

Today's webinar will begin shortly.  
We are waiting for attendees to log on.

Presented by:  
**Jennifer Sandberg**

Presented by:  
**Caroline Brown**

Please remember, employment law compliance depends on multiple factors – particularly those unique to each employer's circumstances. Numerous laws, regulations, interpretations, administrative rulings, court decisions, and other authorities must be specifically evaluated in applying the topics covered by this webinar. The webinar is intended for general-information purposes only. It is not a comprehensive or all-inclusive explanation of the topics or concepts covered by the webinar.

# What Employers Need to Know About the Fair Labor Standards Act's New Overtime Exemption Rule



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# What's Going On?

- 2014 – President Obama charged the U.S. Labor Department with revising and updating the 2004 definitions for certain exemptions under the federal Fair Labor Standards Act
- 2015 – The Department published its proposed changes and received numerous comments
- 2016 – The Department published revised definitions that will affect most employers in at least some way on *December 1, 2016*
- Management should be thinking about:
  - What this means for the organization
  - What steps to take in response

# Four Main FLSA Requirements

1. A minimum wage (currently \$7.25 an hour).
2. Premium pay for overtime work (at a rate of 1.5 times the "regular rate" of pay for over 40 hours worked in a single workweek).
3. Certain recordkeeping, including accurate time records.
4. Limitations on the employment of minors under 18.

# FLSA Coverage

- "Individual" Coverage
- "Enterprise" Coverage
- Hospitals, Residential Care, Schools
- Public Agencies, Domestic Service In Households

# FLSA "Employee" Status

- The Requirements Apply Only To An "Employee"
- "[A]ny Individual Employed By An Employer"
- Joint Employment
- Independent Contractors
- Volunteers
- Trainees, Interns

# What Are "Exemptions"?

- "Exempt": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies
- New rules affect most "white collar" exemptions from minimum-wage and overtime

# "White Collar" Exemptions Affected

- Executive, Administrative, Professional
- Also "Computer Employees", "Highly Compensated" varieties
- Three general requirements for most of them:
  1. Paid on a "salary basis"
  2. Salary is at least a certain amount
  3. Employee performs specific kinds of work



# Example: Executive Exemption

- Primary duty is managing the enterprise or a customarily-recognized department or unit
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight
- Paid on a "salary basis" at a rate of at least \$455 a week (for now)

# Example: Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- This work includes the exercise of discretion and independent judgment as to matters of significance
- Paid on a "salary basis" at a rate of at least \$455 a week (for now)
- Possibly one of the most often erroneously-applied FLSA exemptions

# Other Examples

- Job titles do not determine exemption status, but some examples of employees who might meet the requirements for other "white collar" exemptions include:
  - "Learned" Professional: Doctor, Some Engineers, Teacher, Scientist
  - "Creative" Professional: Painter, Musician, Screenwriter
  - Computer Employee: Programmer, Software Engineer, Systems Analyst
  - Highly-Compensated: "Project Manager" meets only one of the duties required for the administrative exemption

# What Is Changing?

- Effective December 1, 2016, minimum salary threshold will be \$913 per week (paid on a "salary basis")
- Requirement still applies each pay period (not annualized)
- Effective December 1, 2016, total-annual-compensation threshold for "highly compensated employee" exemption will increase to \$134,004
- Thresholds will be "updated" every three years, with 150 days' notice

# What Is Changing?

- Employers will be able to satisfy up to 10% of the salary threshold from "nondiscretionary bonuses and incentive payments"
- Includes commissions
- Can count only those paid quarterly or more frequently
- Cannot do this as to the salaries of employees treated as exempt under the "highly compensated" exception

# Any Exceptions?

- No, for the most part
- Time-Limited Non-Enforcement Policy for "providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds"
- USDOL won't enforce \$913 threshold
- Extends through March 17, 2019
- Separate USDOL materials on non-profits, governments, higher education provide no exceptions but expand upon USDOL's views

# What Should You Do?

- Immediately evaluate exempt employees' current status, develop action plan
  - Continue to treat some or all as "white collar" exempt?
  - Treat as exempt on some other basis?
- Consider the FLSA alternatives (but don't forget the applicable laws of other jurisdictions)

# Are They *Really* Exempt?

- Default position: Each employee is non-exempt, that is, each is subject to FLSA's requirements
- Exemptions are strictly interpreted
- Specific requirements apply
- The employer has the legal burden to prove when challenged that each one is met
- Otherwise, the employer loses



# Are They *Really* Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do
- Job descriptions alone do not "make employees exempt"

# Are They *Really* Exempt?

- Outlines, checklists: Helpful, but aren't the final answer
- An illusion of analysis and certainty
- Most points can't be reduced simply to "Yes", "No"
- Quick-and-easy evaluations usually leave serious vulnerabilities
- Independent understanding and analysis of each factor and circumstance are essential

# Another Exemption?

- For example, is FLSA's Section 7(i) overtime exception an option?
  - Employee of a "retail or service establishment", and
  - More than half of employee's compensation in a "representative period" comes from "commissions", and
  - Regular hourly rate in an over-40-hours workweek is more than 1.5 times FLSA minimum wage
- Check applicable state and local laws

# What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
  - Pay by-the-hour?
  - Pay a salary as straight-time compensation for 40 hours (or some other number)?
  - Pay a salary as straight-time compensation for all hours?
  - Pay on a commissions-plus-overtime basis?
  - Another approach (for example, a day-rate, job-rate, or piece-rate basis)?
  - Check applicable state and local laws

*Tip: Remember that the "regular rate" includes more than just base pay*

# Accurate Timekeeping

- If non-exempt, must keep accurate records of worktime:
  - Know everything that counts
  - Have a system and policies for capturing the time accurately
  - Train employees to follow
  - Train supervisors/managers to enforce
  - Periodically see whether the time records appear to be accurate

# What Else Should You Do?

- Exemptions aside, are you sure you're 100% in compliance?
- Publicity will cause all employees (exempt or not) to focus upon their pay (the 2004 changes did)
- Find out now where you stand, especially if it's been a while since you looked
- Are you sure you are accurately recording worktime, properly computing overtime, making only lawful deductions, correct about all "contractors" . . . ?

# Non-Compliance Consequences

- Back wages, plus equal amount ("liquidated damages")
- Civil money penalties
- 2-year limitations period, 3 years if "willful"
- Court-ordered compliance in the future (possible "contempt of court" for later violations)

# Non-Compliance Consequences

- Pay plaintiff's "reasonable" attorney's fees, costs (and yours)
- Possible individual management liability
- Possible criminal penalties
- Diversion, distraction, disruption
- Adverse publicity



# Some Closing Thoughts

- Don't fall for "conventional wisdom":
  - "*Everybody* treats this job as exempt."
  - "The employee *wants* to be exempt."
  - "The employee *agreed* to be exempt."
- Consider applicable state and local laws:
  - Might not have the same exemptions
  - Might define exemptions differently
  - Might affect pay-plan options or designs

# Final Questions

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# Thank You

Visit our blog at "[www.wage-hour.net](http://www.wage-hour.net)"



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