

# Over(time) and Out! The DOL Makes its Move



## FLSA Workshop: Get Ready for the New Overtime Rules

**Confronting your workplace challenges side by side.**

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# Presenter



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# Breaking News:

**Working Extra Hours = Extra Pay**

**DOL Issued Final Rule on May 17, 2016**

# Before We Get Too Far . . .

## Coverage under FLSA – 2 Tests

- **Enterprise Coverage**

- ER must have two (2) or more EEs and
  - (1) have \$500,000 in annual sales or business, or
  - (2) hospitals, businesses providing medical/nursing care for residents, schools and preschools, and gov't agencies

- **Individual Coverage**

- EEs are covered if work involves "interstate commerce"
- Also, domestic workers (housekeepers, FT babysitters, cooks) normally covered

# “White Collar” Exemptions

- Executive
- Administrative
- Professional
- Outside Sales capacity
- Computer-Related Occupations

# Three Tests for Exemption

- Salary Level – big changes!
- Salary Basis – no changes
- Job Duties – no changes

# Back to the Breaking News:

	Current Regulations (2004 until effective date of Final Rule 2016)	Final Rule Issued  <b>Effective December 1, 2016!</b>
<b>Salary Level</b>	\$455 weekly	\$913 weekly;  40 <sup>th</sup> percentile of FT salaried workers in the lowest-wage Census region (currently the South)
<b>HCE Total Annual Compensation Level</b>	\$100,000 annually	\$134,004;  90 <sup>th</sup> percentile of FT salaried workers nationally
<b>Automatic Adjusting</b>	None	Every 3 years, maintaining the standard salary level at the 40 <sup>th</sup> percentile of FT salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90 <sup>th</sup> percentile of FT salaried workers nationally.
<b>Bonuses</b>	No provision to count non-discretionary bonuses and commissions toward the standard salary level.	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly.
<b>Standard Duties Test</b>	See WHD Fact Sheet #17A for a description of EAP Duties.	No changes to the standard duties test.

# Effect of the New Rules

- DOL estimates 4 million-plus salaried workers currently ineligible for OT will become eligible.
- DOL estimates another 100,000 will receive raise to remain exempt.



# Pegging the New Salary Levels

- **Standard salary level.** Salary threshold will equal 40th percentile of weekly earnings for FT salaried workers in lowest-wage Census region - \$913/week
- **HCE salary level.** Raises salary level (above which most white collar workers are ineligible for OT) to 90th percentile of FT salaried workers nationally - \$134K

# Automatic Updates

- Updates "exempt" salary threshold every three (3) years, beginning January 1, 2020.
- Each update will raise threshold to 40th percentile of FT salaried workers in lowest-wage Census region
  - Estimated to be \$51,168 in 2020.
- HCE threshold will increase to 90th percentile of FT salaried workers nationally
  - Estimated to be \$147,524 in 2020.
- DOL will post new salary levels 150 days in advance of effective date, beginning on August 1, 2019.

# Summary of the New Rules: Bonus, Incentive Payments, Commissions

- Allows up to 10% of salary to be met by non-discretionary bonuses, incentives, or commissions, if made on at least quarterly basis.
- Recognizes importance these forms of pay have in many compensation arrangements.
- Responds to comments from business community.

# Summary of the New Rules: Duties Test

- Rule does not make changes to “duties tests.”
- For workers with salaries above updated level, ERs will continue to use same duties tests to determine whether or not worker is exempt.

# What Should You Do Now?

- Conduct immediate audit of all classifications currently classified as exempt
  - New rules may require reclassification or salary increases.
- Remember, rule goes into effect Dec. 1, 2016.

# NOW IS THE TIME TO ACT!

## WHY?

- DOL OT rules go into effect Dec. 1, 2016.
- Employee Morale Issues
  - Perception of “exempt” vs. “non-exempt” classification.
- Less scrutiny from DOL and workforce
- On other hand, may be able to use Dec. 1 as “cover” for correcting historical problems

# Employer Response

## STEP ONE: Audit Workforce

- White Collar Exemptions:
  - Identify exempt EEs with salaries between \$455 and \$913.
  - Review job duties (and job descriptions) to confirm they meet “duties test”
  - If a question about job duties meeting exemption, evaluate whether/how duties can be changed to meet exemption.
  - Generally treat EEs in similar positions same to avoid claims of unfair treatment/discrimination.



# Employer Response

## STEP TWO: Implement the Changes

- White Collar Exemptions:
  - Decide whether EEs should remain exempt.
  - Can you increase salary to meet new threshold?
    - Coordinate with your Budget Process.
  - If not, evaluate hours and determine an hourly rate that will approximate current compensation assuming eligibility for OT.
  - Consider ways to reallocate duties to lessen impact (i.e., use of PT employees or redistribution of duties).
  - Consider layoffs and/or RIF if no other solution available – but must consider impact on OT hours!



# Hypotheticals

## Warehouse Manager

- Currently classified as an “exempt executive”
  - Supervises 4 EEs and meets duties test
- Salary of \$34,500
- Works regular hours, which rarely exceed 40.

# Analysis

- Duties test clearly met, but problem is \$\$\$\$
  - B/c OT will be rare and raise to stay exempt would be significant (\$13,000), N/E status makes most sense.
  - Best options are salaried N/E or hourly.
    - Salaried N/E would most closely resemble how currently paid.
    - Salary could be reduced to account for possible future OT.
  - TIP: make these evaluations/decisions before implementing any future salary increases.

# Hypotheticals

## Accounts Payable Coordinator

- Currently classified as “exempt administrative”
  - Exercises discretion and independent judgment
  - Probably meets the “primary duty” test
- Salary of \$39,000
- Works variable hours from week-to-week.
  - Sometimes over 40 hours/week
  - Other weeks 50+ hours/week

# Analysis

- Although presently exempt, there is at least some question about how duties test would come out, if challenged;
- Raise to remain exempt will be about \$9,000 per year; that said, paying OT (without any salary reduction) will also lead to increased compensation;
- Fixed salary/fluctuating workweek (FWW) may be option
  - Permits salary plus half-time premium for OT hours. Employer can reduce salary to account for significant OT.

# Hypotheticals

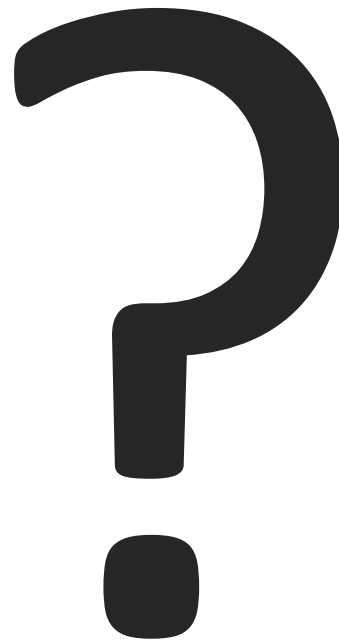
## Human Resource Manager

- Classified as “exempt administrative” (and possible executive)
- Salary of \$46,500
- Works very few hours -- basically just sips cocktails and eats bonbons all day (ha!)... no seriously, always works (after hours and from home)

# Analysis

- Duties are clearly exempt, so granting raise and maintaining exempt status is way to go here.
- Tracking hours of HR Manager would be difficult and there could be very little policing of overtime.

# Questions?



# Thank You!



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