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Overtime: Get Up to Speed on the U.S. Department of Labor's Final Rule

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Tuesday, Oct. 25
2:15–3:30 p.m.



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Agenda

- FLSA Overview
- The New Overtime Rule
- Planning for Your Company
- Decisions Staffing Firms Will Need to Make



FLSA – History and Overview

- Fair Labor Standards Act (“FLSA”) is Federal Law (29 U.S.C. § 201 *et seq.*) that governs child labor, and the payment of minimum wage and overtime.
- Originally passed in 1938
- Secretary of Labor has ability to enforce, as well as private civil actions



FLSA – History and Overview (cont.)

- Federal minimum wage is \$7.25 an hour.
- 2 or 3 years (if “willful”) statute of limitations
- Liquidated damages are possible (double)
- Mandatory attorney fees and interest



FLSA – History and Overview (cont.)

- DOL increasing enforcement efforts
- Approx. 8,000 new claims filed in Federal Court each year
 - This does not include cases filed in state court or DOL enforcement actions that do not result in a court filing



Remember State and Local Laws

- Most states and some local governments have their own wage and hour laws
- Some mirror the FLSA while others may be more generous to employees (minimum wage, meal breaks)
- Must comply with the law that is the most generous to the employee
- CA employers beware of differences in determining exempt status



Where is the Litigation?

- More than a 400% increase in FLSA suits in the past 15 years
 - Claims are difficult to defend
 - Employers shy to litigate and quick to settle
- Confusing and old laws that don't make sense
- PI lawyers looking for new markets as malpractice reforms come about
- With a sluggish economy, employees are more likely to sue.



What are the Claims?

- Overtime: off the clock
- Misclassification
- Donning and Doffing
- Meal/rest breaks
- Minimum Wage



Overtime Exemptions

- The "white collar" exemption is a complete minimum wage and overtime exemption for *bona fide* executive, administrative, professional and outside sales employees
- Secretary of Labor has broad power under 29 U.S.C. § 213(a)(1) to establish the terms



Exemption Tests

Since 1940, the DOL's regulations have generally required each of three tests to be met for the FLSA's Executive, Administrative, and Professional exemption to apply:

- Salary Level
- Salary Basis
 - Salary level and basis tests do not apply to lawyers, doctors, teachers or outside sales
 - Computer employees can still be paid by the hour (\$27.63)
- Duties
 - (look at the WHD Fact sheets on www.dol.gov/whd)



Salary Test

Salary Basis

Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed



Salary Level

Amount of salary paid must meet a minimum specified amount;

- **This is what has been changed**

Duty Test

Executive

- Management of a department or division
- Direct the work of 2 or more full time employees
- Authority to hire or fire

Administrative

- Office or non-manual work related to the management operations of the employer
- Exercise discretion and independent judgment

THE NEW OVERTIME RULE

What Hasn't Changed

- No changes to the salary *basis* test
- No changes that impact outside sales, teachers, lawyers or doctors
- No changes to the duties tests



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What Has Changed

- **SALARY LEVEL TEST:**
 - \$913 per week (\$47,476 annualized)
 - Up from the current \$455 per week
 - (\$23,660 annualized) (but less than the proposed \$50,440)
- **How was that determined???**
 - Set at the 40th percentile of full-time non-hourly paid employees in the lowest wage Census region (South)
 - What is the South?
 - Delaware, District of Columbia (including government jobs and lobbyists...), Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, and West Virginia

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Included In Salary

The new rule: compensation paid at *least* quarterly, can satisfy up to 10% of the minimum salary requirement, including:

- Non-discretionary bonuses
 - Non-discretionary incentive bonuses tied to productivity or profitability would qualify
 - An unannounced holiday bonus would not qualify
- Incentive payments
- Commissions
 - Meaning \$47,476 a year \$913 a week and measured on a quarterly basis (Can be calendar or fiscal quarter – just consistent)
 - Discretionary bonus are those made solely at discretion of employer and not through the use of a measurement tool

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Scenario

- Employer provides a production bonus of up to 25% of employee's salary.
- Employee's base salary is \$40,000.
- Can the employer use the full production bonus to satisfy the salary requirement?
- No, the production bonus may only satisfy up to 10% of the new salary level.



"Catch-up" Payments

- The rule permits a "catch-up" payment at the end of each quarter.
- Each pay period an employer must pay the employee on a salary basis at least 90 percent of the standard salary level required.
- If at the end of the quarter the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for 13 weeks, the employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level).



Scenario

- Joe is an exempt professional employee who is paid on a weekly basis.
- In January, February, and March, Joe must receive \$821.70 per week in salary (90 percent of \$913), and the remaining \$91.30 in nondiscretionary bonuses and incentive payments (including commissions) must be paid at least quarterly.
- If at the end of the quarter Joe has not received the equivalent of \$91.30 per week in such bonuses, the employer has one additional pay period to pay Joe a lump sum (no greater than 10 percent of the salary level) to raise Joe's earnings for the quarter equal to the standard salary level.



Scenario (cont.)

- What if Joe quits before the end of the quarter?
 - Must pay Joe a lump sum (no greater than 10 percent of the salary level) to raise Joe's earnings to the standard salary level for the weeks he worked.
 - Keep in mind however, that an employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment.



Highly Compensated Employees

- **\$134,004** total annual compensation
 - Up from the current **\$100,000**
 - Up from DOL's proposed **\$122,000**
 - Set at the 90th percentile of full-time non-hourly paid employees nationwide
- **Who are HCEs?**
 - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee



Highly Compensated Employees

- HCEs must receive 100% of the \$913 weekly threshold on a salary or fee basis, but non-discretionary bonuses and incentive payments (including commissions) may be used to satisfy the remainder of the \$134,004 total annual compensation requirement.
- Bonus or other incentive payment can be paid annually.



Adjustment

- The salary levels will automatically increase every three years, beginning January 1, 2020
 - DOL must publish the change not less than 150 days before the January 1st “effective date” in the Federal Register and at www.dol.gov/whd

**Those in other states may need to give notice of wage change in this adjustment as well as in future adjustments.*



Adjustment

- New levels will be based on BLS’ data from the second quarter of the year preceding the update
 - Salary level will be based upon the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region
 - HCE level will be based upon the 90th percentile of the weekly earnings of full-time salaried workers nationwide



Impact of Changes

Department of Labor estimates number of workers who will be eligible for overtime:

- 4.2 million workers
- 19% of all exempt employees
- 56% are women
- 82% have attended college



How Should Employers React? Guidance from DOL

- For each affected employee newly entitled to overtime pay, employers may:
 - increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
 - pay an overtime premium of one and a half times the employee's regular rate of pay for any overtime hours worked;
 - reduce or eliminate overtime hours;
 - reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
 - use some combination of these responses.



How Should Employers React? Guidance from DOL (cont.)

- The circumstances of each affected employee will impact how employers respond to the new rule.
 - give raises to employees who regularly work overtime and earn slightly below the new standard salary level, in order to maintain their overtime-exempt status so that the employer does not have to pay the overtime premium.
 - For employees who rarely or almost never work overtime hours, employers may simply choose to pay the overtime premium whenever necessary.
 - Nothing in the rule requires employers to change employees' pay to hourly from salaried, even if the employees' classification changes from exempt to overtime eligible.



Pop Quiz

- Fred is currently classified as exempt and works 50 hours a week. To maintain his current weekly wage, XYZ, Inc. wants to reduce Fred's pay and change Fred to an hourly employee.
- Is this permitted under the new rules?



Answer

- Yes, XYZ, Inc. can reduce the amount of pay allocated to Fred's base salary (provided that he still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant.



Pop Quiz

- If Joe is paid \$134,004 as of December 1, 2016, he should be classified as an exempt highly compensated employee regardless of the duties test ?



Answer

- Incorrect. Employees who earn at least \$134,004 per year (and at least \$913 per week) must still satisfy the HCE duties test to qualify for exemption. Although the HCE duties test is less rigorous than the standard duties test, the employee must still perform exempt duties on a customary and regular basis.



PLANNING FOR YOUR COMPANY

SO NOW WHAT?

- Highly likely the new rules are **not** going to go away
- Determining who to reclassify and implementing reclassification can take up to **six months**
- December 1st is almost here!
- Start **NOW!**



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Considerations Include

- Potential loss of manager flexibility
- Labor coverage without salaried workers
- Turnover
- Morale issues
- Potential pay compression
- Compensation structure



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Impact

What areas may be impacted?

- Finance
- Technology
- People
- Operations
- Ongoing Impact



Financial Impact

Potential financial impact may include:

- Increased salary and benefit costs
- Added cost to update systems
- Cost of new record keeping systems
- Funding challenges



Technology Impact

Potential impact on technology may include:

- New timekeeping and scheduling systems
- Systems training for managers and employees
- Tools to monitor hours and cost ongoing



People Impact

The impact on people may include:

- Recruitment and retention challenge
- Leadership training
- Morale
 - Perceived demotion in status
 - Question around motive for change



Dealing with the People Impact



Operational Impact

The impact on operations may include:

- Operational changes in:
 - Scheduling
 - Staffing
 - Travel rules
- Training
- Sectors *most* impacted include:
 - Mid-level professional or entry-level management positions
 - Lower cost of labor market workforces
 - Retail, hospitality services, non-profit

Is this an OPPORTUNITY????



Ongoing Impact

Ongoing organizational impact includes:

- Salary level requirements
 - Adjusted every three years beginning in 2020
- Policy and process implementation
- Compliance



DECISIONS STAFFING FIRMS WILL NEED TO MAKE

Planning

- Identify employees who need to be reclassified
- Develop new compensation plan for the reclassified employees
- Review wage-hour policies and processes
- Communicate the changes
- Train the reclassified employees and their managers



What To Do

- Review jobs paid below \$47,476 annual salary
 - Or, below \$42,728.40 annual salary with at least \$4,747.60 in bonuses and commissions
- Reclassify exempt positions to non-exempt OR Increase base pay



What to Do

- Now is the time to conduct a job duty review to assess misclassifications with less exposure (you may want to do with an attorney so that you have attorney-client privilege)

Scenario

- Sue is a recruiter for ABC Staffing, Inc. and classified as exempt.
- She performs 40 hours of work each week and is currently compensated at \$40,000/annually.
- Can ABC continue to pay Sue the same way under the new rule and maintain the exemption?
- No, ABC may raise Sue' salary above the new threshold (\$47,476) to retain her exempt status. However, if Sue rarely or never works overtime, it may make more sense to reclassify Sue from exempt to non-exempt and simply pay for any overtime work hours if they do occur.
- If Sue is reclassified as non-exempt, she can continue to be paid a salary, so long as she receives overtime pay for any overtime hours worked.

Data Collection and Evaluation

- Pull salary and incentive pay data
- Calculate the cost of increasing salary to **\$47,476**
- Consider lowering incentive pay to offset salary increase
- Calculate the cost of overtime
 - How many hours are exempt employees working?
 - $(\text{Weekly salary} / 40) * 1.5 * \text{expected overtime hours}$



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Choosing an Approach

Tactical or Strategic Approach?

Questions to consider:

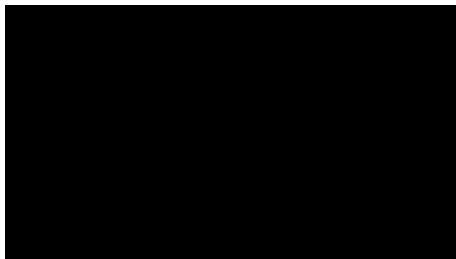
Do you know...

- How many hours your exempt employees actually work per day/week?
- The **total** cost to bring all exempt employees to new salary threshold?
- If all of your job descriptions are up-to-date?
- Talk to your employees – learn their perspective



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Talk To Your Employees



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Choices Are Few

- Maintain the exemption by providing employees with a salary increase;
- Reclassify the employees to non-exempt and pay overtime for work over 40 in a work week; or
- Reclassify the employee as non-exempt, but set the hourly rate to minimize additional labor costs. (Consider sub-classes)



Choices Are Few

- ADP has a free app you may want to review:
- <http://www.adp.com/flsa-calculator/index.html#individual-calculator>
- It will do some of the analysis for you. However, in order for you to be able to use the app or make any kind of assessment accurately – you need to collect information. In particular, you want to look at how many hours your exempt employees under the new base salary are working overtime?



Understand

Talent costs:

- Pay compression
- Potential impact on career paths
- Impact on work schedules and labor coverage
- Cost of hiring
- Re-assessment of talent policies and practices:
 - Job descriptions
 - Number of employees
 - Number of hours per employee
- OPPORTUNITY????



Understand

- Number of hours currently impacted
- Explore savings alternatives to offset added labor / systems costs
- Assess existing pricing structures, contracts and margins
- Understand cost impact of various options



Understand

- Benefits and other reward changes
- State specific requirements
- Systems updates:
 - Payroll
 - HRIS
 - Scheduling tools
 - Timekeeping and Reporting



The BIG Questions....

- Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
- Should we adjust the exempt salary level downward to account for overtime or adopt an hourly rate that will minimize additional costs?
- How will we calculate overtime for salaried non-exempt employees?
 - Divide salary by 40
 - Divide salary by actual hours worked
 - Can we use an alternative plan such as a fluctuating work week
- How do we want to handle incentive compensation?
- Do we need to make changes to any benefits to recoup costs?



Analyze

Identify lost dollars:

- Compensation analysis
 - Where organization is placed in the market
- Assess payroll practices
- Assess benefit plans
- Eliminate payroll “leakage”
- Correct misclassification



Assess Scheduling Practices

- Redesign schedules
- Fixed schedules
- Fluctuating work weeks
- Overtime approval



Job-Redesign?

- Conduct job analysis
- Reallocate workloads
- Considerations may include:
 - Work redistribution
 - Headcount reduction



Communication

- Train your managers
- Explain why the change is taking place to alleviate employee's concerns that this is a demotion, changing habits, loss of flexibility
- Pay for every hour worked
- Explain new timekeeping and policy procedures.
 - off-the-clock work, meal and rest break, travel time, mobile device, controlling overtime hours

Plan and Deploy

- Proactive, transparent communication
- Provide information on updated policies, practices, and duties
- Build organizational awareness around what *is* and *is not* the reason for change
- Instruct managers how to manage non-exempt staff
- Inform employees how to operate in new environment

Opportunity?

- Your clients have the same challenge –
 - Can you make this into an opportunity?
 - DOL's video shows how some employers will not want to work that employee overtime when they adjust the salary....
 - Opportunity?
 - DOL's Explanation



*Wage and Hour
Can it be an Opportunity?*



Thank You For Joining Us Today



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