

The New DOL Overtime Rules: Beyond Compliance

Practical Issues and Opportunities to Address Old & New Problems

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Discussion Leaders



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Today's Agenda

- Overview of the new overtime rules
- Economic impact "Facts" (Theories?)
- How are YOU going to deal with the new rules?
 - Record keeping
 - Financial impact on your business and your employees
 - Communication issues
 - Strategies
- Scenarios to consider



The New White Collar Exemptions Summary

- DOL announced final regulations on May 17-effective **December 1**
- Weekly salary requirement increases from \$455/week (\$23,660/year) to \$913/week (\$47,476/year for a full-time employees) to classify employees as "exempt" under the FLSA
- Automatic escalator of salary threshold based on 40th percentile of weekly earnings of full-time workers from the BLS every 3 years beginning 1/1/2020
- Increased salary threshold for "highly compensated employees" from \$100,000 to \$134,004/year
- "Good" news: the "duties" test remains unchanged (so far)
 - But will DOL's next step be to "more than 50%" instead of the current "primary" test?



The New White Collar Exemptions Summary

- More “good” news: For the first time, employers can count **non-discretionary** bonuses and commissions to satisfy the minimum salary level, but **ONLY** up to 10% of that level (\$4,747).
 - They must be non-discretionary.
 - They must be paid quarterly or more frequently.
 - Annual bonuses don’t count; Discretionary bonuses don’t count.



What has not changed?

- Specific exemptions for certain designated job categories remain the same. Doctors, lawyers, most teachers, and bona fide “outside” sales employees remain exempt from overtime and the new minimum salary thresholds do not apply to them.
- Computer employee exemption unchanged:
 - Unlike EAPs, they are not absolutely required to be paid on salary basis.
 - Can be paid hourly (at least \$27.63/hour)
 - This equals \$1,105.20 per week (over new \$913/week threshold).



How Much is This Going to Cost?

- Secretary of Labor Thomas Perez claims that the proposed rule “could add as much as \$1.3 billion nationwide to workers’ pockets” *
- At least one study challenges this claim and claims that:
 - Employers will be motivated to actually cut base salaries in response to the new regulation, thereby thwarting the DOL’s goal as stated by Sec. Perez;
 - Weak evidence at best that overtime pay means an increase in overall employment;
 - DOL hasn’t fully analyzed the impact of the new rule on the labor market (Surprise, Surprise!!)*

**An Economic Analysis of Overtime Pay Regulations, Boudreaux and Palagasvhvili, April 2016 Working Paper, Mercatus Center – George Mason University, p.4.*



How Much is This Going to Cost?

- Example- supervisor currently makes \$35 k/year salaried, works 45 hours/week. Gets the same amount EVERY week.
- But as of 12/1/16, what if she is hourly?
 - Adjustment of average pay downward to account for overtime?
 - Smaller check some weeks?
 - And what about taking off an hour early for the kids’ soccer game? (More on this later)
- DOL estimates direct annualized cost to employers at about \$250 Million.**
- So where is the other BILLION coming from?

**Ibid.*

***DOL FAQ-<https://www.dol.gov/whd/overtime/nprm2015/faq.htm#10>*



Is This Really Going To Happen?

- The only way this doesn't go into effect is if Congress acts pursuant to the "Congressional Review Act"
 - The Act allows lawmakers to challenge an agency regulation Congress doesn't like by passing a "Joint Resolution of Disapproval"
 - That would stop the rule from taking effect for 60 days
 - The President could (and would) veto the resolution via a "disapproval memo" which Congress would have to override by a two-thirds majority of BOTH Houses of Congress
- Do you think that's going to happen, especially in an election year?



THE "WHITE COLLAR" EXEMPTIONS: THE NEW SALARY TEST

- Minimum salary of \$913/week (currently \$455/wk)
- Must be paid on a "salaried basis", i.e., normally no docking of pay except:
 - Full sick days if sick policy in place
 - Full personal days when PTO per bonafide plan exhausted
 - First and last week of employment
 - Full week absences
 - Violations of written safety rules, under certain circumstances
 - FMLA absences



THE “WHITE COLLAR” EXEMPTIONS: THE DUTIES TESTS

● Executive Exemption

- Primary Duty is managing either the enterprise or a department/subdivision of the enterprise.
- Must supervise 2 or more full-time employees
 - Hiring and firing authority
 - Recommendations given weight



THE “WHITE COLLAR” EXEMPTIONS: THE DUTIES TESTS (CONT.)

● Administrative Exemption

- Primary Duty is office or non-manual work related to management policies or general business operations.
- Primary Duties require *discretion and independent judgment* regarding *matters of significance*.



THE “WHITE COLLAR” EXEMPTIONS: THE DUTIES TESTS (CONT.)

● Professional Exemption

- Primary Duty is intellectual in character and requires advanced knowledge in a field of science or learning.
- Advanced knowledge acquired by prolonged course of specialized study.



THE “WHITE COLLAR” EXEMPTIONS: “HIGHLY COMPENSATED” EMPLOYEES

● Highly Compensated Employees (“HCE”) Exemption:

- Annual compensation is \$134,004 or higher (currently \$100,000+)
- Must also regularly perform at least one of the duties of an executive, administrative, or professional employee.



THE “WHITE COLLAR” EXEMPTIONS: THE DUTIES TESTS (CONT.)

● Computer Employees Exemption

- May be compensated on a salary basis—or an hourly basis of at least \$27.63/hr
- Must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker
- Primary Duty consists of:
 - Systems analysis, or
 - Designing or modifying computer systems or programs based upon user or system specifications, or
 - A combination of these.
- *Not your help desk people!*



THE “WHITE COLLAR” EXEMPTIONS: THE DUTIES TESTS (CONT.)

● “Outside” Sales Employee Exemption

- Primary Duty is:
 - Making sales or obtaining orders or contracts for services or for the use of facilities for which payment will be made by the client or customer.
 - Required to be regularly and customarily engaged away from the employer’s place of business.



What Do Changes Mean for Employers?

- Raising salary threshold will likely increase number of employees classified as non-exempt.
- Increased payroll costs and recordkeeping burdens.
- Newly non-exempt will need to track time.
- Handbooks will need to be revised.
- Policies will need to be analyzed.



How to Prepare for the Changes

- Audit your workforce!
- Identify potential problems under new rules
 - Exempt paid less than \$47,476
 - HCEs less than \$134,004
- FLSA mini audit
 - What exempt duties are performed?
 - What non-exempt duties are performed?
 - Are current non-exempts properly classified?



How to Prepare (cont.)

- Gather all salary/incentive pay information for every employee who is currently earning less than \$913 weekly.
- Who will need a salary increase to remain exempt?
- Who will need to be reclassified as non-exempt?
- Do some fact-finding!
 - **How much do they actually work?**
 - Is overtime occasional or sporadic? Or regular and expected?
 - Collective bargaining agreement in place? Impact?



How will newly non-exempt employees be paid?

For those you re-classify as non-exempt:

- Will they be paid hourly going forward?
- Will you make them salaried non-exempt?
 - You still have to determine what their "regular rate of pay" is for overtime calculation purposes.
- Will you limit OT possibilities?



How will newly-non-exempt employees be paid? (cont.)

- Divide their current salary by 40 hours to arrive at new hourly rate?
 - Easiest, but most expensive
 - Best for those who work OT sporadically
- Determine a new, lower hourly rate to compensate for expected, regular OT?
 - Divide weekly salary by 40 and then add expected OT hours x 1.5
 - e.g., if employee regularly works 50 hours per week, divide current salary by 55 hours (since overtime is paid at overtime rate of 1.5 times regular rate) to determine hourly rate.



How will newly-non-exempt employees be paid? (cont.)

- Enter into **Fluctuating Workweek** arrangement
 - Most states (except 6) allow this.
 - Employer and employee must agree in advance and in writing.
 - Employee is paid a salary that is meant to cover all straight time up to a certain number of hours in a given workweek.
 - e.g., Employee is paid \$807/wk (\$42,000 annualized) for all work hours up to 50. (So paid the same whether they work 35 hours, 40 hours, 47 hours, etc.)
 - For all hours over 40 in a workweek, employee is paid half-time.
 - Complicated! Employer must divide weekly salary by weekly work hours on a week-by-week basis!



Other Impact of FLSA changes

- Changes to benefits?
 - Changes needed to offset payroll increases?
 - Health and other insurance coverage?
 - Retirement contributions?
 - Other fringe benefits?
 - Are benefits different for exempt and non-exempt employees?
 - e.g., vacation accrual; retirement plan participation?
 - Caution: Modifications to ERISA-qualified plans may require BOD or other action.



How To Prepare for the Changes:

- Audit your policies and procedures:
 - Job descriptions: are they reflective of what employees actually do?
 - Are employee classifications defined correctly?
 - Timekeeping and pay policies– will they work to capture all time worked?
 - Compensation review process to keep pace with increases.



Capturing all time worked

- Remote work and flexibility
 - Do non-exempt employees:
 - Have remote email and voice mail access?
 - Laptops or other remote access to system?
 - Travel for work?
- Need to restrict remote access for affected employees?
 - If not, how will time be tracked?



Plan the Communication Strategy:

- Who will communicate the change?
- What is the message?
 - Changes required by law
 - Employee's value to employer has not changed.
- How will changes be communicated?
- When? How soon?



Communication Strategy (cont.)

- Train everybody affected!
 - Newly non-exempt employees and their supervisors
 - Do they know how to answer the question, “**What is work?**”
 - Checking email, voice mail
 - Remote work
 - Travel time
 - Training time



Other Analysis: Reorganization

- Workflow assessment
 - Are duties effectively placed
 - Can/should non-exempt functions be consolidated?
 - Are duties evenly distributed?
 - Where's the fat?
 - OT
 - Amount
 - Causes
 - Principal recipients



Analysis

- “Opportunities”
 - Upcoming retirements
 - Workload trends/objectives
 - Previous errors- misclassification
 - Fat elimination
- Overtime Analysis
 - What is the \$ impact if the job goes hourly
 - Increase to \$47476 vs. cost of overtime
 - Will salary increase require bump of salaries “up the chain?”
 - Adjusting the salary- decreasing the hourly rate to reflect contemplated OT
 - Consider non-monetary costs



Analysis

- What is the nature of the work that causes the OT/ extra hours
 - Exempt/nonexempt
 - Can it be consolidated with other like work?
- Other factors that affect reorganization
 - Pay for extra work for exempts
 - Bonuses
 - Remote work
 - Particular skills sets
 - Certifications



Analysis

- Play “what if?”
 - Chart different scenarios that accomplish the goal
 - Cost the scenarios
 - Think through the impact on
 - Morale
 - Production
 - Flexibility
 - What happens if some get pay raises and some get re-classified to hourly? Challenges?



Boardwitchu Inc. Scenario

- Boardwitchu Inc. is an incorporated manufacturer (woodshop) that employs 6 people in two divisions: woodworkers and detail/assembly. Each division is overseen by a foreman who is paid \$44,500.00 as a salaried employee. The company sometimes pays a bonus to all employees based on performance. Last year the bonus was \$4,500.00 for the foremen. The year before, the bonus was \$2,225.00.
- The woodworker/machinists make from \$16 to \$18.50 an hour. Overtime averages 200 hours a year.
- Originally there had been 4 employees in the woodworking division and 3 in assembly but declines in demand for company products and a timely retirement reduced the assembly division to its current level of two employees, the foreman and a detail/assembler.



Boardwitchu Inc. Scenario

- The foremen report directly to the President who draws a salary of \$100,000.00. The President and foremen also spend a substantial amount of time performing non-exempt work, as they are skilled machinists.
- All employees except the detail/ assembler are cross-trained.
- When deadlines creep up the two foremen pitch in and work more than 8 hours. This is particularly true for the assembly foreman.
- The foremen are not paid anything for overtime but are allowed to accumulate time off based on hours worked over 40 per week.



Boardwitchu Inc. Scenario

- See handout– (sent by email)
 - 6 employees
 - 2 managers @ \$44,450 each
 - Exempt employee discretionary bonus
 - Comp time arrangement for exempts
 - President
 - Recent reorganization due to a retirement
 - All employees- save one, cross-trained, paid at \$18.00 an hour or so



Assignment

- Reorganize in a manner that
 - Optimizes efficiency
 - Minimizes cost
 - Does not crush morale
 - Complies with FLSA

Identifying Problems

- Foremen
 - Salary Level Test issue for assembler foreman
 - Current exempt status question for assembler foreman
 - Salary Basis issue with the OT treatment?
- President- HCE
 - Salary level issue
 - HCE duties test
 - Duties test

Audit: Foreman Position Duties

- Principal foreman duties
 - Disciplines, hires and fires and reviews time sheets of employees in their division
 - Woodworking foreman is responsible for ordering raw materials to maintaining production levels
 - Assembly foreman is responsible for product packaging, quality control and delivery
 - Each acts as lead person demonstrating tasks and working in the shop performing non-exempt duties at least 4 hours a day



Identifying the Opportunities

- What issues could be addressed?
 - @ \$2980.00 each foreman to meet the salary level test
 - The Assembly Foreman may not pass a duties test- certainly not as an Executive
 - Too many supervisors?
- Tools
 - All cross-trained
 - Still not much compression
 - Extra cost of bonus program



Identifying Solutions

- Option 1
 - Pay both foreman overtime at an hourly rate of \$20.00 per hour.
 - No significant changes in duties
 - Discontinue comp time- will have to pay overtime
 - Bonus remains as is
 - Add additional week of vacation to each foreman
- Net cost-\$0- in fact, decrease in off time for foremen



Identifying Solutions

- Option 2
 - Consolidate divisions
 - Assign additional admin. tasks to Woodworker Foreman and increase salary to 48,000.00
 - Make Assembly Foreman shop lead man at \$20.00 per hour- paying overtime
 - President to continue to assume certain Administrative Functions; no changes in duties
 - Extra week vacation to lead man
 - Extra time procedure for Foreman to continue
- Est cost: @ \$2500.00



Questions/Comments?



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