

# The Fair Labor Standard Act: White Collar Exemptions and New Regulations

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# Why is this Topic Important?

- Increased litigation
- Significant potential liability
- Individual liability
- Defenses are limited

# Common Misconceptions & Pitfalls

- If I pay an employee a salary the employee is exempt from overtime.
- Failure to pay Non-Exempt employees for “off-the-clock work”.
- Not paying for breaks lasting less than 20 minutes.
- If a manager shows up late for work I can dock his salary.

# Minimum Wage and OT under FLSA

- Employers must pay Non Exempt employees:
  - Minimum wage (\$7.25/hour)
  - Overtime for all hours worked over 40
- Must pay for all hours worked including:
  - Time at meetings
  - Time answering emails and calls
  - Time on breaks < 20 minutes
- Exempt employees do not get paid OT



# FLSA

## White Collar Exemptions

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
  - **EXECUTIVE**
  - **ADMINISTRATIVE**
  - **PROFESSIONAL**
  - **OUTSIDE SALES**
  - **HIGHLY COMPENSATED EMPLOYEES (“HCE”) (\$100,000).**
- Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA.

# Requirements for Exemption

- Must be paid at a certain Salary Level (currently at \$455/week)
- Must be paid on a Salary Basis
- Must perform certain specific Duties

# Salary Basis

- Regularly receives a predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Need not be paid for any workweek when no work is performed
- Deductions for partial day absences is not permitted

# Improper Deductions

- Only 7 types of deductions are permitted
- An actual practice of making improper deductions from salary will result in the loss of the exemption
- Safe Harbor Provision can preserve exemption if employer reimburses employee and violation is isolated

# Safe Harbor Policy

## Sample Language

“If you believe you have been subject to any improper deductions, you should immediately report the matter to Human Resources. If it is determined that a deduction was made in error, the Company will reimburse the employee for any improper deductions and take good faith efforts to prevent improper deductions in the future. No employee will be retaliated against for making a good faith inquiry as to the status of deductions made from an employee’s paycheck.”

# Exceptions to Salary Level and Basis

- The salary level and salary basis tests do not apply to:
  - Outside Sales Employees
  - Doctors
  - Lawyers
  - Teachers
  - Certain computer-related occupations paid at least \$27.63 per hour
  - 20% equity owner executives

# Executive Exemption

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.
- Own at least 20% equity and actively engaged in management

# Primary Duty and Management

- “Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. (50% or more)
- “Management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control . . .

# Administrative Exemption

- Primary duty is 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
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- Most challenging exemption to defend

# Management and Independent Judgment and Discretion

- Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.
- Discretion: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee has authority to waive or deviate from established policies and procedures without prior approval

# Learned Professional Exemption

- The employee's primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction
- Fields of science or learning include: law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status ( not mechanical arts or skilled trades)

# New DOL Rule

## OLD Overtime Rule

**\$23,660**

Previously, full-time, salaried workers who earned up to this amount annually (\$455 a week) were not eligible for FLSA overtime protections.

## NEW Overtime Rule

**\$47,476**

The DOL more than doubled the salary threshold, requiring employers to pay workers who make up to this annual amount (\$913 a week) overtime pay.

# Proposed Rule Doubles Salary Threshold

- Effective December 1, 2016
- Key changes:
  - **HCE level increases from \$100,000/year to \$122,148/year (22% increase)**
  - **EAP level increase from \$455/week to \$913/week (113% increase)**
- The proposal also advocates automatically adjusting exemption thresholds in the future such that the threshold for EAP workers is set as the 40th percentile of full-time salaries, and for HCE workers as the 90th percentile of full-time salaries
- The DOL estimates 1.2 million employees will see wage increase from new regulations

# Possible Employer Responses

- Increase employee salaries to meet exemption level
- Reclassify Salaried Workers as Hourly
- Increase salary of some employees and lay-off other employees
- Combination of above

# 21 States Sue over DOL Rule

- United States District Court for the Eastern District of Texas.
- Led by Texas and Nevada, and includes the following states:  
Alabama, Arizona, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, New Mexico, Ohio, Oklahoma, South Carolina, Utah, and Wisconsin.



# House Votes to Delay Rule

- The Regulatory Relief for Small Businesses, Schools and Nonprofits Act passed mostly along party lines by a vote of 246-177
- Attempts to delay implementation for six months.
- President has threatened to Veto the Bill.

