
- The employee is customarily and regularly engaged away from the employer’s place of business.

**Computer Employees.** An employee is exempt from being paid minimum wage and overtime under the Computer Employee exemption if:

- The employee is compensated on either a salary or fee basis at the required rate; and
- The employee is employed as a computer systems analyst, programmer, software engineer, or other similarly skilled worker; and
- The employee’s primary duty consists of applying systems analysis; designing, developing, or modifying computer systems or programs; or a combination of these duties. Operating or repairing/maintaining computers does not meet this requirement.

**Small Market Broadcast Announcers, News Editors, and Chief Engineers.** An employee falls into this exemption, which applies to being paid overtime **but not minimum wage**, if:

- The employee is an **announcer** (i.e., appears before the microphone or camera to introduce programs, read announcements, and present routine on-air material); a **news editor** (i.e., gathers, edits, and rewrites the news); or a **chief engineer** (i.e., primarily supervises the operation, maintenance, and repair of the studio’s electronic equipment and is licensed by the FCC as a Radio Telephone Operator First Class); and

- The main studio of the employee’s station is located in a city or town with a population of 100,000 or less, and is not located within a metropolitan statistical area (“MSA”) with a total population in excess of 100,000; **or**
- The main studio of the employee’s station is located in a city or town which is part of an MSA with a total population greater than 100,000, but which itself has a population of 25,000 or less and is at least 40 airline miles from the principal city in the MSA.

(Note that you may wish to contact legal counsel to determine whether your relevant city or town falls within the threshold MSA levels set forth above.)

Again, the analysis as to whether an employee meets one of the above exemptions is fact-specific and depends on the employee’s actual day-to-day responsibilities. In addition, while several of these exemptions require that an employee be paid on a salaried basis to be exempt, an employee who is paid a salary is not necessarily exempt under the FLSA. **It is the employer’s burden to demonstrate the applicability of an exemption.**

*The Final Rule.* The Final Rule follows on an Obama-era initiative that tried to update federal minimum wage/overtime pay rules; a 2016 rule that would have updated those regulations ultimately did not take effect after it was challenged in court. Like its predecessor, the Final Rule set to take effect on January 1, 2020, raises the minimum salary threshold that must be met for certain employees to become “exempt.” In other words, the Rule will likely mean that more employees are not considered exempt and therefore must receive minimum wage and overtime pay. The Final Rule also permits employers to use certain nondiscretionary bonuses to reach the threshold salary requirements.

Note: the Final Rule **does not** impact the Outside Sales exemption or the Small Market exemption, two of the exemptions we discussed above. However, The Final Rule **does** change the threshold salary requirements for the Executive/Administrative/Professional (“EAP”), Computer, and Highly Compensated exempt-employee categories.

Specifically, the Final Rule:

- Increases the threshold minimum weekly salary for **EAP Employees** and **Computer Employees** from \$455 to \$684 (or \$35,568 annually). Computer Employees will also be considered exempt if they are compensated on an hourly basis at a rate of not less than \$27.63 an hour.
- Increases the threshold minimum annual salary for **Highly Compensated Employees** from \$100,000 to \$107,432.
- Allows employers to include non-discretionary bonuses and incentive payments (including commissions) that are paid annually (or more frequently than annually) to satisfy up to 10% of the threshold minimum salary level.

A link to the DOL’s Frequently Asked Questions may be found [here](#).

If an employee currently classified as exempt under one of the affected categories is not paid the new salary requirement, stations will need to either (1) increase the employee's salary to meet the threshold, or (2) reclassify the employee as non-exempt and pay overtime for any hours worked in excess of 40 hours in a given week.

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If you have any questions concerning the information discussed in this memorandum, please contact your legal counsel or any of the undersigned.

*Tim Nelson, Editor*

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