

**The Fair Labor Standards Act:  
Overtime ~ Plan for Big Changes Effective  
December 1, 2016**

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# Final Rule

- March 2014 – President Obama Memo
- July 2015 – Proposed Rule
- May 23, 2016 – Final Rule
  - Increased minimum salary for certain exemptions to \$47,476 effective December 1, 2016
  - Increased HCE to \$134,004
  - Automatic increase every 3 years

# Agenda

- Legal background
- What the new rule changes
- Possible “reprieve?”
- Options for compliance
- What employers should do now
- Implementation issues
- Consequences of violation
- Primary duty details

# Fair Labor Standards Act

Assuming employer coverage and employee status

- Minimum wage (\$7.25/hour)
- Overtime pay (if more than 40 hours are worked in a work week)
  - Time-and-a-half the “regular rate”
- Exemptions from minimum wage and/or overtime in statute and regulations
- Recordkeeping, especially hours worked by nonexempt employees
- Child labor restrictions

# Coverage

- Two types of coverage – no exception for non-profits
- Enterprise – Business purpose *and* threshold of \$500,000 annual “sales made or business done”
  - 2013 Case – No business purpose where non-profit trade association did not compete in the general public with commercial enterprises
  - DOL - Income used by a non-profit for charitable purposes does not count, e.g., membership fees, donations, and dues (except for the portion for which the payer receives more than token value in return)  
[www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf](http://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf)

# Coverage

- Individual - Engaged in interstate commerce or production of goods for interstate commerce
- DOL examples:
  - Making out-of-state phone calls
  - Receiving/sending interstate mail or electronic communications
  - Ordering or receiving goods from an out-of-state supplier
  - Handling credit card transactions or performing the accounting or bookkeeping for such activities

# Coverage

- DOL has said that an employee who on “isolated occasions spends an insubstantial amount of time” will not be considered covered individually
- However, DOL has also indicated that it thinks pretty much everyone is involved in interstate commerce these days
- War story

# Exemptions

“White Collar” Exemptions ~ both minimum wage and overtime

- Executive
- Administrative
- Professional
- Certain computer employees
- Outside sales employees

Funky “good lobbyist” exemptions ~ e.g., evergreen wreath makers

# Common Misconception

“Salaried” = Exempt from Overtime

- Not always true
- “Salary basis” means fixed weekly amount not subject to reduction based on quality or quantity of work
- Deductions may not be made unless the reasons fall within a few permitted categories
- Payment on a “salary basis” alone is not sufficient to establish an exemption

# What are the Tests?

Generally, three tests must be satisfied in order to prove an exemption

1. Primary Duty
2. Manner of compensation – payment on a “salary basis” is usually necessary, and
3. Amount of compensation

There is also a simplified “primary duty” test for “highly compensated employees,” currently those who earn at least \$100,000 annually

# What the New Rule Changes

- [www.dol.gov/whd/overtime/final2016/](http://www.dol.gov/whd/overtime/final2016/)
- More than doubles the “amount of compensation” test
  - Currently = \$455/week (\$23,660 annualized)
  - Effective December 1, 2016 = \$913/week (\$47,476 annualized)
  - Slightly less than the proposed rule indicated
- Basis ~ 40<sup>th</sup> percentile of weekly earnings of full-time salaried workers in the lowest-wage census region, currently the South

# What the New Rule Changes

- Increases the requisite annual compensation for “highly compensated employees” eligible for application of simplified “primary duty” test
  - Currently = \$100,000
  - Effective December 1, 2016 = \$134,004
  - Weekly salary must be at least \$913
  - Balance can be met with commission, bonus, etc.
  - “Catch-up” payment can be made in month 13
- Basis ~ 90<sup>th</sup> percentile of full-time salaried workers nationally

# What the New Rule Changes

- Automatic adjustments to both minimum salary amount and annual compensation for “highly compensated employees”
- Every three years beginning on January 1, 2020
  - Minimum salary amount = 40<sup>th</sup> percentile, lowest area
  - Minimum amount for HCE = 90<sup>th</sup> percentile, nationally
- DOL will publish updated amounts 150 days in advance of effective date

# What the New Rule Changes

- Allows employers to meet up to 10% of minimum salary amount with
  - Nondiscretionary bonuses
  - Incentives
  - Commissions
- \$821.70/week plus \$91.30
- \$1,186.90 over quarter (13 weeks)
- Paid at least quarterly
- Can make up shortfall in first pay period of the next quarter
- If not, must reclassify as nonexempt for the quarter and pay overtime due
- DOL promises more guidance before December 1

# What Remains the Same

- Primary duty tests unchanged
- Applicability to part-time workers (practically, adds only recordkeeping requirements)
- No changes for non-profit employers
- No changes for positions not subject to the minimum salary amount test
  - Teachers in educational institutions
  - Outside salespersons
  - Practicing lawyers and doctors
- No changes to other FLSA exemptions

# Possible “Reprieve?”

- The Overtime Reform and Enhancement Act (OREA)
  - Incrementally phase in the new salary threshold over the next three years; \$35,948 on December 1
  - Eliminate automatic updates to the salary threshold every three years
- The Congressional Review Act
  - Application unclear
  - Depends practically on outcome of November elections

# Options for Compliance

- Increase pay to new minimum of \$913/week
  - Biweekly - \$1,826
  - Semimonthly - \$1,978
  - Monthly - \$3,956
  - Use 10% allowance for nondiscretionary bonuses, commissions or incentives
- Reclassify as non-exempt and pay overtime
- Limit hours worked to 40
- Restructure
- Some combination
- No “comp time” in private sector

# Options for Compliance

- Restructure to minimize additional expense
  - Consolidate exempt work to smaller group of employees whose pay sufficient to remain exempt
  - Remove or reassign duties so that newly nonexempt employees can complete their work in 40 hours or fewer
  - Change schedules
  - Convert to part-time
  - Hire more workers
  - Be mindful of management challenges and employee concerns of fairness or possible unlawful discrimination

# What Employers Should Do Now

- How big is the potential problem?
- Identify employees currently classified as exempt E, A, P who earn less than \$913/week
  - Estimate the amount of time worked greater than 40 hours per week
  - Consider “off-site” and “after hours” work
- Determine if other employees have same or similar job duties
  - Wage compression
  - Employee morale

# What Employers Should Do Now

- Identify employees currently classified as exempt under simplified primary duty test as “highly compensated employees” who earn less than \$134,004 annually
- Audit to ensure any such employees meet the more rigorous primary duty tests for executive, administrative or professional employees
- Consider auditing *all* positions classified as exempt to ensure compliance ~ improper classification is frequently investigated/litigated
- Attorney-client privilege

# Implementation Issues

Reclassify employees as nonexempt

- Set new pay ~ options and considerations
  - Hourly
    - Divide weekly pay by 40 hours?
    - Account for overtime to keep wage expense level?
  - Salary - 29 CFR § 778.113
    - If for period longer than one week, reduce it to work week equivalent
    - How many hours is the weekly salary intended to compensate?
    - Possible to have salary include overtime compensation for a fixed number of hours, but if schedule changes at all, must recalculate

# Implementation Issues

- Set new pay ~ options and considerations, cont'd
  - Fixed salary for fluctuating workweek – *Overnight Transportation Co. v. Missel*, 316 U.S. 572 (1942); 29 CFR § 778.114
    - Hours may vary week to week
    - Clear mutual agreement that salary is compensation for all hours worked, whether few or many
    - Each overtime week, divide salary by hours worked to get “regular rate” for the week; pay half of “regular rate” for overtime worked
    - No deduction from salary in short weeks
    - Must not go below minimum wage for all hours worked

# Implementation Issues

- Compare:
  - \$20/hour, 50 hours = \$1,100
  - \$20 \* 40 hours = \$800 and \$30 \* 10 hours = \$300
  - \$800/week fixed for variable hours, 50 hours = \$880
  - \$800/50 = \$16 “regular rate”
  - \$16 divided in half = \$8 \* 10 hours = \$80

$$\frac{\text{Weekly Salary}}{\text{Total Hours Worked}} \times \frac{\text{Total Hours worked} - 40}{2}$$

# Implementation Issues

- Caveats to fluctuating workweek method of calculating overtime
  - DOL in 2011 preamble took the position that hours must actually fluctuate
  - DOL also took the position in 2011 that payment of bonuses or other premiums is incompatible with the method
  - Hybrid examples in 2016 DOL guidance documents
  - Courts have disagreed with DOL's 2011 bonus commentary
  - Legal advice should be obtained to ensure the method is appropriate for a particular employer

# Implementation Issues

- Account for any additional payments that need to be included in the “regular rate”
  - Statutory exclusions 29 U.S.C. § 207(e)
  - Interpretive guidance 29 CFR Part 778, Subparts B and C
- Ensure all hours worked are recorded and properly compensated
  - 29 CFR Part 785
  - On-call, travel time, remote work, rest and meal time policies should be reviewed
  - War story

# Implementation Issues

- Update job descriptions for accuracy and compliance
- Identify benefits that hinge on FLSA classification (time off, training, professional development, etc.) and determine if changes are needed
- Evaluate appropriateness of existing methods of reporting time worked to new populations

# Implementation Issues

- Identify training needs for managers unaccustomed to managing nonexempt workers and newly nonexempt employees unaccustomed to reporting time worked
- Develop a plan for communicating changes with sensitivity to perceived lowered status of reclassified workers and perceived unfairly increased workload for exempt employees
- Where is the \$\$\$\$ going to come from????

# Consequences of Violation

- Liability for unpaid overtime and/or minimum wages within the limitations period
  - Two years
  - Three years if violation is “willful”
- Liability for “liquidated damages” equal to above amount (essentially double damages); new DOL enforcement policy
- “Good faith” and “reasonable grounds” can result in reduction or elimination of “liquidated damages”
- Reasonable attorney’s fees, and costs

# Primary Duty Details

The principal, main, major or most important duty that the employee performs

Executive

Administrative

Professional

Computer

Outside Sales

# Executive Primary Duty

- Managing the enterprise or a customarily recognized department or subdivision
- Customarily and regularly directing the work of at least 2 full-time employees or the equivalent
- Have the authority to hire or fire or recommendations are given particular weight

# Administrative Primary Duty

- Performance of office or non-manual work directly related to management or general business operations, e.g.,
  - Tax, finance, accounting, auditing, budgeting, insurance, marketing, advertising, human resources, public and governmental relations, legal and regulatory compliance, computer network, internet and database administration
  - Not production workers

# Administrative Primary Duty, continued

- Exercise of discretion and independent judgment with respect to matters of significance
  - Consideration of possibilities and choice or action free from immediate direction or supervision
  - High level of importance or significance, not just risk of loss
  - Not skill in application of standards

# Administrative Exemption Examples

- Insurance claims adjusters
- Certain financial services industry workers (not if primarily selling)
- Team leader on major projects (purchasing or selling a business, negotiating real estate purchase)
- HR managers
- Some systems analysts and computer programmers

# Professional Primary Duty

## Learned Professional

- Performance of work requiring advanced knowledge in a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction
- Consistent exercise of discretion and judgment

# Professional Primary Duty

## Creative Professional

- Performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
- Not routine mental, manual, mechanical or physical work
- Fields such as music, writing, acting, and the graphic arts

# Professional Exemption Examples

- Commonly exempt professionals
  - Lawyers, teachers, accountants, pharmacists, engineers, actuaries, certified athletic trainers, chemists, chefs, etc.
- Not exempt
  - Licensed practical nurses, bookkeepers, cooks, paralegals, engineering technicians

# Exempt Computer Primary Duty

- The application of systems analysis techniques and procedures, including consultation with users, to determine hardware, software or system functional specifications

# Exempt Computer Primary Duty, continued

- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications,

## Exempt Computer Primary Duty, continued

- The design, documentation, testing, creation or modification of computer programs related to machine operating systems
- A combination of the above which requires the same level of skills
- Not repair, help-desk, or CAD workers

# Outside Sales Primary Duty

- Making sales / obtaining orders or contracts for services or facilities
- Customarily and regularly engaged away from the employer's place of business in performing the primary duty
  - not sales made by mail, telephone or the internet unless merely an adjunct to personal calls

# The Fine Print

This presentation is not intended to serve as a substitute for legal advice. For advice specific to a given situation, please consult with an attorney.