THE WAIT IS OVER —

NEW PROPOSED FLSA REGULATIONS WILL SIGNIFICANTLY IMPACT EMPLOYERS

E. JASON TREMBLAY
ARNSTEIN & LEHR LLP
AGENDA

I. Introduction to the FLSA
II. What Does the FLSA Require?
III. Who Is Exempt From Overtime?
IV. New FLSA Regulations
V. Hot FLSA Topics
VI. Take Away Strategies & Tips
VII. Responding to a DOL Audit
I. INTRODUCTION TO THE FLSA
Enacted in 1938, the FLSA established minimum wage and overtime standards.

Department of Labor’s Wage & Hour Division was created to enforce the FLSA.

Largely unchanged since 1938.
All employers that engage in interstate commerce or in the production of goods for interstate commerce.

Only employers who are exempt are those small businesses not engaged in interstate commerce and who have an annual gross revenue under $500,000.
Payout is extremely large.
Frequently asserted as collective and class actions.
Attorney’s fees are available.
Some of the regular burdens of proof are shifted to the employer – almost strict liability.
Individual liability statute.
FLSA is now the most popular employment collective action.

Record # of FLSA suits filed in 2014.

DOL estimates that 80% of employers are out of FLSA compliance.

One of the states with the largest growth in wage and hour litigation is Illinois.
II. WHAT DOES THE FLSA REQUIRE?
1. Exempt or non-exempt?
2. Accurately and fairly capture and record the hours worked by non-exempt employees.
3. Pay at least minimum wage for the first 40 hours of work during a work week.

Federal Minimum Wage = $7.25
Illinois Minimum Wage = $8.25
Chicago Minimum Wage = $10.00
4. Pay at least 1.5 a non-exempt employee’s regular rate of pay for hours worked in excess of 40 hours per work week.
5. Regulates the minimum wage and work hours for minors.
III. WHO IS EXEMPT FROM OVERTIME?
Must be paid a salary of at least $455/week (approximately $23,700 per year). ***

Must fall into recognized exemption.

*** This salary threshold is being updated.
MOST COMMON FLSA OVERTIME EXEMPTIONS

- Executive
- Administrative
- Learned Professional
- Computer Professional
- Outside Sales
- Specific Job Exemptions
1. Paid on “salary” basis of at least $455/week.

2. Primary duty must be management.
   - interviewing, selecting and training of employees, setting and adjusting their rates of pay and work hours, appraising work productivity and disciplining employees, etc.

3. Must have 2 full-time direct report employees.

4. Must have authority to hire, fire and promote.

Reference: WHD’s Fact Sheet #17B
1. Same “salary basis” weekly pay threshold.

2. Primary duty must be to perform office or non-manual work directly related to the management or business operations.

3. Use discretion and independent judgment regarding matters of significance.

*Examples*: labor relations/HR, finance directors, public relations, legal officers, insurance claims representative, etc.

Reference: WHD’s Fact Sheet #17C
1. Same “salary basis” weekly pay threshold.

2. Employee’s work requires higher education to perform the job and must have academic training or degree.

Examples: RNs, doctors, attorneys, accountants, engineers, etc.

Reference: WHD’s Fact Sheet #17D
(CREATIVE PROFESSIONAL EXEMPTION)

1. Same “salary basis” weekly pay threshold.

2. Employee’s work requires invention, imagination, originality, or talent in a recognized artistic or creative profession.

Examples: actors, musicians, composers, soloist, certain painters, writers, cartoonists, novelists, etc.

Reference: WHD’s Fact Sheet #17D
1. Must be paid on “salary basis” (or hourly rate of $27.63/hour).

2. Must be a systems analyst, programmer, engineer or skilled worker whose primary duties consist of:
   - using systems analysis techniques and procedures to determine hardware, software or system functional specifications;
   - designing, developing, documenting, analyzing, creating, testing or modifying computer systems or programs based on user or system design specifications;
   - designing, documenting, testing, creating or modifying computer programs related to machine operating systems; or
   - combination of these duties.
General Rule of Thumb: The employee must be writing code versus repairing hardware or troubleshooting.
1. No salary threshold.

2. Primary duty is “making sales” or obtaining orders.

3. Customarily engaged away from employer’s place of business.

Note: Any fixed site, whether home or office, used as “headquarters” is considered one of the employer’s place of business.
1. Manual laborers such as plumbers, mechanics, carpenters.
2. Fire fighters, police and other first responders.
3. Those paid hourly – not receiving a salary.
4. Those receiving a salary below $455/week.
IV. NEW PROPOSED FLSA REGULATIONS
Primarily impacts the “white collar” exemptions.

Estimated that 5-10 million workers who were previously exempt will now be non-exempt and entitled to overtime.
INCREASE IN SALARY THRESHOLD

- Sets salary threshold for exempt employees at $921/week ($47,892/year).
- Equates to 40th percentile of weekly earnings for full-time salaried employees (2013).
- DOL believes that such percentile represents the most appropriate line of demarcation between exempt and non-exempt employees.
Note: Final rule could increase salary threshold to $970/week ($50,440/year).

Equates to 40th percentile of weekly earnings (2016 estimate).
For first time ever, the salary test will automatically update annually to ensure the threshold remains meaningful.

Left unchanged, the salary threshold becomes stale/outdated due to inflation.

The proposals: 1. Peg the threshold at 40th and 90th percentile every year 2. Adjust threshold based on inflation as measured by the CPI-U.

DOL is seeking comment on what makes sense.
The duties test associated with the “white collar” exemptions remain untouched and unaffected.

DOL seeking comments on whether standard duties tests are working.
DOL also proposes changes to the highly compensated employee (HCE) exemption.

Currently, the salary threshold for HCE is $100,000.

Proposed to raise it to $122,148 (90th percentile).
DOL is also seeking comment on whether nondiscretionary bonuses (such as production bonuses) should be able to be used to satisfy a portion of the salary test requirement.
Comment period lasts 60 days from when proposed rules were published and then the DOL will issue final rules.

Last time FLSA regulations were issued (2003), it took nearly 13 months from beginning to end to issue final regulations.
V. HOT FLSA TOPICS
Improper Deductions From Exempt Salary.

– very limited situations where you can dock an exempt employee’s salary.

– absence for full day or more for personal reasons other than illness or disability.

– violation of major safety rule.

– absence for full day or more for sickness in accordance with bona fide plan, policy or practice.
Problems With After Hours Work.

- “work suffered or permitted to be performed is work time.”

- be careful when issuing non-exempt employees Blackberry or smartphones.

- “catching up” on emails at home can be compensable.
Interns – Employees or Not?

- In March 2015, Viacom agreed to pay $7.2M to resolve minimum wage claims brought by two former interns on behalf of 12,500 member class.

- In December 2014, Condé Nast settled for $5.8M with former interns.

- In 2014, NBC Universal settled for $6.4M with former SNL & MSNBC interns.
DOL SIX FACTOR INTERN TEST

*Must meet all factors.

1. Internship, even though it includes actual operation of employer’s facility, is similar to training given in educational environment.

2. Internship is for benefit of the intern.

3. Intern does not displace regular employees, but works under close supervision.
DOL SIX FACTOR INTERN TEST\(^1\)

4. Employer provides training and derives no immediate advantage from the activities of intern – occasionally, operations may be impeded.

5. Intern is not necessarily entitled to a job following internship.

6. Employer and intern understand that intern is not entitled to wages.

\(^1\) DOL Fact Sheet #71 (April 2010)
On July 2, 2015, the Second Circuit Court of Appeals rejected the DOL test and issued a new test hinging on whether the employer or the intern is the “primary beneficiary” of the internship.

Came about due to acceptance of interlocutory appeal of Glatt v. Fox Searchlight Pictures and Wang v. Hearst Corporation.
NON-EXHAUSTIVE LIST OF FACTORS

1. Extent to which intern and employee clearly understand there is no expectation of compensation (compensation = employee).

2. Extent to which internship provides training similar to that in an educational environment, including clinical training.
3. Extent to which internship is tied to formal education program.

4. Extent to which internship is tied to the intern’s formal academic commitment by corresponding to academic calendar.
NON-EXHAUSTIVE LIST OF FACTORS

5. Extent to which internship’s duration is limited to the period in which internship provides the intern with beneficial learning.

6. Extent to which the intern’s work complements, rather than displaces the work of paid employees.

7. Extent to which the parties understand that there is no entitlement to a job.
VI. TAKE AWAY STRATEGIES & TIPS
- Know and pay minimum wage.
- Pay overtime rate, if applicable.
- Double check your exempt vs. non-exempt classifications.
- Do not rely on titles for classification.
- Duties, not titles, matter.
- Ensure time and pay records are properly kept.
- Be careful about independent contractors.
- Know proper deductions for exempt employees.
- Ensure you follow state wage and hour laws.
- Implement FLSA Safe Harbor policies and procedures.
  - prohibit improper deductions, off the clock work and complaint procedures.
- Require employees to certify that they have been accurately paid.
- Require employees to obtain approval before working overtime.
- Control “after hours” work by non-exempt employees.
- If Ever In Doubt, Treat Employee as Non-Exempt (and call your attorney).
VII. RESPONDING TO A DOL AUDIT
- Wage and hour audit can occur at any time, with or without notice.
- Usually triggered by employee complaint but there is also targeted enforcement initiatives.
- Necessary to “preplan” for audit.
(PRE-AUDIT PREPARATION)

- Self-audit job descriptions, payroll records, labor law posters, etc.
- Ensure managers are familiar with key concepts of wage and hour law.
- Establish a response team (include your attorney).
Clarify scope of the investigation/audit.

Ensure a designated representative is available during investigation.

Verify credentials of DOL investigator.

If DOL shows up unannounced, then ask to come back in 72 hours (exception is if investigator has subpoena).

Always be courteous and respectful.
(OPENING CONFERENCE)

- Clarify scope of investigation.
- Request that all document/information requests be in writing.
- Discuss who investigator would like to interview.
(DOCUMENT PRODUCTION)

- Never produce originals – make copies and bates label.
- Maintain duplicates of what is produced.
- Only produce what is requested.
- Be wary of confidential information on documents.
Ensure DOL investigator is escorted.

DOL not allowed to disrupt normal business operations.

Track who investigator asks to interview.

Take notes of what is being done.

Be courteous.
DOL has right to privately interview non-management employees.
DOL has right to record interview and/or ask for witness statements.
Company can be present for management employee interviews.
Prepare employees for interviews. Be careful.
Employee has right to copy of any statement given.
Investigator will outline violations found and post audit rights.

Take detailed notes and identify any errors/corrections.

Request time to submit supplemental information, if prudent.

Explore appeal options with your attorney.
THANK YOU

E. Jason Tremblay
Arnstein & Lehr LLP
120 S. Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-6676
ejtremlay@arnstein.com
www.arnstein.com