

# FLSA & the Final Rule

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# Agenda

- What is the Fair Labor Standards Act?
- Explain the FLSA Regulations & Duties Test
- New Final Rule Changes
- Calculating Overtime
- How to Prepare for the new changes
- Failure to Comply with the FLSA
- Q & A

# Today You Will Learn:

- All about the Fair Labor Standards Act (FLSA)
- How to determine what positions are exempt and nonexempt (the duties tests)
- How to look up the regulations online
- How to correctly keep track of time & calculate overtime
- The new rule and how to prepare
- FLSA Record keeping requirements
- What happens if you don't comply with the FLSA

# History

The initial FLSA bill was signed into law on June 25, 1938 by President Franklin D. Roosevelt. The bill:

- Banned oppressive child labor
- Set the minimum hourly wage at 25 cents, and
- Set the maximum workweek at 44 hours.

# FLSA Today

The FLSA today establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State and local governments

- Minimum Wage - \$7.25 per hour as of July 24, 2009.
- Provides overtime pay for hours worked over 40 per week at a rate not less than one and one-half times the regular rate of pay.
- Defines “hours worked” and how to calculate overtime pay
- The Wage & Hour Division (WHD) of the U.S. Department of Labor (DOL) Administers and enforces the FLSA.

# Who is Covered?

- Almost all employers today are covered under the FLSA.
- Enterprises with:
  - At least 2 or more employees
  - At least \$500,000 a year in business
  - Workers who are engaged in “interstate commerce”
  - Workers who produce goods for commerce
  - Workers who provide domestic service

# Exempt or Nonexempt?

- Some employees are exempt from the overtime pay provisions. These exemptions are narrowly defined under the FLSA and you should carefully check the exact terms and conditions for each exemption by using the Duties Test and reviewing the regulations.
- The exemptions that would apply to your office are Executive, Administrative, Professional, Outside Sales Reps and certain Computer-related positions.
- Those employees who do not fall under one of the above exemptions are considered “nonexempt” and are eligible for overtime pay for all hours worked over 40 hours in a workweek.

# Who is Exempt from Overtime Pay?

To qualify for exempt status, you must satisfy all of the following:

## Salary Level Test

As of today, an employee must be paid a minimum of at least \$455 per week (\$23,660 a year) to qualify for the exemption, and...

## Salary Basis Test

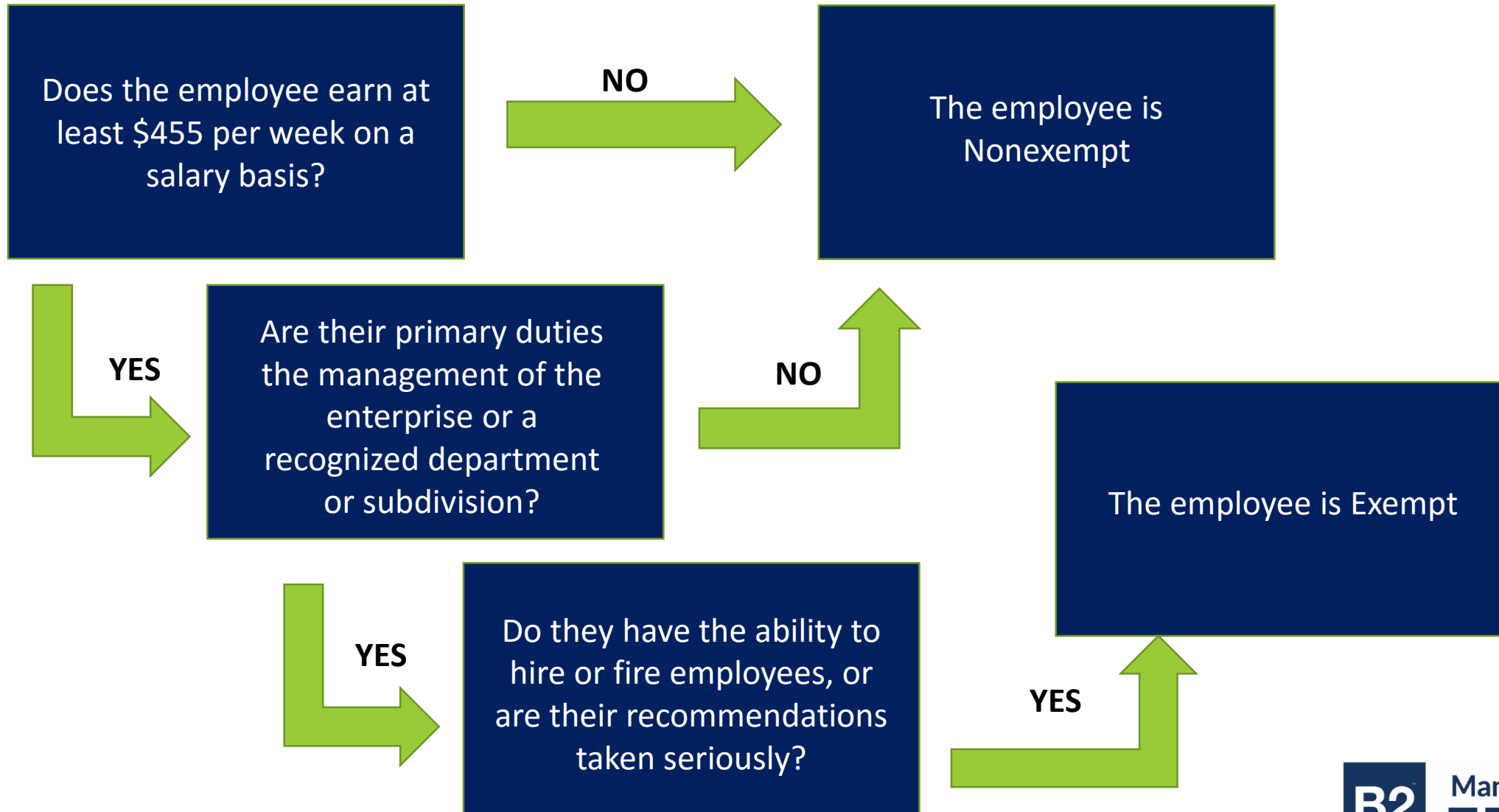
An employer must pay an exempt employee their full salary in any week of which they perform work (some exclusions), and...

## Duties Test

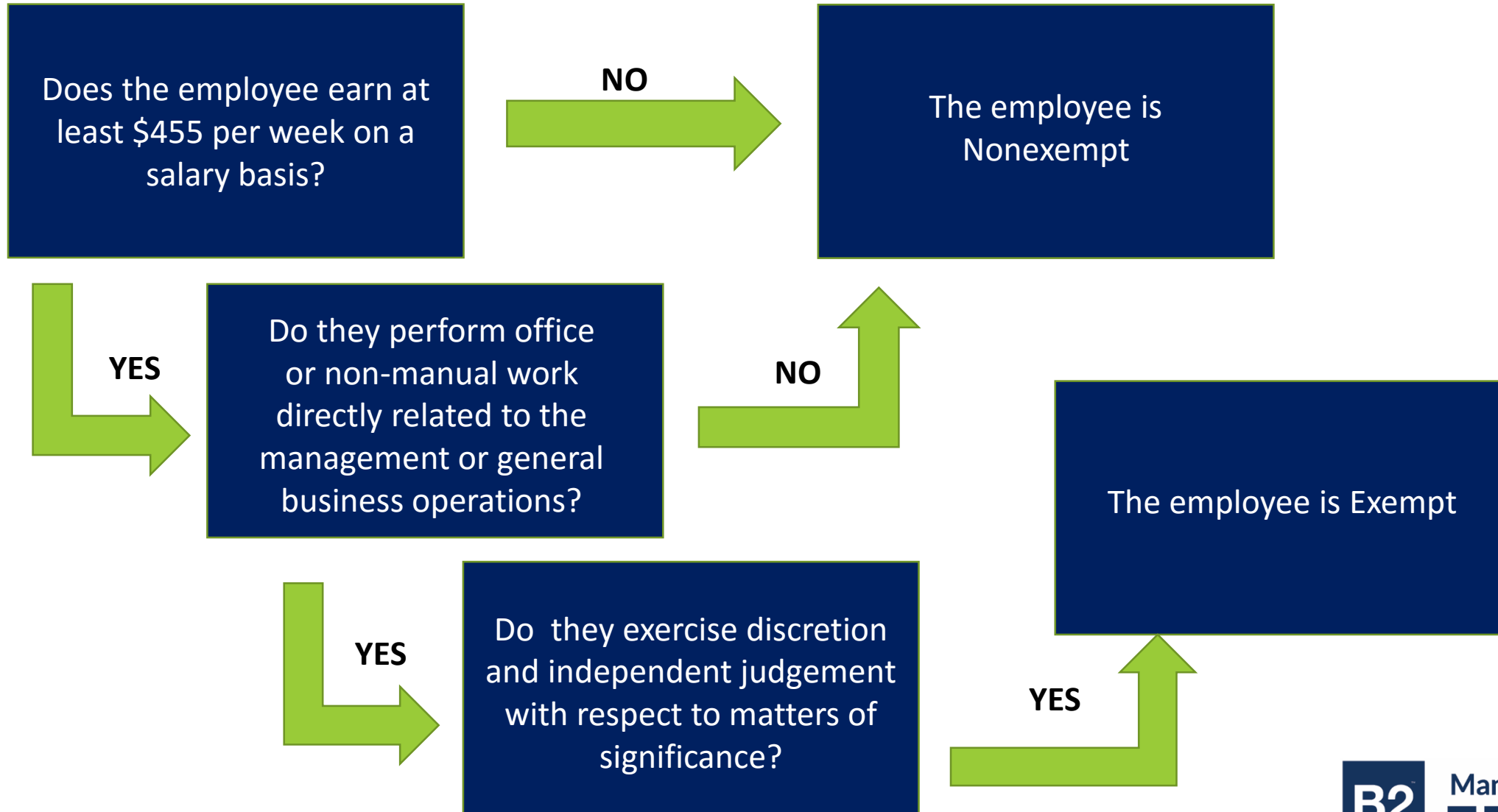
They must also qualify for one of the duties tests of either executive, administrative, professional, creative or a computer-related job



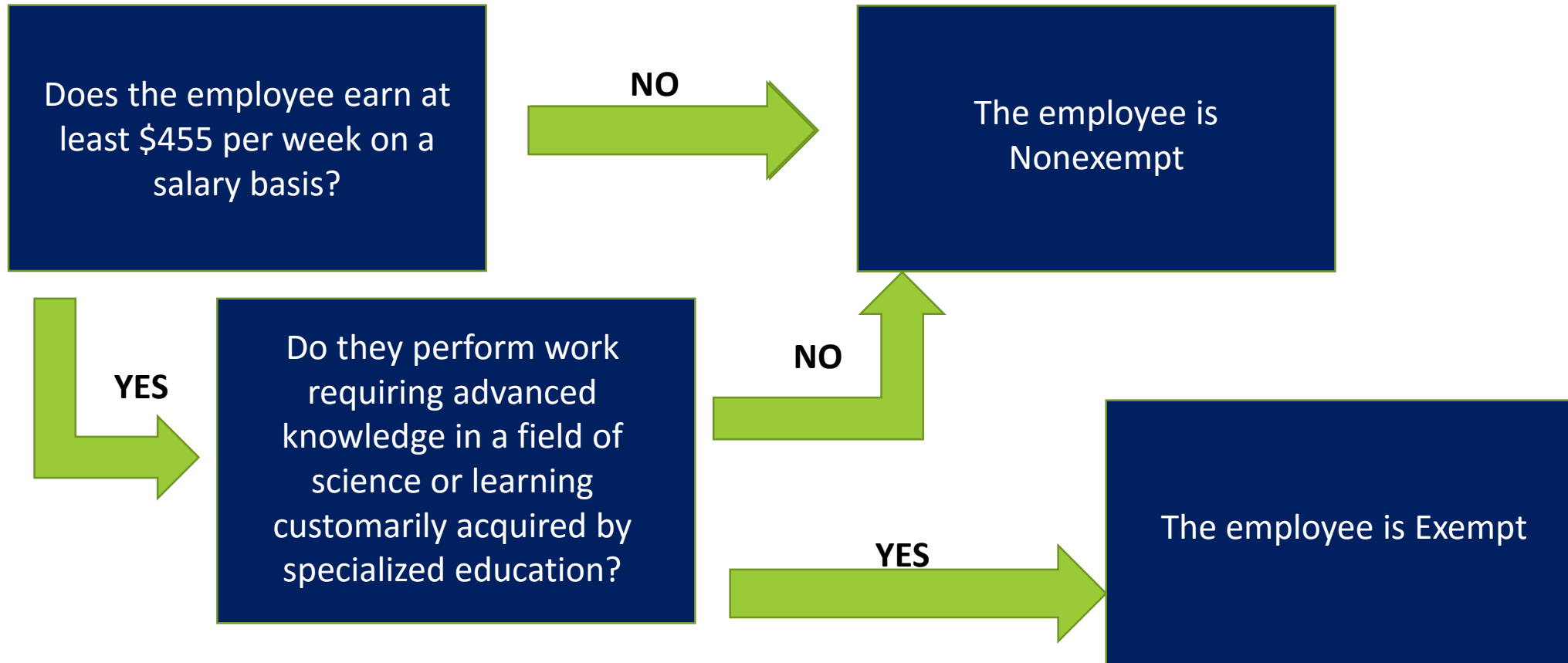
# Executive Exemption



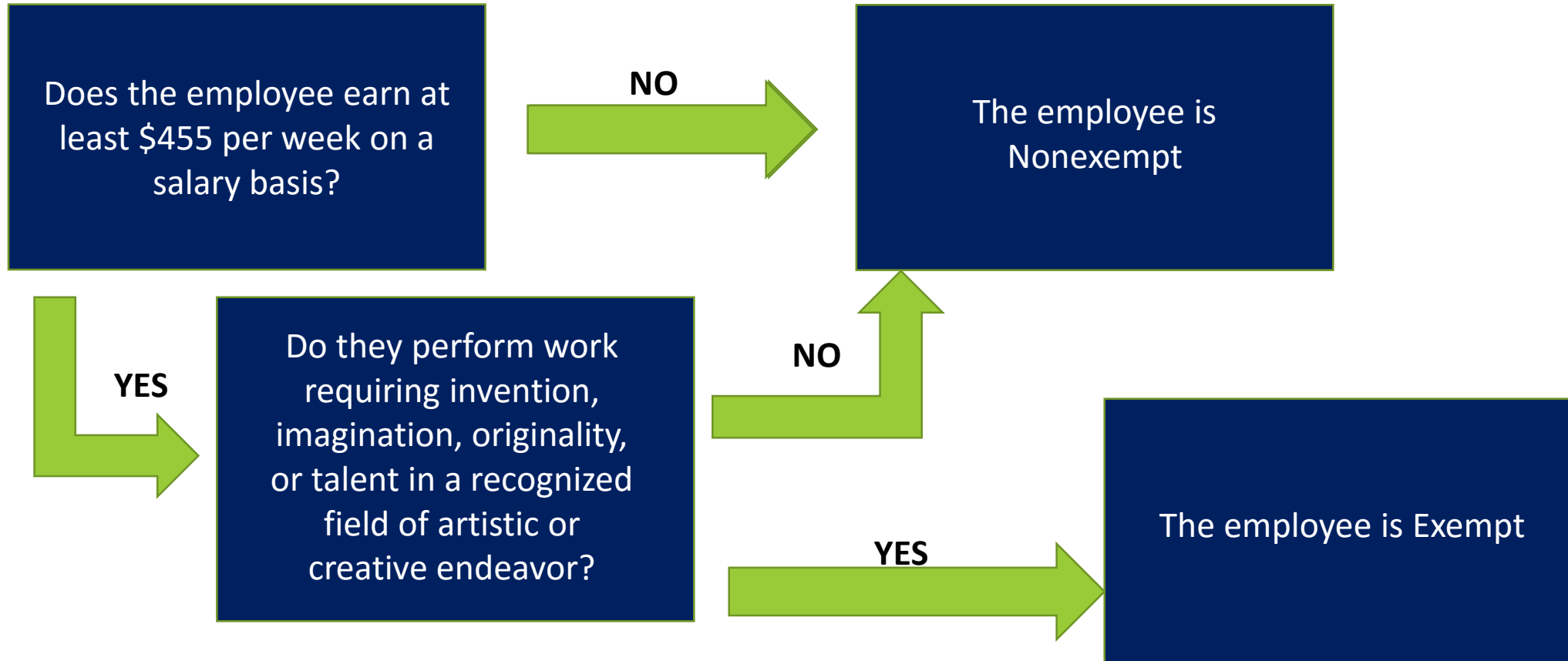
# Administrative Exemption



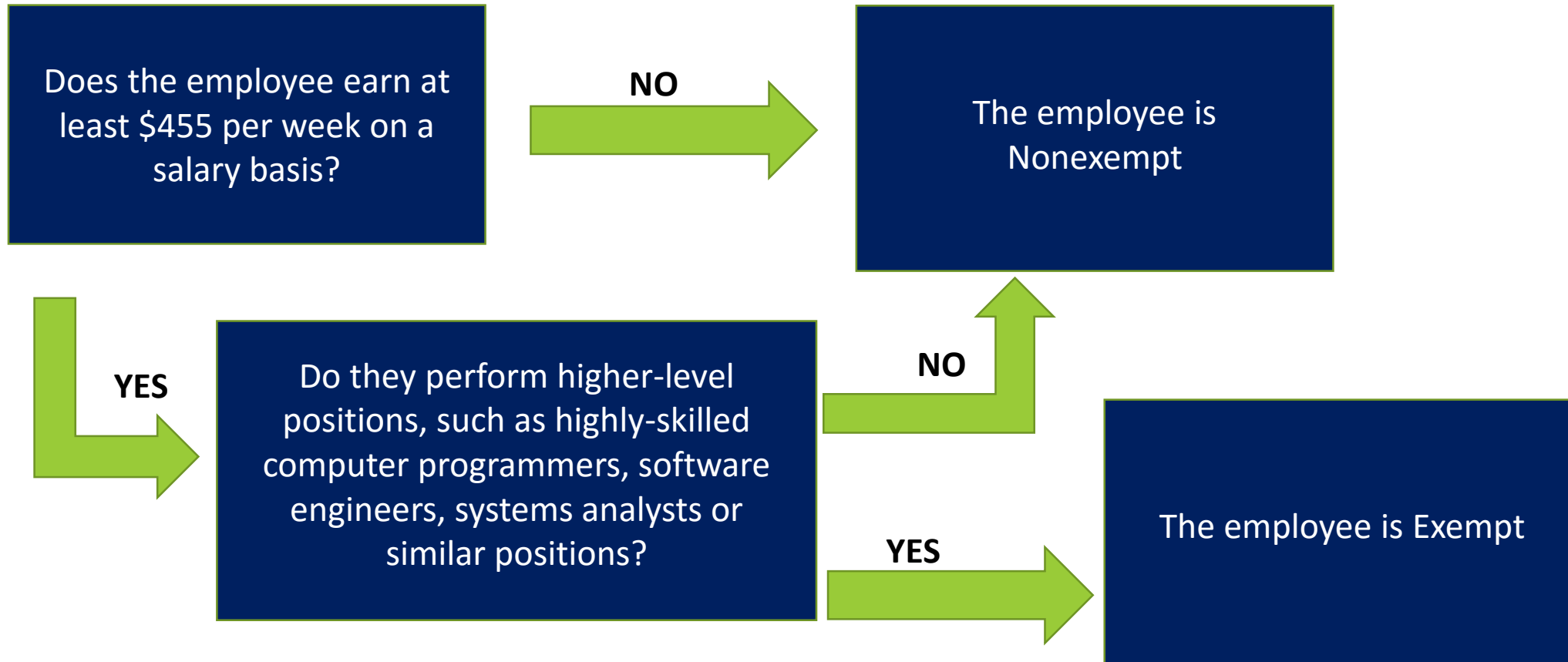
# Professional Exemption



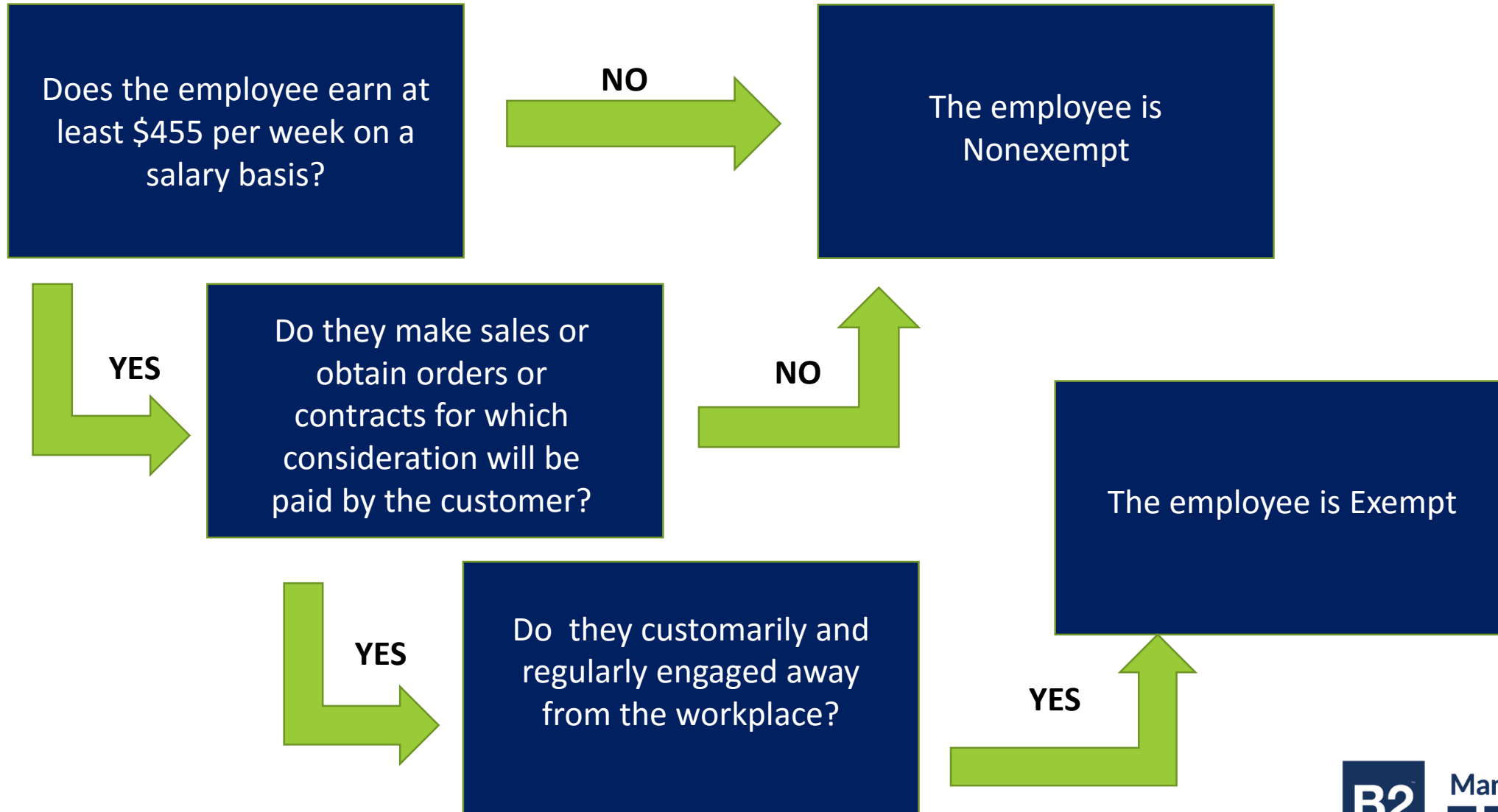
# Creative Professional Exemption



# Computer Exemption



# Outside Sales Exemption





When in doubt  
ALWAYS make them  
nonexempt

***Job titles never determine exempt status  
under the FLSA.***

***Additionally, receiving a particular salary,  
alone, does not indicate that an employee is  
exempt***



# Reviewing the Regulations

- Go to [www.DOL.gov](http://www.DOL.gov)
  - Under Agencies select Wage and Hour
- Go to [www.ecfr.gov](http://www.ecfr.gov)
  - Select Title 29 – Labor
  - Click on 500 – 899 – Wage and Hour, Department of Labor
  - Click on 541 – Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees

# Paralegals

- Elaws – FLSA Overtime Security Advisor - Professional Employees
  - (7) Paralegals. Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

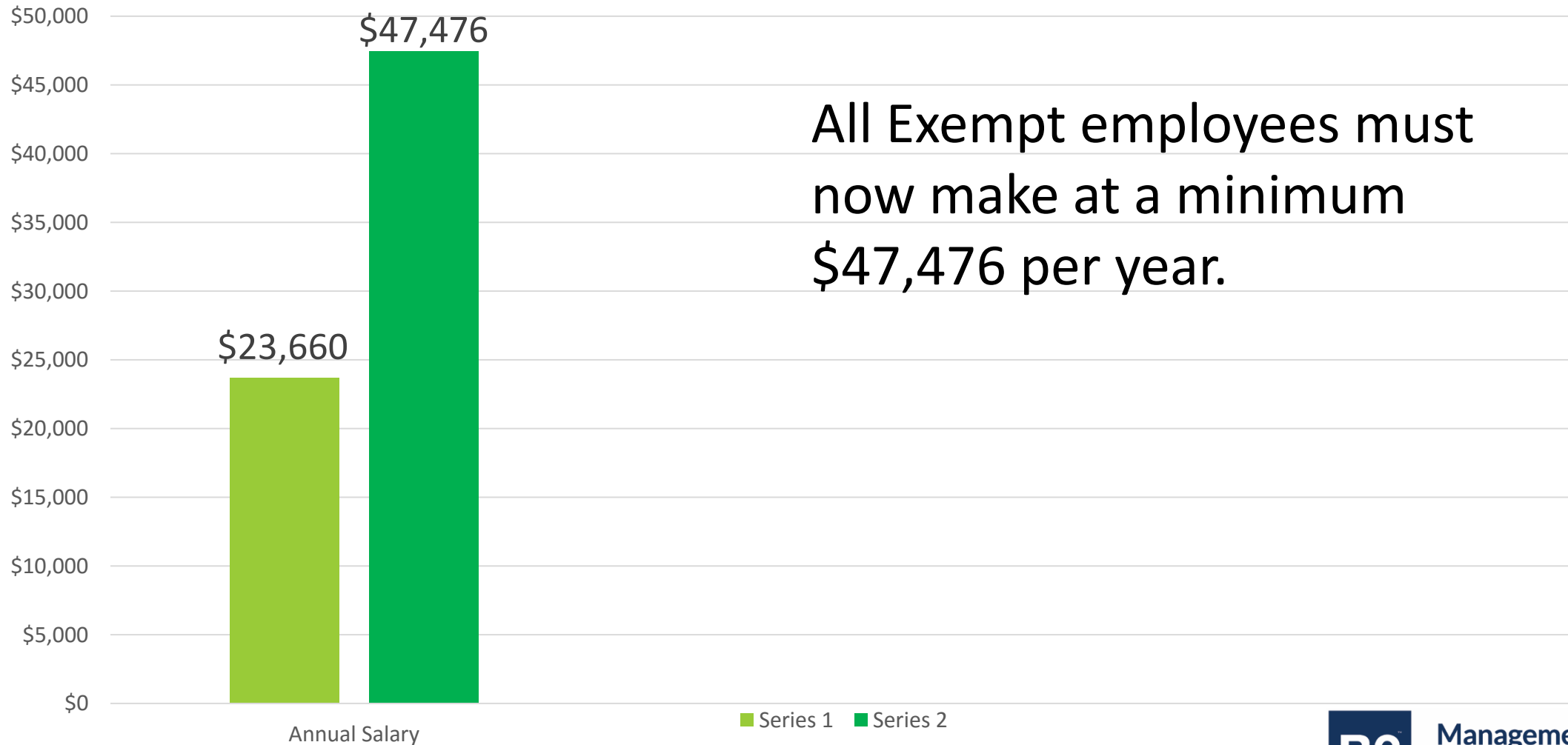
# New Overtime Law – Effective December 1, 2016

## What's Changing?

- Minimum salary level increased
- Provision for automatic salary level increase every 3 years
- Highly comp level increased

(No changes to the Duties Test)

# Minimum Salary Level Increase



# Three Tests Must Be Met in Order to be Exempt

The regulations implementing the white collar exemptions generally require individuals to satisfy three criteria to be exempt from overtime requirements:

1. They must be paid on a salary basis not subject to reduction based on quality or quantity of work (“salary basis test”) rather than, for example, on an hourly basis;
2. Their salary must meet a minimum salary level, which after the effective date of the Final Rule will be \$913 per week, which is equivalent to \$47,476 annually for a full-year worker (“salary level test”); and
3. The employee’s primary job duty must involve the kind of work associated with exempt executive, administrative, or professional employees (the “standard duties test”).

# Highly Comp Employee Change

- The salary amount for highly comp employees has increased from \$100,000 to \$134,004.



# Calculating the Minimum Salary

- The final rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level, provided these payments are made at least on a quarterly basis.

- Example:

▪ Regular salary	\$44,500	
▪ Average monthly commission	\$ 1,000	\$3,500 is less than 10%
▪ Average quarterly bonus	<u>\$ 2,500</u>	
	\$48,000	

## **Q. May employers make a catch-up payment in the event that an employee doesn't receive enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to remain exempt?**

- If an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to retain their exempt status the Department permits a "catch-up" payment at the end of the quarter.
- The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 13 week period). Any such catch-up payment will count only toward the prior quarter's salary amount and not toward the salary amount in the quarter in which it was paid.
- If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the quarter.



# Calculating Overtime

- Non-discretionary bonuses and other types of compensation, for example, a Referral Bonus, must be included in the regular rate of pay when calculating overtime.
- Example: An employee making \$12/hour worked 56 hours in a week and also received a \$50 Referral bonus.

56 hours x \$12/hour + \$50 bonus = \$722

\$722 / 56 hours = \$12.89 (regular rate of pay for the week)

40 hours x \$12.89 = \$515.60

16 overtime hours x \$19.34 (1-1/2 times hourly rate) = \$304.44

Total one week pay = \$820.04

# Preparing for the New Overtime Rule

- Begin reviewing and analyzing current employee salaries, job duties, and classifications.
- Prepare to make classification changes and/or salary increases to meet the new salary minimum for Exempt employees.
- Review and update job descriptions.
- Adjust work loads and/or schedules.
- Review your policies on overtime.
- Training on timekeeping requirements
- Communication with your employees!

# Review and analyze current employee salaries, etc.

- Now is the time to review all current employee salaries. If they are Exempt and make less than the \$47,660, you have several choices:
  - Raise salaries to maintain the exemption
  - Don't increase a salary and reclassify them to Nonexempt and pay them overtime. Note: You may want these type of employees to keep track of their time over a 4 to 6 week period in order to calculate their average hours worked. In some cases, it may be less costly to increase their salary, as long as they meet all the qualifications for an Exempt employee

# Review Job Descriptions & Adjust Work Loads

- Review job descriptions to ensure they are current and a true reflection of the job duties.
- For Exempt positions, ensure the job description justifies the Exempt status.
- You may want to reorganize workloads or adjust employee schedules in order to eliminate the need for overtime.

# Review Your Policies

- Review your Overtime policy to ensure employees have to get preapproval prior to working overtime.
- Review and/or create a Working from Home and/or Mobile Device policy in order to prevent Nonexempt employees from working overtime or off-the-clock.

# Timekeeping

- Ensure you have a timekeeping system in place, even if it is a paper timesheet that the employee completes.
- Train newly classified Nonexempt employees in how to track their time.
  - Be sure they understand that they will need to “watch the clock” in order to record their correct arriving, lunch and leaving times.
  - Do not allow employees to complete every timesheet with their work schedule. For example, writing in 8:00 a.m. to 5:00 p.m. every day of the week.
  - All timekeeping records needs to be complete and accurate!

# Communicate

- Start communicating now!
  - Inform employees of the New FLSA Rules and what it may mean to them.
  - You don't want to blind-side anyone.



# FLSA Recordkeeping Requirements

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.
8. Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period
14. Date of payment and the pay period covered by the payment.





# Not Just Monetary Penalties

Non-compliance can lead to criminal charges against the employer.

- In April 2014, U.S. Federal Prosecutors indicted Republican Congressman Michael Grimm from Staten Island, for violations of wage and hour-related tax laws.
- In late 2013 the U.S. Labor Department's Dallas office issued a [press release](#) about criminal charges it had levied against a Texas-based rope manufacturer. Not only did the company face criminal charges, but ultimately the “*owner, plant manager and office manager* were also convicted on separate felony counts” as well.

# Other Headlines

- June 22, 2016 - Historic Oklahoma City restaurant pays workers \$52K in back wages, damages after Labor Department investigation
- May 24, 2016 - Molina Healthcare of New Mexico to pay \$700K to more than 400 caseworkers after US Labor Department investigation finds them eligible for overtime
- April 19, 2016 - Nueces County Sheriff's Office pays \$769K in overtime back wages, penalties following US Labor Department investigation
- March 24, 2016  
Oil well service workers receive \$1.5M in back wages, damages after US Department of Labor investigations in New Mexico, Texas

# Be Smart – Know the FLSA Regulations!

You'll never know  
when the DOL will  
stop by your office!



# Questions

