

# Recent Changes to the FLSA and discussions over CBD in the workplace

South Carolina Association of Counties  
HR Quarterly Meeting

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# FLSA Overtime Rules: Overview

- Fair Labor Standards Act (“FLSA”) sets federal minimum wage and overtime requirements for non-exempt employees
- Overtime applies to employees who are non-exempt and work more than forty hours in a single work week
  - Firefighters, police officers, etc. treated differently
- Exempt employees
  - Do not have to be paid overtime or minimum wage
  - Must meet two parts:
    - (1) duties test
    - (2) have a fixed salary that meets threshold
  - Also, highly compensated employees are exempt



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# FLSA Exempt Employees

- Duties Test: employee must perform primarily
  - Executive
  - Administrative, or
  - Professional
- As defined by the regulations
- Very fact-specific



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# FLSA Exempt Employees: Salary Threshold

- Remained the same from 1975 until 2004
- In 2004 was updated to \$455 per week or \$23,660 annually
  - Highly compensated employee threshold was \$100,000
- 2016 U.S. Department of Labor under the Obama administration proposed to raise the salary threshold to \$47,000 annually (\$913 weekly)
- Challenged in court
- The Federal District Court in Texas invalidated



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# Salary Threshold Update

- September 24, 2019, the U.S. Department of Labor finally issued a final rule setting the minimum salary threshold for employees exempt from minimum wages and overtime under the FLSA
- Annual Salary Threshold effective January 1, 2020
  - \$35,568 annually (\$684 per week)
  - \$107,432 annually for highly compensated employee



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# Salary Threshold Update

- Minimum salary must be guaranteed—not subject to productivity goals.
  - However there is an allowance that up to 10% can be met by non-discretionary bonuses, incentives, and commissions remains
    - This can be paid annually (under Obama era had to be paid quarterly)
- No change to the duties test
- Highly compensated employees: those who earn at least \$107,432 need only perform one of the exempt duties under the executive, administrative, or professional exemption to be classified as exempt



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# FLSA: action items

- Must comply with new salary thresholds
- Increase salary levels to new minimum or move employees from exempt to non-exempt status and ensure that they accurately record and report all time worked
- Employers who pay their exempt employees a combination of salary and incentive-based compensation should determine whether to count up to 10% of that income toward meeting the new threshold
- Also review exempt employees' duties to ensure that they meet one of the duties tests applicable to the executive, administrative, or professional exemptions
  - Most exempt employees meet the salary thresholds—it is more common that they fail to meet the duties test



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# CBD in South Carolina



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# CBD in South Carolina

- Cannabidiol (“CBD”) comes from hemp plant which is not marijuana plant but is from same plant family
- CBD legalized in SC in 2017 because it produces only trace amounts of the psychoactive component tetrahydrocannabinol or THC which is found in marijuana
  - This small amount of THC cannot get a person “high.” It is non-psychoactive
  - CBD must have less than 0.3% of THC in it to be legal
- Julian’s Law
  - Passed in SC in 2014 to allow medical patients with severe seizure disorder to legally possess CBD with no more than 0.9% THC
  - The U.S. FDA has approved a purified form of CBD to treat seizures



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# CBD Uncertainties and Discussion

- The levels of CBD/THC in products are not closely tested and regulated—could employee test positive for marijuana when he used CBD?
- Hemp flowers hard to distinguish from marijuana flowers
- Marijuana remains illegal in South Carolina (S.C. Code 44-53-110) and is illegal under federal law
  
- Confusion: in 2019 the S.C. Department of Agriculture banned CBD as an added ingredient in both human and animal food products
  - Later the policy was clarified that pure hemp oil is allowed as long as “CBD” is not mentioned on the label
- BUT regardless CBD is probably not going anywhere
  - Example: <https://arrowheadseed.com/>



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