

**The Fair Labor Standards Act:
Overtime ~ Plan for Big Changes Effective
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Agenda

- Legal background
- What the new rule changes
- What remains the same
- Possible “reprieve?”
- What employers should do now
- Options for compliance
- Implementation issues

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

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

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)
- “Good faith” and “reasonable grounds” can result in reduction or elimination of “liquidated damages”
- Reasonable attorney’s fees, and costs

Common Misconception

“Salaried” = Exempt from Overtime

- Not always true
- Payment on a “salary basis” alone is not sufficient to establish an exemption
- “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

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

The New Rule

- On May 23, 2016 the U.S. Department of Labor published a final rule affecting the exemptions
 - Executive
 - Administrative
 - Professional
- Proposed rule was published on July 6, 2015
 - Focus on updating the minimum salary requirement which had been in place since 2004
 - Goal of establishing a mechanism for automatic updates
 - Suggested possible changes to “primary duty” tests

What the New Rule Changes

- Approximately 4.2 million employees who are currently properly classified as exempt will be entitled to overtime beginning on December 1, 2016
- The DOL estimates that an extra \$1.2 billion will go into workers' pockets

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What the New Rule Changes

- 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 ~ 40th 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 ~ 90th 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 = 40th percentile, lowest area
 - Minimum amount for HCE = 90th 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 wks)
- 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

What Remains the Same

- Primary duties test
- 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
 - Outside salespersons
 - Practicing lawyers and doctors
- 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

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
- Change in DOL enforcement position regarding liquidated damages

Options for Compliance

Make changes to retain exempt status

- Increase pay to new minimum of \$913/week
 - Biweekly - \$1,826
 - Semimonthly - \$1,978
 - Monthly - \$3,956
- If sufficient quarterly nondiscretionary bonuses, commissions or incentives (at least \$1,186.90), increase weekly salary to \$821.70
 - Monitor carefully ~ require timekeeping?
 - Make timely “catch up” payment if necessary
 - If not, pay overtime ~ practical problems

Options for Compliance

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?

Options for Compliance

- 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

Options for Compliance

- 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

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

Options for Compliance

- 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 that payment of bonuses or other premiums is incompatible with the method
 - Courts have disagreed with DOL, but legal advice should be obtained to ensure the method is appropriate for a particular employer

Options for Compliance

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

Options for Compliance

- Any other options?
 - 8 and 80 for hospitals and residential care facilities; 29 U.S.C. § 207(j); 29 CFR § 778.69
 - Alternate “work period” up to 28 days with slightly higher overtime thresholds for certain public employees engaged in fire protection or law enforcement if not preempted by Texas law; 29 U.S.C. § 207(k); 29 CFR § 553, Subpart C

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

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