

Prep for the new OT rule

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It shouldn't be much trouble, unless you're currently out of compliance.

The Department of Labor's (DOL) new overtime rule, scheduled to go into effect Dec. 1, will hurt, but I don't think it profoundly changes the way landscape companies do business—unless you're out of compliance with the current DOL regulations.

In working with hundreds of small business owners in the landscape and pest control industries, there is a problem here.

Many service companies apply the current rules incorrectly. Moving into compliance with the existing regulations may be scarier than complying with the new rule.

The new rule doesn't change how to categorize employees in terms of using the exemptions; rather, it changes the threshold amounts that allow an employee to be paid a salary using one of the exemptions.

Many firms I encounter believe that they can just pay employees a salary and not be subject to overtime—and that's exactly what they do, right or wrong. Employees have to meet certain requirements to be paid a salary. If they don't meet those requirements, the employer is out of compliance.

Again, this scenario is not because of the changes in the law. It falls under the current rule, which many companies don't apply correctly.

The changes will affect only those employees who are paid a salary and who fall under one of the “white collar exemptions” (discussed below) as justification for being on salary.

Employers who are currently paying folks properly, who are using the “white collar exemption” properly and who have a salaried employee who falls below the new minimum (\$47,476 per year) will have to make some decisions. Those are the only employees affected by the new rule.

Background on exemptions

Landscape and lawn care companies typically employ service technicians, equipment operators, inside and outside salespeople, office/customer service people and managers/supervisors.

Two concepts are relevant here:

1. Nonexempt employees: Employees who must be paid hourly plus overtime after 40 hours per week.

Technicians and equipment operators are nonexempt; however, they may fall under a provision called 7(i) (See below for discussion on that item). Check with your state, as some states are more stringent than the federal provisions regarding overtime and accepting 7(i) as an exemption. In any event, technicians are not the employee class affected by the rule change. Also, most customer service representatives and office workers must be paid hourly plus overtime, as they do not meet the “white collar exemptions” below. Again, these workers are not affected by the proposed rule change, as they do not qualify for exemption and must be paid hourly.

2. Exempt employees: Employees who can be paid a salary and are exempt from overtime by virtue of meeting one of the exemptions in the Fair Labor Standards Act.

What are the exemptions available to allow an employee to be paid a salary and not an hourly wage? I’ve listed the “white collar exemptions” below that qualify for employees to be paid a salary. These are the job classes that will be affected by the rule changes.

Currently, these classes are defined by their duties tests. In all cases except “highly compensated employees,” as explained below, there is a minimum salary requirement of at least \$23,660 per year. The new rule raises this amount to \$47,476 per year.

It’s this raise in the minimum salary for these “white collar exemption” classes that has caused the debate. Remember, just because you pay a staff member a salary doesn’t

mean you're correct in classifying that employee as exempt. We've worked with many clients who've learned this fact the hard way, coming up on the short end of a DOL audit.

- **Administrative employees:**

While many office workers, such as customer service reps, may fall under this exemption, many do not. We see many landscape and pest companies getting trapped here during an audit when it comes to light that the employee doesn't meet the "duties test" to use this exemption and, therefore, must be paid hourly.

- **Executive employees:**

Most managers will fall under this category, as long as they direct the work of two or more other employees and have the ability to hire and fire or have significant influence in the decision. However, under the new rule, this manager will need to be paid a minimum annual salary of \$47,476. If he doesn't, you may move him to hourly or give him a raise.

- **Professional employees:**

This exemption is not usually used in our line of work. It's used for work that is "predominately intellectual in character" such as computer engineers, teachers or other similarly skilled workers.

- **Highly compensated employees:**

Employees earning more than \$100,000 fall into this exemption.

These are the "white collar exemptions" and the area that is affected by the changes. Remember, it's not production staff who are affected, it's employees to whom you pay a salary using the "white collar exemption."

7(i) exemption and what you should do

That said, in many states (check with your state DOL) technicians may qualify for an exemption called 7(i). This exemption is complex, but if it's used properly it can be effective.

If a retail or service employer elects to use the section 7(i) overtime exemption for commissioned employees, it must meet the following three conditions:

1. The employee must be employed by a retail or service establishment;

2. The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked; and
3. More than half the employee's total earnings in a period must consist of commissions.

Unless all three conditions are met, the Section 7(i) exemption is not applicable, and overtime premium pay must be paid for all hours worked over 40 in a workweek at time and a half the regular rate of pay.

If you decide 7(i) is not for you or you're in a state where it's not acceptable, you must pay hourly plus overtime. You may pay production bonuses and/or commissions, but these payments must be increased by a "special" overtime rate if the employee has worked more than 40 hours.

The bottom line? Look at all your nontechnician or commissioned employees to whom you pay a salary. Revisit the exemption definitions. If your employees don't meet the requirements, put them on hourly plus overtime. If they do meet the definitions but their salary is less than \$47,476, decide on how you're going to comply: give them a raise or put them on hourly plus overtime.