

Changes to Fair Labor Standards Act (FLSA) White Collar Exemption Rules



OLLIS/AKERS/ARNEY

**HUMAN RESOURCES
CONSULTING**

Learning Objectives

- Understanding the Fair Labor Standards Act
- Current overtime regulations of the FLSA
- Proposed changes to FLSA overtime regs
- Current & future compliance requirements
- Properly classifying employees
- “Exempt” & “non-exempt” classifications
- Next Steps



Fair Labor Standards Act (FLSA)

FLSA establishes standards for:

- Minimum wage
- Overtime pay
- Recordkeeping
- Child labor laws
- Prohibits discrimination in pay on the basis of sex



Fair Labor Standards Act (FLSA)

- Provides protection to employees making good faith complaints regarding wage & hour matters
- Applies to private and public employers
- An individual, such as a supervisor, may be held *personally liable* for knowingly avoiding the law



Common Mistakes

That FLSA regulates more than it does:

- Method, system or practice by which comp is paid
- Compensation for employee injuries
- Requirement for employment benefits



Imposes No Duty to Provide Benefits

- Vacation, holiday, severance or sick pay
- Meal or rest periods (except nursing mothers)
- Holidays off or vacation
- Premium pay for weekend or holidays
- Pay raises or fringe benefits
- Discharge notice, reason for discharge, immediate payment of final wages



Interaction with Missouri Comp Laws

- Time of payment
- Form of payment
- Deductions
- Assignments
- Garnishments
- Withholding the payment of support



Wage & Hour Division Enforcement

- Inspect & copy an employer's records
- Interview employees
- Make determinations of FLSA violations
- Authorizes employees to sue to recover unpaid minimum wages or overtime comp, liquidated damages, attorney's fees and costs



Coverage Categories

- Enterprise coverage
- Individual coverage
- Small, local businesses may fall outside of coverage, but may still be required to comply with applicable state law



Individual FLSA Coverage

- Employees must be engaged in commerce or in the production of goods for commerce
- Employee must be employed by an employer in an enterprise engaged in commerce or in the production of goods for commerce



Enterprise FLSA Coverage

- An enterprise is engaged in commerce or the production of goods for commerce and annual gross sales or business is at least \$ 500,000
- Even if an organization is not a covered enterprise, its individual employees may still be covered by the FLSA



Commission-Paid Employees

Not subject to overtime requirements if:

- Must receive at least 1 ½ times the current minimum wage and
- More than 50% of their earnings must come from commissions



Posting Requirements

Covered employers must display an official poster outlining FLSA provisions



Employee or Independent Contractor

- FLSA only applies to “employees”
- Three categories to consider:
 - Behavioral control
 - Financial control
 - Relationship to the parties
- No changes currently proposed related to definitions of “employee” or “independent contractor”



Current Overtime Requirements

- Unless exempt, employees covered by FLSA must receive overtime for hours worked in excess of 40 hours in a given “workweek”
 - Not less than 1 ½ times their regular pay rate
- No limit on the number of hours worked
- No additional wage required for work on weekends, holidays or regular day of rest
 - UNLESS overtime is worked during this time



Defining the Workweek

- Fixed and regularly recurring period of 168 hours
- Seven consecutive 24-hour periods
- May begin on any day of the week and any hour of the day



Exempt from Minimum Wage & Overtime Requirements

- “Primary Duty” - performance of exempt work
- Factors to consider when determining primary duty
 - Relative importance of exempt duties
 - Amount of time performing exempt duties
 - Relative freedom from direct supervision
 - Salary paid versus wages of other employees
- Generally, more than 50% exempt work = Exempt Employee



White Collar Exemptions from Overtime Pay Provisions

- Executive Exemption
- Administrative Employee Exemption
- Professional Exemption
- Computer Employee Exemption
- Outside Sales Exemption
- Highly Compensated Employee Exemption



White Collar Exemptions

Requirements generally:

- Compensated on a salary basis; not subject to reduction based on quality or quantity of work
- Paid at least \$ 455/week; \$ 23,660 annually
- Satisfaction of the Duties Test
- Last updated in 2004



Satisfaction of the Duties Test

- If the employee meets the salary requirements for exemption, they must then perform one or more of the “Duties” for the exemption category
- No proposed changes for this test, however the DOL is requesting comments on whether employers believe these “Duties” are workable



Executive Exemption

- No less than \$ 455 per week salary
- Primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision
- Customarily & regularly direct the work of 2 or more employees (or 2 FTEs)
- Authority to hire & fire employees, or opinion must be given particular weight



Administrative Employee Exemption

- No less than \$ 455 per week salary
- Primary duty must be performing office or non-manual work directly related to the management or general business operations
- Customarily & regularly exercises discretion & independent judgement with matters of significance
- Look at primary duties, not job title
- (HR Managers)



Professional Exemption

Two types:

- Learned Professional
- Creative Professional



Learned Professional Exemption

- No less than \$ 455 per week salary
- Primary duty must be performing work requiring advanced knowledge acquired from prolonged advance instruction
- Performs intellectual work, varied in character, which requires the consistent exercise of judgment & discretion
- (Accountant, attorney, registered nurse)



Creative Professional Exemption

- No less than \$ 455 per week salary
- Primary duty must be performing work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- (Music, writing, acting, graphic arts)



Computer Employee Exemption

- Salary or fee basis no less than \$ 455 per week
- Hourly rate at least \$ 27.63/hour (\$57,460 annually)
- Must be employed as a computer systems analyst, computer programmer, software engineer or similarly skilled in the computer field
- Excludes the manufacture or repair of computer hardware or related equipment
- Employees whose work is highly dependent upon the use of computers or software programs but not primarily engaged in computer systems analysis and programming or other similarly skilled occupations identified in the primary duties test, are not exempt under the computer exemption



Computer Employee Exemption

Primary duties must consist of one or more of the following:

- Application of systems analysis techniques & procedures, including consulting with users to determine hardware & software specification
- Design, development, documentation, analysis, creation, testing or modification of computer systems or programs based on & related to user specification
- Design, documentation, testing, creation or modification of computer programs related to machine operating systems



Outside Sales Exemption

- NO SALARY REQUIREMENT
- Primary duty must be making sales (as defined by FLSA), or obtaining orders or contracts for services or the use of facilities
- Must be customarily and regularly away from the place of business or in-home office
- Outside sales must be the primary duty



Highly Compensated Exemption

- No less than \$ 455 per week
- Total annual compensation at least \$ 100,000
- Primary duty includes office or non-manual work
- Customarily & regularly performs any one or more of the duties of an executive, administrative or professional employee



Upcoming Changes

President Obama issued a memorandum to the Secretary of Labor on March 13, 2014, directing the Secretary to modernize & simplify the existing overtime regulations for executive, administrative & professional employees

- Updated salary requirements for the exemptions
- Annual updates to increase the salary requirement to correspond with rises in inflation
- No proposed changes to the “Duties Test” but DOL is seeking comments on whether the test is working for employers



Department of Labor Statistics

- In 2013, there were an estimated 144.2 million wage & salary workers, **43 million white collar salaried employees**
- Salary requirements adjusted 7 times since 1938; most recently in 2004
- In 1975, 62% of FT salaried workers were eligible for overtime. Today, only 8% of salaried workers fall below the salary minimum.
- 85% of FT salaried workers who failed the Duties Test (eligible for OT) made at least \$455/week. Therefore, Duties Test only screens an estimated 15% of the eligible workforce.
- DOL estimates **21.4 million** employees are currently exempt who are subject to the salary requirement and may be potentially affected
- In Year 1, **4.6 million** estimated to become eligible for overtime benefits
 - 110,000 employees estimated to become eligible in Missouri



Proposed Changes

- DOL proposed setting the standard salary level for the White Collar Exemption at the 40th percentile of weekly earnings for FT salaried workers
 - 2013 data - \$ 921/week (\$ 47,892 annually)
 - 2016 data - \$ 970/week (\$ 50,440 annually)
- DOL proposed setting the Highly Compensated comp level equal to the 90th percentile of earnings for FT salaried workers
 - \$ 122,148 annually
- DOL proposed automatically updating the salary and compensation levels on an annual basis (fixed percentiles of wages paid or inflation measured by Consumer Price Index)



Proposed Changes

- No changes to the current “Duties Test”, comments were requested
- Considering the inclusion of certain performance-based nondiscretionary bonuses in the salary calculations; no changes yet
- Seeking comments regarding whether the Paperwork Reduction Act should be changed to reflect the purpose of the President’s Memorandum
 - Current recordkeeping requires hours & wages of employees by employers
 - NO NEW INFORMATION COLLECTION REQUIREMENTS



Advantages of the Proposed Changes

- No updates since 2004
- Increases salaries of millions of workers who will lose their exemption status
- DOL stated current wage levels are too low to screen out white collar workers
- DOL states this will ease the burden on employers to properly classify employees
 - Fewer Duties Test; eliminates guesswork & potential litigation costs
- Simplifies the regulation



Disadvantages of the Proposed Changes

- Concerns for upward mobility of mid-level managers & similar employees
- Higher salary requirements may prevent promotions
- Increased burden on businesses
- Yearly increases to minimum salary requirements may be difficult to predict



Direct Costs to Employers

- Regulation familiarization
- Adjustment costs
- Managerial costs

Estimated costs to employers are between
\$ 239.6 million and \$ 255.3 million



Next Steps

Classification of employees

- Conduct an internal audit
- Determine how you will classify new hires moving forward
- Review & reclassify current employees, as needed
- Classification is critical
 - Non-exempt employee may be deprived of OT and back pay
 - Employee improperly classified as independent contractor may be deprived of OT and other benefits



Four Trends

- FLSA class action claims growing
- Misclassification cases continuing
- Claims over “winding up” and “winding down” at work
- Working off the clock



Other Compensable Issues

- Meal periods & rest breaks
- Nursing breaks
- Waiting time while on duty
- On-Call time
- Travel time
- Commuting in a company vehicle
- Meetings, lectures & training programs
- Uniform changing
- Equal pay issues



Penalties & Enforcing the FLSA

- Statue of limitation to collect past-due wages is **two years** for ordinary violations & **three years** for willful violations
- Liquidated damages – back wages, attorney's fees and costs
- Civil fines of up to \$ 1,000 for repeated and willful violations
- Criminal penalties
 - \$10,000 fine for first offenders
 - Fine & maximum prison term of six months for second offenders



Equal Pay Provisions

- Persons performing jobs requiring equal skill, effort, and responsibilities at the same establishment may not be paid different wage rates based upon their sex
- Same statutes of limitation



Termination-Related Issue

Vacation pay upon separation

- Vacation is not “wages” in Missouri
- Critical to define in your vacation or PTO policy such as “unused accrued vacation or PTO”



Conclusion – Comment Period

- One of the Comment Periods ended 9/4/15
- 290,722 comments received
- 5,772 comments were posted on DOL website
- Multiple commenters have petitioned to have the Comment Period extended



Conclusion

Final Rule

- No timetable yet
- Final Rule will include an implementation date
- Wall Street Journal reports DOL not expected to issue the final rule until mid- to late-2016
- If this is the case, changes probably won't go into effect until 2017



Conclusion

Bonus Time!!!

- More time to prepare your organization
- Timing remains uncertain; no guarantees
- Don't delay; review exempt employees and note those close to the new salary threshold
- Minimum your risk



Conclusion

Read more on the proposed rule

- www.regulations.gov
- Rule Identification Number (RIN) 1235-AA11

Fair Labor Standards Act Information

- www.wagehour.dol.gov
- Help Line: 1-866-4USWage (1-866-487-9243)



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'We're going to need a bigger rug or we're sunk.'



QUESTIONS?



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