DOL Proposed Overtime Regulations:
The specifics and how to prepare your business

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Program Agenda

• Summary of Changes
• Timeline
• Overview: The Fair Labor Standards Act
• Overview: The Current White Collar Exemptions
• Proposed Changes to the Regulations
• Information about Timing
• Practical Steps for Planning
• Questions
Summary of Changes

• U.S. Department of Labor is proposing to increase the minimum weekly salary level for employees to be exempt from FLSA overtime under the Executive, Administrative, (some) Professional, Highly Compensated Employees, and Computer-Related Occupations (“White Collar”) exemptions.

• The new minimums would update each year.
Summary of Changes

• DOL is soliciting comments on whether to change the salary level test and aspects of the duties components of these exemptions, but not whether to change the salary basis test itself.
Timeline

• 2004: Overtime exemptions last revised
• March 2014: President Obama directs update
• July 6, 2015: Proposed Rule published
• September 4, 2015: Comment period ends
• Mid-2016?: Final Rule expected to be published
• Later 2016?: Final Rule to be effective
Overview: Fair Labor Standards Act

- FLSA enacted in 1938

- Most employers subject to FLSA
  - $500,000 min./year

- Minimum Wage
  - Currently $7.25
  - Exemptions

- Overtime
  - 1.5 times the regular rate for hours over 40 per week
  - Exemptions

- Equal Pay Act
  - No pay discrimination on the basis of sex
Overview: Fair Labor Standards Act

- Remedies: Liquidated Damages, attorneys fees
- Statute of Limitations: 2 years, 3 if willful
- Collective actions
- Retaliation protection
- No administrative prerequisites to filing a lawsuit
Don’t Forget State or Local Law

• State and Local Law may also apply
  – Whichever law provides greatest benefit applies
FLSA Overtime Exemptions

- Overtime Exemptions:
  - Many FLSA exemptions apply either for both minimum wage and overtime or for overtime only.
  - “White Collar” exemptions:
    - Bona fide executive, administrative, professional, outside sales employees
    - DOL authorized to interpret
FLSA Overtime Exemptions

- Overtime Exemptions:
  - Additional: certain computer-related occupations
  - Highly compensated employee performing white collar duties (2004 Regulation)
White Collar Exemptions

- **Duties** tests for each exemption – no changes (yet)

- **Salary Basis Test** – no changes

- **Salary Level Test** – significant changes in proposed rule
Duties Tests: Overtime Exemptions

• Executive:

  – The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

  – The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

  – The employee must have the authority to hire or fire, or the employee’s suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status must be given particular weight.
Duties Tests: Overtime Exemptions

- **Administrative:**
  - The employee’s primary duty must be the 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
  - The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
Duties Tests: Overtime Exemptions

• **Learned Professional:**
  
  – The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

  – The advanced knowledge must be in a field of science or learning; and

  – The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
Duties Tests: Overtime Exemptions

• Creative Professional:

  – The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
Duties Tests: Overtime Exemptions

• Computer Employee:
  – Computer systems analyst, computer programmer, software engineer or other similarly skilled worker; &
  – The employee’s primary duty must consist of:
    • The application of systems analysis techniques and procedures, including consulting with users, *to determine hardware, software or system functional specifications*, or
Duties Tests: Overtime Exemptions

• Computer Employee:
  – Computer systems analyst, computer programmer, software engineer or other similarly skilled worker; &
  – The employee’s primary duty must consist of:
    • 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; or
Duties Tests: Overtime Exemptions

• **Computer Employee:**
  
  – Computer systems analyst, computer programmer, software engineer or other similarly skilled worker; &
  
  – The employee’s primary duty must consist of:
    • The design, documentation, testing, creation or modification of computer programs related to *machine operating systems*, or
    • A combination of duties, requiring the same level of skills.
No Changes: Salary Basis Test

• Exempt workers are paid their full salary for any week in which they perform work, regardless of the amount of work they perform.
  
  – Only very limited deductions are permitted, such as absences for personal reasons of more than a full day.
  
  – Improper deductions jeopardize the exempt status.
  
  – Employers must have a policy with complaint mechanism for improper deductions.
Changes: Salary Level

- Dramatic increase in the current minimum weekly salary
  - $455/week ($23,660 annually)
    - For exempt Executives, Administrators, and some Professionals
  - Pegged to BLS 40th percentile for salaried workers
  - Amount to change annually
  - Examples:
    - 2013 (proposed rule): $921/week ($47,892)
    - 2015 Q1: $951/week ($49,452)
    - 2016 (estimate for Final Rule): $970/week ($50,440)
  - Alternative method: CPI Urban
Changes: Salary Level

• Highly Compensated Employees
  – Perform some exempt duties but might not comply with all the duties requirements
  – Current minimum of $100,000 total annual compensation
  – Proposal: Peg to BLS 90th percentile
    • Example: 2013: $122,148
    • The weekly amount must still be at least the new weekly amount
Changes: Salary Level

• Computer-Related Occupations
  – Current: $27.63 per hour or $455 weekly
  – Proposal: $27.63 per hour or [new weekly salary]
Changes: Salary Amount

• White Collar exemptions not affected
  – Exemptions that do not use the weekly salary level test:
    • Professionals such as teachers, doctors, lawyers
    • Outside sales
Changes: Salary Level

• What to include in the Salary Amount?
  – Non-discretionary bonuses
  – Incentive payments
  – Commission payments
Comments Requested: Duties

• Should the Duties tests be changed?

• “Primary” duty: Adopt a “bright line” time percentage rule
  – 50%

• Should the pre-2004 short test/long test be brought back?

• Should the Executive exemption concurrent duties (non-primary) be retained?
Notice and Comments

• September 4, 2015 Deadline

• [www.regulations.gov](http://www.regulations.gov)

• Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

• Regulatory Information Number (RIN) 1235-AA11
Uncertainty

• Which salary level adjustment method will be used: BLS or CPI-U?

• Can the Duties tests be changed without first identifying the new proposed rule?

• Will Congress delay the effective date for 60 days via the Congressional Review Act?
Is There Anything Else to Know?

- July 15, 2015: DOL Wage Hour Division Administrator’s Interpretation about the FLSA “suffer or permit” standard as applied to misclassification of employees as contractors


\[ E \neq IC \]

Employees ≠ Independent Contractors
Additional Resources

- U.S. DOL Wage Hour Division Website:
  - Notice of Proposed Rulemaking
  - Overtime Resources
  - Fact Sheet: Middle Class Economics Rewarding Hard Work by Restoring Overtime Pay
  - A Hard Day's Work Deserves a Fair Day's Pay (Huffington Post)
  - Frequently Asked Questions
  - Fact Sheet on Proposed Rule
  - Blog Post: 5 Million Reasons Why We’re Updating Overtime Protections
The Sky is Falling!!
Well, Only for Some

- Often Proposed Regulations get changed, but given DOL’s focus and the politics, there will be changes.
  - Timing
    - Likely not effective until mid-2016 as DOL plans to “rely on data from the first quarter of 2016” in setting the salary level.

- Doesn’t affect non-exempt employees.

- Doesn’t affect certain FLSA exemptions that don’t include a salary requirement.
  - E.g., outside sales, teaching professionals, attorneys, doctors, and those that meet the computer-employee exemption (who are paid at least $27.63 per hour).
OK, the Sky IS Falling for Many

- WHD estimated that approximately 11 million workers will no longer qualify as exempt.
  - Others estimate that number to be closer to 15 million.

- Hardest hit industries - Health services, wholesale/retail, and hospitality.

- Hardest hit jobs - Store managers and middle management

- Hardest hit regions - South and rural areas
So What is the Salary Benchmark?

• Good question – stay tuned!
  – It is $921 per week in the proposed rule
    • But DOL suggested this would be a different number by the time the regulations are effective, and proposed an automatic update approach.

• What this means?
  – Must be flexible
    • Will likely impact annual budget planning
Budgeting Issues

• Without a change in the business/compensation plan, overtime costs will increase. Is there a fix?
  
  – Re-analyze exemption status and responsibilities.
  
  – Re-analyze staffing levels.
    • Even if it would result in more non-exempt employees, can/should you increase headcount to avoid overall overtime?
  
  – Reduce base wage rate to account for additional OT that will now be owed.
Philosophical Issues

• Consider breaking up raises into cost of living increases versus performance/merit increases.

• The Proposed Rules, if adopted, could lead to the elimination of “part-time exempt” positions (unless they meet another exemption).
Logistical Issues

• Revisit timing of “annual” salary increases.
  – The minimum salary level could change annually and might not coincide with normal salary increases.

• Institute auditing/monitoring “around the border” as the salary threshold will change yearly.
  – Without monitoring and adjustments, employees around $50,000 per year may fall out of the exemption (or arguably could become exempt again).
Record-Keeping Issues

• For some positions on the border of the minimum salary level, employers may want to require timekeeping as "safety net."

  – Need to plan to work with payroll provider ahead of change.

• Any conversions from exempt to non-exempt may also impact other areas of an employee’s compensation and calculation of benefits (or even entitlement to benefits).
HR/ Personnel Issues

- Morale issues
  - Employees that never tracked time before will now be required to.
  - Dusting off the idea of “salaried, non-exempt.”

- Training
  - Those not accustomed to tracking time will be more likely to work off-the-clock.
Rethinking “Total Compensation”

• Consider shifting some compensation to incentive compensation and nondiscretionary bonuses (e.g., production bonuses).
  – Currently not included in meeting salary basis, but the Final Regulations may allow this.
    • DOL might cap such amounts or require periodic payments, but worth considering.

• Consider eliminating employer-paid benefits and increasing base pay to get over the new salary threshold.
Commissions “Reinvented” and Section 7(i)

• Commission-based plans and Store Managers
  
  – Exempt (currently) Store Manager who typically works 50 hours per week makes $45,000 annually.
  
  – New Comp Plan - for each workweek, the Manager will receive 0.5% of the store’s first $50,000 in gross sales plus 1% of sales over that amount.
  
  – In a given week, the Store generates $100,000 in gross sales. Manager’s compensation would be $750 for that workweek.
    • No overtime required - regular hourly rate of that workweek is $15 per hour, which is more than 1.5X FLSA current minimum wage.
Preparing for Possible Changes to “Duties” Test

• May not change, but . . .
  – Since DOL sought comment on the duties test, it can issue final regulations without putting such changes out for further public comment.

• Update job descriptions.
  – If appropriate, focus on “primary duties.”
  – Interview exempt employees to compare experience with job descriptions.

• To the extent possible, limit the extent to which exempt employees perform non-exempt duties.
What Should I Do Next?

• Be ready!!
  
  – In 2004, the DOL only gave employers 120 days to comply with the new regulations.

• Consider filing Comments to the Proposed Regulations.
  
  – Due September 4, 2015.

• Regardless of changes to FLSA, consider state wage-hour statutes.
What Should I Do Next?

- Consider an FLSA compliance audit
  - Exemption/classification issues
    - Exempt v. non-exempt
    - Independent contractors v. employees (e.g., Uber, FedEx)
    - Interns
  - Off-the-clock issues
    - Review time-stamp data
    - Reconsider “target rich” practices
Questions Answered

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Thank you!