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The DOL's Final FLSA Overtime Exemption Rule: What Employers Must Do Now

June 1, 2016

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Agenda

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- Background
- New Rules
- Consequences of New Rules
- What Employers Can and Should Do

How We Got Here

2004 White Collar Exemptions to FLSA Overtime Requirements

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

How We Got Here

- Climate of Wage/Hour Change
- President Obama's 2014 Directive
- US Department of Labor Final Rule – May 18, 2016
- Final Rule Effective – December 1, 2016

The Policy Rationale

- Increase Wages for Working Middle-Class
- Clarify Law
- Reduce Disputes
- Hollow Promises?

Summary of New OT Rules

- Components of White Collar Exemptions:
 - Salary Basis Test (fixed pay) – **No Changes**
 - Duties Test (specific to exemption) – **No Changes**
 - Salary Level Test (min weekly pay) – **Revised**

New Salary Threshold Rules

- Salary (for Exec/Admin/Some Prof'l):
 - \$455/wk (\$23,660/yr) → **\$913/wk (\$47,476/yr)**
- Highly Compensated Employees:
 - \$100,000/yr → **\$134,004/yr**
 - which must include a min salary of \$455/wk → **\$913/wk**

This Is Only the Beginning

- Automatic updates to salary threshold
- Every 3 years – beginning January 1, 2020
- 40th % of FT salaried in lowest-wage region
- 90th % of FT salaried nationally

Effect of Auto Indexing

- Expected to exceed \$50,000 in 2020
- Use of wage index skews salary level because it:
 - includes employees not covered by rule (for example, federal employees); and
 - includes employees not subject to salary level test (for example, doctors, lawyers, and teachers).
- Use of wage index may result in upward shift because:
 - current exempt employees may be given raises to avoid salary compression;
 - those converted to salary non-exempt may have increased earnings due to overtime pay; and
 - those re-classified to hourly will be excluded from data.

New Limited Use of Bonuses

- Up to 10% of salary can be satisfied with non-discretionary bonuses, incentive pay, and commissions
- Must be paid quarterly or more frequently
- Catch-up allowed on quarterly basis
- Equates to a guaranteed bonus if not tracking time

Biggest Impact

- Employers with exempt employees earning less than \$48,000
- Geographic regions – South and Midwest
- Industries – Hospitality, Tourism, Retail, Restaurants, Health, Higher Education, and Tech
- Job categories – store managers, bank branch managers (or asst mgrs), finance departments, and admissions office and other college staff

Impacts on Workforce and Hiring

- Exempt Employees:
 - longer hours:
 - more duties; and
 - salary compression.
- Non-Exempt (Reclassified) Employees:
 - less training, mentoring, and education;
 - less flexibility and more restrictions; and
 - less full-time and more part-time
- New Hiring Dampened

Employer's Options

1. Maintain Exemption and Raise Salary
To Meet New Salary Threshold

OR

2. Reclassify as Non-Exempt and
Pay Overtime Premium for Overtime Hours

Practical Tips for Self Audit

- Audit exempt positions currently earning under \$50,000 (including “part-time”), and determine the amount of OT hours by:
 - tracking hours worked while auditing and evaluating;
 - pulling existing data (such as computer log-in and log-out; and
 - shadowing positions while auditing and evaluating.
- Audit exempt positions > \$50,000 for compliance w/duties test
- Consider state laws and CBAs
- Consider involving legal counsel (A/C privilege)

Tips for Maintaining Exempt Classification

- Increase salary to satisfy new threshold
- Consider non-discretionary bonuses
- Budget for tri-annual automatic increase
- Consider pay compression on others already making over \$50,000

Candidates for Maintaining Exempt Status

- Employees earning just under the new salary threshold
- Employees with substantial non-discretionary bonuses/commissions
- Positions where salary compression not an issue
- Positions requiring a lot of OT hours

Tips for Reclassifying to Non-Exempt

- Reverse-engineer the comp package
 - Configure hourly rate, bonuses, and anticipated OT so that total comp package of re-classified workers is about same as when salaried exempt
- Reduce scheduled hours of non-exempt
- Hire additional personnel to spread out hours (reduce OT)
- Transfer certain tasks up to exempt employee
- Consider effect on benefits eligibility
- Consider comp required for training and mentoring

Pay Rate Options for Non-Exempt

- Hourly Rate plus OT premium
- Salary plus OT
 - Fluctuating work week program (fixed salary for all hours worked, plus half-time OT premium)
- Piece Rate plus OT
- Commissions plus OT

Considerations for Pay Structure

- Employee perceptions of demotion
- Set work hours or variable work hours?
- Consistent OT or infrequent OT?

Candidates for Reclassification

- Employees earning well below new threshold
- No or minimal non-discretionary bonuses
- Salary increase would cause significant pay compression with other employees
- Employees who do not work much OT
- Employees who work consistent/predictable OT

Tips for Reclassification

- Develop Employee Communications Plan
 - Required by Department of Labor
 - Position still valued by company
 - Your pay will vary each week you work (if hourly)
 - You will be expected to be at work during core hours
 - Not as much flexibility

Tips for Reclassification

- Timekeeping / Record-keeping policies
 - train newly exempt and their managers
- Restrictions on work outside normal work hours
- Mobile devices and remote access
- Update offer letters, handbooks, and job descriptions, including by:
 - making hours expectations clear; and
 - documenting if salary is for all hours worked.

Tips for Reclassification

- Compliance with meal and rest periods
- Telecommuting
- Travel time
- Overtime restrictions – require approval
- Consider timing of implementation (pre-Dec. 1?)
- Consider timing of “annual” pay increases
- Conduct audit after initial period to test compliance

No Changes to Common Myths

- Still not about being paid a salary
- Still not about job title
- Still not about written job description
- Still not about how "everyone else" does it
- Still required to pay even if not authorized
- Still cannot be waived
- Still no comp time for private employers

Some Things Stay the Same: Litigation

- Vulnerable positions are those that pay \$47,476 to \$50,000 where duties test will continue to be litigated
- Litigation involving reclassified claims
- Off-the-clock claims
 - Reclassified workers accustomed to working at all hours and not keeping track

Relevant Practical Law Resources

- DOL's Final Rule Doubles Minimum Salary Required for White Collar Exemptions Under the FLSA
- FLSA White Collar Exemptions Checklist
- Questionnaire to Determine Exempt Status Under the FLSA

These relevant resource are available with a free, no-obligation trial to Practical Law.
Visit [Practicallaw.com](https://www.practicallaw.com) and request your free trial today.

Questions

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About the Speakers

Wage & Hour Defense Institute



To learn more about the Wage & Hour Defense Institute, please visit <http://whdi.litcounsel.org/>.

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Paul Bittner is a partner and vice chair of the Firm's Labor and Employment Group. He has been practicing law since 1993 with an emphasis on labor and employment law and has extensive experience representing employers.

Paul has represented both public and private sector employers in union negotiations, labor arbitrations, unfair labor practice proceedings, representation elections, and other related matters in front of the National Labor Relations Board and state agencies. Paul is a member of the Wage and Hour Defense Institute, providing counsel to employers on all aspects of wage and hour compliance. He has tried both individual and collective actions under the Fair Labor Standards Act.

Paul is a frequent lecturer on a variety of employment law topics including traditional labor law, ADA, FMLA, wage and hour and sexual harassment. He has successfully represented employers in jury trials, bench trials, arbitrations and administrative hearings.

Paul regularly counsels employers on union relations and union avoidance, Title VII, Americans with Disabilities Act (ADA) , Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA) and other wage and hour laws, Family and Medical Leave Act (FMLA), the Fair Credit Reporting Act (FCRA), and compliance with Occupational Safety and Health Administration (OSHA). Paul has also defended employers in various employment law claims pursuant to employment practice liability insurance policies.

About the Speakers



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Frank Neuner is the managing partner of the St. Louis office of Spencer Fane, serves on the firm's Executive Committee, and is a member of the Labor & Employment practice group and the Litigation & Dispute Resolution practice group. Frank's practice currently focuses on assisting employers with the broad array of labor and employment law issues that arise in the workplace. Clients have entrusted Frank to represent them in federal and state courts at the trial and appellate levels, in administrative actions before federal and state agencies, and in alternative dispute resolution proceedings.

Frank also serves as a mediator for workplace conflicts, civil rights controversies, and business-related disputes. He has a wealth of experience mediating single-plaintiff disputes, as well as class and collective actions, including wage and hour cases. In addition to his private mediation practice, Frank serves as a mediator for the U.S. Equal Employment Opportunity Commission and the Missouri Commission on Human Rights. Over the course of his career, Frank has represented all the various participants in employment disputes—including businesses, managers, and individual employees—and therefore he is uniquely qualified to lead parties toward resolution of these conflicts. He received his certificate from Northwestern University School of Continuing Studies for successfully completing its Mediation Skills Training Program. Frank has also completed an Advanced Mediation Skills training course, presented by the Straus Institute for Dispute Resolution, Pepperdine School of Law. Frank has been approved as a Certified Neutral by the United States District Court for the Eastern District of Missouri. Frank is a national member of the Association of Attorney-Mediators, and he serves as Vice President of the St. Louis Chapter of the Association of Attorney-Mediators.

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Susan N. Eisenberg has more than 25 years of experience representing employers in all aspects of employment matters and is widely recognized as one of the leading employment law attorneys in Florida. Susan has extensive jury and non-jury trial experience involving sex, race, religion, age and disability harassment and discrimination issues. She also litigates non-compete and confidentiality issues as well as accessibility issues under the Americans with Disabilities Act. She regularly handles single plaintiff as well as class-action litigation. Susan is also widely known for her experience with wage and hour issues and is one of the authors of the premiere treatise titled *The Fair Labor Standards Act*.

Susan also advises clients on employment law compliance, discipline, terminations, reductions in force and wage and hour audits. She has extensive experience in conducting workplace investigations including those involving high level executives. She prepares workplace policies and procedure manuals, employment contracts, non-compete and confidentiality agreements and separation agreements. Susan also conducts informative and entertaining in-house training on employment issues.

Susan is Florida Bar Board Certified in Labor and Employment Law and has been a Fellow of the College of Labor and Employment Lawyers since 2007. Susan was recognized as one of the top 20 women lawyers in South Florida in 2014. She is a frequent lecturer, author and bar association leader. She regularly writes and speaks on employment issues for the American Bar Association, Practising Law Institute, and American Conference Institute. Susan is the former chair of the American Bar Association's Federal Labor Standards Legislation Committee, president of the Academy of Florida Management Attorneys, and founding member and past president of the Wage and Hour Defense Institute.

In addition to her litigation and counseling practice, for the past 10 years Susan has been an Arbitrator with the American Arbitration Association and a Certified Mediator.