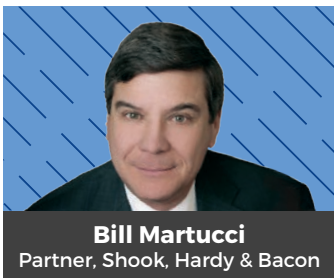


# Wage and Overtime Final Rule: What You Need to Know Now

PANELISTS



**Erica Brune**  
President, Lever1



**Bill Martucci**  
Partner, Shook, Hardy & Bacon



**Mark Avery**  
Chief Strategy Officer, Truss



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Flash Forum panelists (left to right) Mark Avery, Erica Brune and Bill Martucci speak at the Wage and Overtime Final Rule panel.

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**A**re you ready for the new federal wage and overtime rule that takes effect December 1? To help you prepare, *The Kansas City Business Journal* recently assembled a panel to discuss the new federal regulations and what they mean for you, your employees and your business.

**Stacie Prosser, publisher of the *Kansas City Business Journal*:** One of the biggest questions everybody has is whether this legislation can be stopped. Is this something that we're all just going to have to live with?

**Bill Martucci of Shook Hardy & Bacon:** I think we are going to have to live with it for a couple of reasons.

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First, it is well in place at this point. Second, the president does have certain authorities to provide regulatory guidance and he has done that here through the Department of Labor. And then, finally, salaries haven't really changed dollar-wise at the managerial level since about 1975. So, I think it is here to stay, and frankly, the final rule is a little bit more reasonable than what had been proposed early on.

**Erica Brune of Lever1:** I agree. I

have heard nothing that this could be repealed or changed. And, it is going to increase every three years.

**KCBJ: What are the major changes to wage and hour laws?**

**Martucci:** In this most recent legislation, the standard salary level increased dramatically but the so-called duties test didn't change. Just yesterday, I sent off information to a client about the executive exemption. The technical term is executive, but the concept is really more manager or supervisor. And, the test there is that you must have as your primary duty managing two or more people or managing an enterprise of the operation.

The other two exemptions that are rather prominent are the administrative exemption and the professional exemption.

A really hot issue for the Department of Labor is the independent contractor. Are you my employee? Are you entitled to full benefits and overtime pay or are you an independent contractor and not covered by

any of those standards?

The Department of Labor is very much into this issue, and their basic thought is even though you call yourself an independent contractor, if you work for one employer and the employer provides all the necessary tools of the trade, then you are going to be considered an employee. And, if you're considered an employee, then the employer is subject to withholding, benefit and overtime questions.

**KCBJ: What are some of the policies employers need to update or change immediately?**

**Brune:** The good news is that there are a lot of options for you to fit this law into your practice of employing people. This doesn't mandate now that you have to start paying a ton of overtime. You just have to pay it if employees work it. And so, there are a lot of policies that you can put in place that are at your complete discretion to determine how you want this ruling to impact

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your business.

For example, Kansas and Missouri don't require you to give breaks or pay breaks to anyone unless you're under 16 years old. Most of you probably don't have employees who are 16 or younger. So, it is at your discretion if you want to mandate a 30-minute lunch, a one-hour lunch or two 15-minute breaks a day. However you want to structure that is up to you and will play into whether an employee is working 40 or more hours a week.

Another policy that I would consider is do you want them to work overtime, and that's going to be a business decision in terms of your business productivity. Because we do have until December, we're telling our clients to start looking at people's time. Let's spend the month of August checking what hours they are truly working because you really may not have a lot of people working more than 40 hours. The biggest concern I hear from my clients is 70-hour workweeks. But, nobody really wants to work 70 hours a week even if you're going to get a couple of hours of extra pay.

So, when you monitor employ-



ANDREW GRUMKE

Flash Forum attendees listen to panelists' discussions.

ee behavior, you may see that it is not as big of an issue as you thought. Tracking is a great place to start. See how much your people are working and how big of an impact this is going to be, and that information will help craft what policies you want to put in place.

If you find that people are only working on average one hour of overtime or no overtime, maybe you can be a little bit loose on these policies because you want people to get the work done. If the phone rings at 5:01 p.m., you want your employees to answer it because that's important to the productivity of your business. On the other hand, if it's not and you can close your doors at 5 p.m. and that's the expectation of your industry and your service, then you can add a policy that says overtime is strictly prohibited and you can then prohibit people from working overtime.

The good news is that you have a lot of choices especially in Kansas and Missouri on how you want this to affect your business. You do have to pay it if they work it. But you can prohibit them from working overtime. You can say it's strictly prohibited. You can say that it's not allowed without manager approval under these circumstances or however you want that to play out, and that's a great control mechanism to keeping your cost down, which I assume is what everyone's biggest concern is.

**KCBJ: What are some of the suggested compliance strategies that businesses need to start thinking about?**

**Avery:** I think the first step is understanding what is happening today. How are people working today? Where are they working? When are they working? Are they working at home? Are they traveling?

We have had this ability to put so many people as exempt that we really don't have the policies and processes in place to track time effectively and that's going to be absolutely critical moving forward. This is an opportunity to look at strategies. Are we going to raise pay or are we going to switch peo-

ple to non-exempt? We can revisit the job duties and really analyze how we have people classified now. And, again, it's really a chance—although it's a time-sensitive chance—to step back and understand how time is being used today in the workforce.

**KCBJ: From a legal perspective, what are some of the most vital steps to take initially and how important is it to use legal privilege in that context?**

**Martucci:** You want to understand what the law does and what the law doesn't do in this area. Probably the very first thing you want to do is look at your workforce and figure out who's in that space between the old number and the new number. You may have quite a few or you may not have that many.

After you identify those folks, you have a decision to make, and the decision truly is do we convert those employees to hourly and keep them where they are or do you move them up and pay them on a salary basis following the test.

The hard part is the psychology. So many people see themselves as exempt and don't keep time records. So, as Erica suggested, use this time between now and the end of the year to track their time and then you make that decision.

With respect to policies, in an ideal world, you have a meeting with everyone and say: "There's a change in the Department of Labor regulations. Here is how it works. Here is how we're going to implement it. Do you have questions?" You'd be amazed at how getting in front of the issue can change people's perspectives.

The second thing is encouraging people to come forward with complaints. You want to get their story and be responsive to that. I've had many cases in which I wished the employee had been rewarded for complaining because then we would be able to help ourselves in other cases in which people complained and weren't so legitimate about it.

So, in all honesty, you really want to encourage those folks to tell you what's going on so you can address it. I'm really serious about that. That's one of the biggest changes in the law. The workplace is no longer like when I started where the key person is up here and they tell you what to do. It's much more collaborative.

**KCBJ: What if there is a difference in salary levels for individuals who hold the same job title—one is exempt and one is not exempt? Is that okay?**

**Avery:** Technically, it's okay. But it's not a good practice. One thing we do know is that employees communicate. They talk. So, if you have



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## CURRENT REGULATIONS vs. PROPOSED RULE AND FINAL RULE

	CURRENT REGULATIONS (2004 until effective date of final rule, 2016)	NPRM (Notice of Proposed Rulemaking)	FINAL RULE
Salary Level	\$455 weekly	\$970 weekly (if finalized as proposed) 40th percentile of full-time salaried workers nationally.	\$913 weekly 40th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)
HCE Total Annual Compensation Level	\$100,000 annually	\$122,148 90th percentile of full-time salaried workers nationally	\$134,004 90th percentile of full-time salaried workers nationally
Automatic Adjusting	None	Annually, with requests for comment on a CPI or percentile basis	Every 3 years, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level	Request for comment on counting nondiscretionary bonuses and commissions toward standard salary level	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly.
Standard Duties Test	See WHD Fact Sheet #17A for a description of EAP duties.	No specific changes proposed to the standard duties test. Request for comment on whether the duties tests are working as intended.	No changes to the standard duties test.

SOURCE: U.S. DEPARTMENT OF LABOR

two employees who have the same job title and one is exempt and one is not exempt, they're going to talk and that's probably going to be a point of frustration.

I would probably do whatever I could to get that person to the exempt level. If for some reason the person that is paid and not exempt, it's not just the salary thing but they are legitimately not exempt, then I'll work to separate those titles in some way.

So, technically, it can exist. I think culturally it would not be constructive and would invite scrutiny. If there ever were a complaint or if there were ever an investigation into the company, it would invite a level of scrutiny that we probably wouldn't welcome.

**Brune:** I agree with that, however, it may not always be practical. And, in a call center environment or somewhere you have 50 people working for example, adding a senior title would be good from an emotional perspective. But you don't want to create a transparency that says: "Oh, you're a senior. You must make this." There are several ways to track time that aren't going to clearly alienate and display what's somebody's salary threshold is.

One other thing that we haven't talked about is converting someone who makes less than \$47,000. If they're under that and they're going to be non-exempt, you don't have to make them hourly. You can still let Mary keep her \$35,000 manager salary. She just needs to track if she works overtime, and she would be eligible for overtime if she worked over 40 hours.

But she can remain salaried, which may soften the blow if you don't have

the ability to raise her up—if it's just not practical to give her that huge of a salary increase. And, that may make her feel that you're not doing anything other than complying with the new law. You're not changing her title; you're not changing her pay. You are just going to pay her that overage if she earns it.

**KCBJ:** How do employers go about informing their employees?

**Avery:** Being proactive is probably most important as are helping our employees understand the context of the change and why the change is happening. People tend to default to the worst assumption if they don't know.

And, really, this is not a negative for anybody—certainly not from a compensation standpoint. There is a status element that is real and legitimate and needs to be addressed. Then determine your process for communication, and the process for communication needs to be very consistent throughout your organization.

So, from your senior leadership, you need to be very clear on how you're going to attack this and how you're going to communicate it, and then, from the managers in place who manage these associates and then the associates themselves. I would be very systematic about how you're going to build that chain of communication and how it's going to be communicated, what kind of materials are you going to give them and when it is going to be communicated. Being very thoughtful about the process of who, what, how and when is critically important.

**KCBJ:** Erica, you said earlier nobody really wants to work 70 hours a

week. But, what if you have an employee that turns in 70 hours of work time and you know they didn't work that time. Do you have to pay them?

**Brune:** That's the number one question that we've been receiving from employers. I'm telling them, if

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**William C. Martucci**  
Partner  
Shook | Kansas City/  
Washington D.C.  
Georgetown University  
Flash Forum Panelist  
wmartucci@shb.com

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employees work it, you have to pay it. And, business owners want to know what exists to stop these people from completely taking advantage of them.

Having the proper processes in place is key. And, if you have someone who's violating those policies, have an honest conversation with them and say: "You understood and signed off on that policy not allowing you to work overtime unless it's pre-approved. What happened? What made you work these extra hours?" Hear what they have to say because there may have been some client crisis that you want to consider and that you didn't understand.

But, the second question is, if you're assuming that there is fraud, it's hard to dispute that unless you have really concrete proof, such as security cameras and things like that. So, my answer to my clients is to pay them this time because it's not worth not paying them, honestly, and write them up. Discipline them based on the policy that you put in place if they do break this policy. But let them know that you suspect that this is a fraudulent timecard and you're going to continue to look at that. If people know they are

being watched, they're 10 times less likely to actually commit the fraud.

Putting in great timekeeping systems so that it's nearly impossible to commit fraud is a safeguard. Having employees sign off on their timecards is another safeguard. Whether they log in with their secure password and hit submit or physically sign a paper timecard, they're taking responsibility for those hours. So if you do suspect they are committing fraud, you have the written documentation. And, have a policy in place not only for overtime but also for submitting false timecards.

**Martucci:** Just to reiterate, you can say no to overtime. We know it takes a whole process. Your process can be, "If you need time to work beyond these hours, please let us know in advance and we'll determine whether that's appropriate under the circumstances." But having "no" in the playbook is okay.

Another important point is that you can enforce business hours. There are always employees who tend to come in early or hang around late. You have to be comfortable to say, "I really appreciate what you do, but we really don't start until X

time, and when such and such a time comes, we close."

**KCBJ:** How do you manage employees working remotely?

**Brune:** I encourage clients not to allow hourly workers any access to work outside of the office. There should be a policy, but it also should be a practice. So that means no access to email on their phones and no access to the server to do work.

The bottom line is: Don't allow them to work remotely. Do not give them access because if you do, they will work. And if they work, you have to pay them. So, that's the non-easy but simple answer on how to manage that.

**KCBJ:** Who needs to be involved in these discussions or who would you bring in to advise your clients?

**Avery:** I do think it needs to be a very collaborative effort because there is a lot at stake. You need conversations with your teams and with your supervisors and meetings with the associates themselves.

Obviously, your finance team needs to be an integral part of how you're going to budget this because there's not one way you're going to fix. You're not just going to raise everybody, but you may raise some. You're going to turn some people into non-exempt but not everybody and maybe allow some overtime but not for everyone.

Then, an attorney is very important because these are some very sensitive issues. I suspect most of the litigation around this has to do with the gray areas, and the gray areas are a lot of the duties. It's what constitutes an exemption. The salary threshold is pretty black and white. You're there or you're not there. But, the duties are pretty broad so as you start re-evaluating duties and you start trying to be very, very clear on what is and what isn't in the exempt status, it's very important to get your legal counsel involved in that conversation.

**Brune:** After you've decided and rolled out your policies, the management participation is critical. As Bill mentioned, a lot of times showing good faith effort goes a long way. Like exemption and non-exemption and like almost all other policies, just having them in writing but not actually practicing it will not get you off the hook. Saying that you don't allow people to work from their phone or late at night but then allowing that to happen is not going to do you any good.

So, coaching the management to not allow their people to work off the clock is what we're going to see litigated. Instill in the culture that it is absolutely not permitted and any

management that doesn't enforce that with their staff would also be reprimanded. You have to act the way that the policies are written. You don't want to just write them and assume you are covered.

**KCBJ:** I'm going to go ahead and open it up for questions.

**Audience Question 1:** How do you counter the perception that you are moving an employee from salary to hourly just to pay them less?

**Brune:** I think explaining that it's a federally mandated law would be the first step. And you need to tell them that you're not changing their pay—you still want to pay them the same amount, but it is going to be in the hourly form versus the salary form. They're still keeping their title, keeping their job responsibilities and keeping their same take-home pay. It's just that now it is going to be processed in a different way. That's how I would initially go about it.

**Avery:** I think a lot of times, when we fail as business leaders, it's not that we didn't communicate well. It's that we didn't communicate at all. Have a one-on-one conversation and explain what is happening and why this change is taking place and why in the end it could be better for them.

**Question 2:** If somebody with a 40-hour workweek works 10 hours on Monday, can she compensate for that time and take off early on Friday?

**Martucci:** Within that workweek, you're okay. Within that week, it's okay to be flexible, but when it flips to next week or the following week, it's not allowed. You can't take off time this Monday and make it up next Monday.

Comp time is used in the federal sector. It is not allowed for the most part in the private sector. Within the workweek, it's technically not comp time.

**Question 3:** How do you track employees' time when they work from home?

**Brune:** Employees have to be responsible to record their time accurately. Again, I talked about the policy and I talked about the practice. So, if you are counting on her to clock in and clock out, which you're going to have to start doing, make it simple for her and ask her to clock in and clock out when she is working and when she is not.

You want to let her know that she is to not fraudulently report her time or to work more than 40 hours unless preapproved. However, that can be within any 40 hours of your workweek.

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