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New Fair Labor Standards Act Overtime Rules: What You Need to Know Now

Clint Robison

Los Angeles

Laura Corvo

Newark

Fielding Douthat

Richmond

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- Your opinion is important – we have a small list of training topics in a quick survey at the end of the event if you would offer your valuable insights for future training ops.

Today's Presenters



Fielding Douthat
Richmond, VA



Clint Robison
Los Angeles, CA



Laura Corvo
Newark, NJ

Learning Objectives

- Overview of the new rule
 - What has changed?
 - What has not changed?
- Impact and Implementation of the new rule
- Transition Issues
 - Communicating with Impacted Employees

Laws/Regulations Covered



1. Fair Labor Standards Act
2. 29 U.S.C. 201, et seq.; 29 C.F.R. Part 541

Current Overtime Rule

- Non-exempt employees paid hourly and receive overtime
- Exempt employees paid a salary and perform certain duties
 - Salary of at least \$455 per week (\$23,660/yr)
 - Must be a bona fide
 - Executive
 - Administrative or
 - Professional employee
- Highly compensated employees
 - Receive \$100,000 annually, which includes a \$455/week salary.
 - Primary duty includes office or non-manual work; and
 - Customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

The New Overtime Rule - Changes

- **Effective December 1, 2016:**
 - Minimum salary increases from \$23,660/year to \$47,476/year
 - Nondiscretionary bonuses, incentive payments and commissions may be counted toward as much as 10% of threshold
 - Payments must be paid on a quarterly or more frequent basis
 - If by the last pay period of the quarter, the sum of salary and additional compensation does not equal 13 times the weekly salary, employer may pay the difference no later than the next pay period after the end of the quarter
 - Highly Compensated Employee exemption increases the annual salary amount from \$100,000 to \$134,000, which includes a weekly salary of \$913/week.
 - Automatic salary updates every three years



What Has **Not** Changed – Duties

- Duties Test - Regardless of salary amount, Employees still must qualify under the executive, administrative or professional exemptions.
 - Executive Exemption
 - Primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
 - Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and have the authority to hire or fire (or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight)
 - Administrative Exemption
 - Primary duty must be performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
 - includes the exercise of discretion and independent judgment with respect to matters of significance.

What Has **Not** Changed - Duties

- Duties Test - Regardless of salary amount, Employees still must qualify under the executive, administrative or professional exemptions to be exempt from overtime.
 - Professional Exemptions
 - Learned Professional - Primary duty must be performance of work requiring advanced knowledge (science or learning obtained by prolonged course of study), which is predominantly intellectual in character and requires consistent exercise of discretion and judgment
 - Creative Professional - Primary duty must be performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
- Look at Actual Job Duties and not Job Titles



What Has **Not** Changed – Improper Deductions

- Improper deductions still can destroy the exemption for:
 - the individual employee, and
 - all employees in same position who are subject to similar deductions
- Improper deductions include:
 - Partial day absence (excluding first or final week and unpaid under FMLA),
 - inclement weather, and
 - furlough for less than one-week

What Has **Not** Changed – Cost of Noncompliance

- Penalties for noncompliance remain the same.
 - Regulatory Penalties
 - Private Lawsuits



Impact: According to the DOL

- The Department of Labor anticipates the following impacts:
 - The rule will directly impact 4.2 million salaried employees by either increasing their salary or making them eligible for overtime.
 - The rule will indirectly impact 8.9 million salaried employees who are improperly classified as exempt because their duties do not meet the executive, administrative or professional exemptions

Impact: Who's Affected ?

- More than half are women – 56 % – 2.4 million
- More than half – 53 % – of affected workers will have at least a four-year college degree.
- More than 3 in 5 (61%) will be age 35 or older.
- About 1.5 million are parents of children under 18.



Impact: All States Affected

- Raising the threshold will affect workers in all states.
- Largest effects—in terms of states with the greatest share of salaried workers
 - West Virginia (30.7 percent)
 - Arkansas (30.6 percent)
 - South Carolina (30.3 percent)
 - Florida (29.3 percent),
 - Georgia (28.2 percent)

Impact: California and New York

- Overtime salary thresholds higher than the present federal threshold.
- Salaried workers there with incomes greater than \$455 per week but less than the state thresholds are already technically covered.
- But simply raising salary to meet the new Federal will not be enough to satisfy California's exemption requirements in the future.



Impact: Sectors

- Retail
 - May not pass along labor costs to customers but may instead make significant adjustments to the structure of their workforce.
- Restaurants and hospitality
 - National Retail Federation report, estimates the new regulations will affect more than 2 million retail and restaurant employees.
- Educational institutions will likely be affected
 - researchers in the sciences (and some in the humanities)
 - Non-academic administrative workers
 - Employees whose duties are not unique to education



Impact: Illustration

- Varying degree of impact based on the demographics and pay scales of the organization
- Example: An organization with 25,000 employees of which 5,000 are currently exempt
 - Of the current exempt population, 10% (500 employees) impacted
 - \$4.6m in potential new payroll costs if all converted to non-exempt.

Assumes: Overtime of 5 hours worked per week and one holiday worked per year

Risk: Litigation – 2015 Record

- 8,781 FLSA cases filed in 2015, up nearly 8%. 
- Since 2000, the number of wage and hour filings in federal court has increased by more than 450%.
- Wage and hour lawsuits represent the largest category of employment-related class-action filings.

Risk: Litigation Decisions

- FLSA overtime claims may be pursued even where federal contract incorporates laws with no private right of action. [Amaya v. Power Design, Inc.](#)
- Eleventh and Sixth Circuits - private FLSA settlements are unenforceable absent DOL supervision or court approval.
- Recent NLRB rulings have broadened the category of who may be a joint employer.

Risk: WHD Enforcement

23% INCREASE

in **agency-initiated investigations** from FY-2009 to FY-2014

20% INCREASE

in establishments **found in violation** from FY-2009 to FY-2014

78%

violation rate in **agency-initiated investigations** in Fiscal Year 2014

350 more investigators from 2009 to 2011

Risk: Non-Compliance Penalties

- The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.
- Employers may be assessed civil money penalties of up to \$1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law.



Risk: Social Media Zip Line

- Social media has created a rapid avenue for information transmission, including legal information.
- Heightened awareness in the work forces about wage and hour issues.
- Class plaintiffs can use social media to notify potential members about their lawsuit. *Mark v. Gawker Media LLC* (S.D.N.Y.)

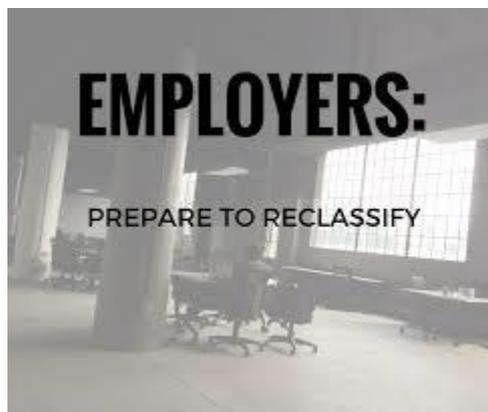


Think About: Effective Date

- December 1, 2016 - effective date
- January 1, 2020 - start indexing the new salary threshold every three years
- A large number of businesses budget and operate on a calendar year; January 1, 2017 marks the start of new quarter

Think About: Regular Rate Calculations

- Reclassification of workers will trigger more bonus calculation complexities
 - If a non-exempt employee is paid a non-discretionary bonus, that bonus must be layered into the corresponding pay period and included in the “regular rate” (hourly rate) in order to determine the rate for overtime.



Think About: Benefit Plans

- A plan's definition of compensation may include overtime pay without specifically referring to it.
- Determine now whether projected increases in overtime wages could affect their plans' ability to continue to meet nondiscrimination requirements.
- Reclassification of employees in response to the new rule may have plan implications.



Workplace: Part-Time Workers

- Companies have modeled use of more part-time workers in newly nonexempt positions.
- Companies have modeled different levels of management and compensation based on the volume of sales at the different stores.
- This would also enable the company to better account for geographic differences in pay.

Workplace: Middle Management

- Study indicates middle management may be pushed toward non-exempt (hourly) classification.
 - The loss of exempt 'perks'.
 - Potential morale issues; time-clock mandate.
- What will the promotion track for managers look like after the changes?



Is More Coming?

DOL solicited comments on the current duties test, though it made no changes there.

The DOL has announced that it will publish a request for information seeking stakeholder input on the use of electronic devices by overtime-protected (i.e., nonexempt) employees outside of scheduled work hours.

But Wait...
**THERE'S
MORE!**

DEVELOPING A PLAN FOR COMPLIANCE



Developing a Plan for Compliance

- Identify the positions that will be effected by the new regulations
 - Exempt employees making less than \$913 per week
- Audit the classification of each position
 - Is the position truly exempt under the “duties” tests for executive, administrative and professional exemptions ?
- Crunch the numbers to minimize the impact on your bottom line



Option 1: Raise Employees Salaries

Scenario: Luke earns \$850 per week.
Luke typically works between 45 and 50 hours per week.

Solution: Raise Luke's salary to \$913 per week.



Raise Employee Salaries

Pros

- No overtime costs
- Improve employee morale and retention



Cons

- Costly as...
 - New Regs more than double the salary threshold
 - Automatic increases to salary threshold every 3 years
 - Raises may not end with Luke
- Still run the risk of misclassification based on duties



Option 2: Convert Employee to Hourly

Take Weekly Salary and Divide It By 40 Hours Per Week

Scenario. Leia earns \$600 per week and is currently classified as exempt. Leia works overtime on occasion, but not on a regular basis.

Solution. Pay Leia \$15 per hour for 40 hours a week.



Convert Employee to Hourly

Take Weekly Salary and Divide It By 40 Hours Per Week

Pros

- No risk of misclassification
- Employee pay remains consistent (for the most part)



Cons

- Absorb the cost of any overtime worked by employee
(\$15 x 1.5 = 22.50 per hour of overtime)
- Limits employee flexibility



Option 3: Convert Employee to an Hourly Rate of Pay That Factors In Overtime

Scenario. Han earns \$831.25 per week and is currently classified as exempt. Han typically works 45 hours per week.

Solution. Pay Han \$17.50 an hour ($(\$17.50 \times 40 \text{ regular hours} = \$700 \text{ per week for regular pay}) + (\$26.25 \times 5 \text{ overtime hours} = \$131.25) = \$831.25 \text{ total wages}$)



Convert Employee to an Hourly Rate of Pay That Factors In Overtime

Pros

- No risk of misclassification
- Limit cost of overtime



Cons

- Employee morale and retention
- Minimum wage issues



Option 4: Stagger Shifts

Scenario:- The Star Wars Cantina's assistant manager, Anakin, typically works 50 hours per week and earns less than \$750 per week.

Solution 1. Hire 2 assistant managers to each work 25 hours per week.

Solution 2. Require the exempt manager who earns more than \$1,000 per week to absorb the 10 hours of overtime currently performed by the assistant manager.



Stagger Shifts

Pros

- No overtime costs



Cons

- Employee morale and retention issues
- Additional costs of employing more employees (e.g. training, health care and other employee benefits)



Option 5: Budget Bonuses, Commissions and Other Incentives

Scenario. Lando, a project manager for Death Star construction, earns \$850 per week or \$11,050 per quarter. At the end of each year for the past 5 years, Death Star pays Lando a discretionary holiday bonus of \$4,000.

Solution. Change Lando's discretionary bonus to a non-discretionary bonus and pay that bonus on a quarterly basis so that Lando receives a bonus payment of \$1000 each quarter.



Budget Bonuses, Commissions and Other Incentives

Pros

- Maintain exempt status
- Eliminate overtime cost



Cons

- Limit employer flexibility
 - Bonus is non-discretionary
 - Bonus must be paid quarterly instead of at the end of the year



Option 6: Eliminate Waste and Reduce Hours

Scenario. Obi-Wan typically works 45 hours a week. He arrives each morning at 8 a.m., leaves at 6 p.m. and takes 1 hour for lunch. Each morning, before beginning work, Obi-Wan makes himself breakfast, drinks 2 cups of coffee and updates his fellow employees with a detailed recap of the previous night's episode of his favorite reality show.

Solution. Eliminate the waste in Obi-Wan's day and require Obi-Wan to work from 8 a.m. to 5 p.m.



Eliminate Waste and Reduce Overtime

Pros

- Limits the cost of overtime



Cons

- Requires significant oversight by management
- Employee morale and retention



WHAT POLICIES SHOULD YOU UPDATE AS A RESULT OF THE NEW RULES?

RULES:

- 1.
- 2.
- 3.

Overtime Policies



■ *Do*

- Prohibit employees from working overtime without management approval
- Discipline employees who violate the policy

■ *Do Not*

- Allow employees to volunteer for extra hours for no extra pay
- Have employees sign a waiver that they agree not to be paid for overtime
- Fail to pay an employee who works unauthorized overtime



Time Reporting Procedures

- Employer responsibility to maintain accurate records
- Develop a procedure for tracking time
 - Self report/time sheets
 - Clock in/out
 - Log in tracking
- Confirm you are not making improper deductions for employees who remain exempt
- Off clock issues
 - Training, travel, delays in clocking in

Communicating the Plan

- Explain the changes to employees status and when they will take effect.
- Comply with state law notice requirements
- Blame it on Uncle Sam...
 - Communicate to employees that the changes are being made to comply with a **new** government rule
 - Emphasize that the employee's value to the company has not changed even though their classification has changed
- Provide Training (supervisors and employees)





Questions?



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Thank you for attending. To contact us:

Fielding Douthat

fielding.douthat@leclairryan.com

Clint Robison

clint.robison@leclairryan.com

Laura Corvo

laura.corvo@leclairryan.com

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