



Overtime Exemptions: What's New and How It Affects You



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Overtime Exemptions: What's New and How It Affects You



Carmen Couden
Milwaukee, WI



Kamran Mirrafati
Los Angeles, CA



Today's Agenda

- **FLSA Basics**
- **The White Collar and Highly Compensated Employee Exemptions**
- **The DOL's Final Rule on White Collar and HCE Overtime Exemptions**
- **The Impact of the DOL's Final Rule**
- **Compliance Strategies and Action Steps for Employers**
- **Q&A**



Overtime Exemptions: What's New and How It Affects You

FLSA Basics



FLSA Basics

■ Coverage

» Enterprise coverage

- Businesses or organizations that have annual revenues (sales or business done) of at least \$500,000
- Non-profits are not covered enterprises unless they engage in commercial activities that are provided for a business purpose and result in revenues that meet the \$500,000 threshold
 - Activities that are charitable in nature are not considered commercial activities
 - E.g., providing shelter, clothing, or food to the homeless; hotline counseling services; disaster relief;
 - Income (donations and dues) used for a charitable purpose also are not factored into the \$500,000 threshold



FLSA Basics

■ Coverage (con't)

» Enterprise coverage

- Also applies to “named enterprises” regardless of the dollar volume of business
 - Hospitals
 - Residential care facilities for older adults or persons with disabilities
 - Schools for children who have disabilities or who are gifted
 - Federal, state, and local governments
 - Preschools, elementary and secondary schools, and institutions of higher education



FLSA Basics

■ Coverage (con't)

» Individual coverage

- Based on the nature of an individual employee’s work
- Applies to employees who regularly engage in interstate commerce or in the production of goods for interstate commerce
- Generally speaking, employee whose work involves or relates to moving persons or things across state lines are covered
- Covered activities include:
 - Making out-of-state phone calls, receiving/sending interstate mail or communications, ordering or receiving goods from an out-of-state supplier, handling credit card transactions or performing accounting or bookkeeping for such activities



FLSA Basics

■ Protections for Covered Employees

- » Must be paid minimum wage for all hours worked
- » Must be paid overtime for all hours worked over 40 in a workweek, unless “exempt”
 - Overtime = 1.5 times the non-exempt employee’s “regular rate of pay”
 - Regular rate of pay is not always the same as the employee’s normal hourly rate
- » Employees who are exempt from the FLSA’s overtime requirements are paid a fixed salary regardless of hours worked and do not receive overtime



FLSA Basics

■ Exemptions from Overtime

- » “White Collar” Exemptions
 - Executive
 - Administrative
 - Learned or creative professional
 - Certain computer professionals
- » Highly-Compensated Employee Exemption



FLSA Basics

■ Various other exemptions:

- » Commissioned sales employees
- » Drivers, driver helpers, loaders
- » Mechanics
- » Seasonal amusement/recreational facility employees
- » Plus a variety of other exemptions
 - These other exemptions are **NOT** affected by the new rules!
 - Focus will be on “white collar” and “highly-compensated” employees



Overtime Exemptions:

What's New and How It Affects You

The White Collar and Highly Compensated Employee Exemptions

The Current Status



White Collar Exemptions

- **Executive, Administrative, Learned or Creative Professional, Computer Professional**
- **In order to qualify for any of these white collar exemptions under federal law, must pass two tests:**
 - » **Duties Test**
 - Duties vary based on which exemption (e.g., executive, administrative, etc.) is applied
 - » **Salary Basis Test**
 - Employees must receive a set weekly salary regardless of the employee's schedule or hours worked
 - Currently the required salary is \$455/week (\$23,660/year)
 - Deductions from salary can only be taken in limited circumstances
- **Keep in mind any state law differences!**



Highly Compensation Employee (HCE) Exemption

- **Highly-Compensated Employee Exemption**
 - » **Presumed exempt under federal law if:**
 - Meet the necessary salary threshold (currently \$100,000/year)
 - Primary duty of office and/or non-manual work and regularly performs at least one of the exempt duties of an executive, administrative, or professional employee



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Overtime Exemptions: What's New and How It Affects You

Double Or Nothing...

The DOL's Final Rule on the White Collar and Highly Compensated Employee Exemptions



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History of the DOL's Final White Collar and HCE Exemption Rule

- **This didn't happen out of the blue:**
 - » March 2014: President Obama instructs the DOL to evaluate and modify the white collar exemptions.
 - » June 30, 2015: DOL issues proposed regulations that would significantly raise the minimum salary thresholds and hints at possible revisions to the "duties" tests.
 - » September 4, 2015 – The comment period for the DOL's proposed rule closes.
 - » May 23, 2016 – The DOL's final rule is published in the Federal Register.
 - » December 1, 2016 – Changes required by the rule become effective.
 - Special non-enforcement period through March 17, 2019 for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with fewer than 15 beds

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The DOL's Final Rule On White Collar and HCE Exemptions

■ What Is Changing?: New Minimum Salary for White Collar Exemptions

- » Increases the minimum weekly salary required for exempt status under the white collar exemptions
 - Increases the required salary to \$913/week (\$47,476/year) from \$455/week (\$23,660/year)
 - Equivalent to the 40th percentile of weekly earnings for full-time salaried workers in the lowest income region in the U.S.
 - Final required salary is less than the \$50,440 annual salary included in the DOL's proposed rule but still more than doubles the minimum salary required for exemption



The DOL's Final Rule On White Collar and HCE Exemptions

■ What Is Changing?: New Minimum Salary for Highly Compensated Employee Exemption

- » Increases the minimum annual salary required for exempt status under the highly compensated exemption
 - Increases the required salary to \$134,004/year from \$100,000/year
 - Equivalent to the 90th percentile of weekly earnings for full-time salaried workers in the lowest income region in the U.S.



The DOL's Final Rule On White Collar and HCE Exemptions

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- **What Is Changing?: Automatic Increases of the Minimum Salary Thresholds**
 - » For the first time ever, the minimum salary thresholds will be automatically increased every 3 years
 - Better than the annual increases originally proposed by the DOL
 - » Will take into account inflation and living costs and ensure that the minimum salary thresholds stay at the 40th and 90th percentile levels
 - » First increase will occur in January 2020 and initial increases are likely to result in new minimum salaries of \$51,000 and \$147,000 for the white collar and HCE exemptions, respectively
 - » DOL will post the new salary thresholds at least 150 days in advance of their effective date (beginning August 2019)



The DOL's Final Rule On White Collar and HCE Exemptions

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- **What Is Changing?: New 10% Rule for Bonuses, Incentives, and Commissions**
 - » Also, for the first time, employers will be allowed to satisfy up to 10% of the non-HCE salary to be satisfied by non-discretionary bonuses, incentive payments, or commissions **so long as those items are paid on at least a quarterly basis**
 - » The 10% rule applies to the white collar exemption salary only; it does not apply to the HCE salary
 - » Also, the value of other fringe benefits – health insurance, dental, etc. – cannot be counted toward the salary threshold



The DOL's Final Rule On White Collar and HCE Exemptions

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■ What Has Not Changed?: FLSA Coverage

- » The DOL's final rule does not change the rules for FLSA coverage
- » Still only applies to entities that meet the requirements for either enterprise coverage or individual coverage
 - Non-profits who are not "named entities" and very small businesses should determine whether they are even covered by the FLSA's requirements before implementing any changes



The DOL's Final Rule On White Collar and HCE Exemptions

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■ What Has Not Changed?: Exemptions Other Than White Collar or HCE

- » The final rule also does not make any changes for exemptions other than the white collar and HCE exemptions
- » If employees are exempt under some other exemption, there are no changes required for those exemptions!



The DOL's Final Rule On White Collar and HCE Exemptions

■ What Has Not Changed?: Exemptions Other Than White Collar or HCE

- » Exemptions not affected by the DOL's final rule include, but are not limited to:
 - Commissioned sales employees in retail and service establishments (inside sales employees)
 - Seasonal amusement/recreational facility workers
 - Drivers, driver's helpers, loaders, & mechanics
 - Farmworkers
 - Auto sales, parts, and mechanical workers
 - Babysitters (casual)
 - PLUS various other exemptions



The DOL's Final Rule On White Collar and HCE Exemptions

■ What Has Not Changed?: Duties Tests for White Collar and HCE Exemptions

- » The final rule makes NO changes to the duties tests for the white collar or HCE exemptions
- » However, the rule provides an opportunity for employers to review exempt status for any questionable classifications and ensure that they are properly classified
- » Now is the best time to address any issues
 - Misclassification based upon duties is a significant problem and corrections should be made now while they are likely to be subject to less scrutiny given the need to reclassify positions based upon the DOL's final rule



The DOL's Final Rule On White Collar and HCE Exemptions

- **What Has Not Changed?: Fluctuating Workweek**
 - » The DOL's final rule also leaves intact the fluctuating workweek method of calculating hours of work
 - » Under this method, employers are still permitted to continue to pay a fixed salary that covers a fluctuating number of hours at straight time so long as there is a clear, mutual understanding between the employer and employee regarding the salary and certain other conditions are met
 - » For more information on the fluctuating workweek method of calculation, see 29 C.F.R. 778.114



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The Impact of the DOL's Final Rule

(Dollars, Dollars, and More Dollars)



Impact of the DOL's Final Rule

■ Enormous Financial Impact on Employers . . .

- » DOL estimates that the final rule will affect nearly 5 million workers who will need to be reclassified as non-exempt based on salary alone
- » This means the number of exempt white collar employees is likely to be reduced by more than 50%
- » In the first year alone, DOL expects that the final rule will cost private employers approximately \$1.8 billion (\$1.2 billion in payroll increases and over \$637 million in costs related to audits, time tracking, etc.)
- » The impact is expected to be particularly significant in the retail and restaurant industries (due generally to the employment of lower-paid managers)



Impact of the DOL's Final Rule

■ PLUS Other Less Obvious Implications . . .

- » Potential issues related to redistribution of work to avoid overtime payments
 - Use of more part-time or temporary workers
 - Impact on employees' benefits if more part-time workers are used
- » Other ramifications due to more workers (think Affordable Care Act requirements, unemployment insurance, etc.)
- » Impact on employee morale, view of self



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Compliance Strategies and Action Steps For Employers

(What You Should Do Now!)



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Employer Compliance Options

■ **Employers have many options available to them in terms of compliance:**

- » Raise salaries to qualifying levels (exempt workers)
- » Reclassify, set hourly rates to maintain pay, and pay overtime (hourly, non-exempt workers)
- » Reclassify, maintain salary, and pay overtime above 40 hours of work (salaried, non-exempt workers)
 - Still requires tracking of hours even if salaried
- » Reclassify and limit hours/divide workload among multiple employees (use of more part-time, temps)

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Employer Compliance Options

■ Employers options (continued):

- » Reclassify and adjust/reduce wages (hourly or salary) to account for additional overtime
 - BUT keep in mind minimum wage requirements
- » For nonprofits, use more volunteers
 - Must still comply with the requirements to be classified as a volunteer under the law:
 - Performing voluntary services,
 - For religious, public service, or humanitarian purposes, and
 - Perform service without expectation or receipt of compensation
- » Sell, retire, or take a sabbatical and let someone else deal with the required changes!



Action Steps

■ Practical Action Step #1: Make A Plan

- » December 1st is not that far away
 - You should know by the end of June how you plan to tackle these changes and be identifying your resources needed and time available
 - Do you need a consultant? Hire an attorney? Or just need to do a little self-study?
- » Realize quick fixes are rare: set aside time to problem solve



Action Steps

■ Practical Action Step #2: Communicate

- » Employees know this stuff is happening, so consider being proactive
 - Managing the process of change can be as important as what changes you make and why
 - Consider letting potentially affected employees know there may be changes coming down the road
 - Gives employees an opportunity to digest and plan
 - May yield helpful info as you work through change process
- » Make sure employees know it's Uncle Sam's fault, not theirs



Action Steps

■ Practical Action Step #3: Perform A Self Diagnosis

- » Review existing salary/classification structure
 - Consider creating tiers for salaried positions under the \$47,476 threshold
 - No way we bump them up (and no more misclassification)
 - Of course we bump them up (check the duties test!)
 - Let's take a close look at a bump and the duties test
 - Two of these three tiers become relatively easy to solve and allow you to focus on a smaller subset



Action Steps

■ Practical Action Step #4: How Much Work?

- » For all positions regardless of tier, develop a sense of how much employees actually work
 - Because salaried employees typically do not record hours, you may need to think about how to understand positions on a volume basis
 - Some people you might otherwise make exempt are not close to 40 hours, so would hourly be better?
 - Some may be way over 40, meaning hefty overtime
 - Realize being hourly can have a false stigma associated with it



Action Steps

■ Practical Action Step #5: Can You Remodel?

- » If the work of one must become the work of two, what consequences will flow?
 - Do you create new benefits/leave/other issues?
 - Will employees look elsewhere?
 - Can you grow by bringing more people in?
- » This is an ideal time to assess the efficacy of your current management structure
 - More FTEs = more executive exempts?



Action Steps

■ Practical Action Step #6: Think Longer-Term

- » Salary test amount set to increase every three years – so give your plan shelf-life and think about the impact of future increases
- » Reclassified employees may need training:
 - Clocking in and out
 - Meal breaks
 - Remote working, email, etc.



Action Steps

■ Practical Action Step #7: Don't Be Shy

- » These changes will affect nearly every employer in nearly every industry
 - There are no stupid questions, and when there is great need for information, often there are significant resources to fill that need
 - Use your counsel, information provided by the DOL, and other sources of information
 - If and when in doubt – **get help**
 - Workers and opportunists will be watching come December 1st, so an up-front investment in certainty will be worth it



Additional Resources

- DOL Q&A on the Final Rule:
<https://www.dol.gov/WHD/overtime/final2016/faq.htm>
- DOL Guidance for Private Employers:
<https://www.dol.gov/whd/overtime/final2016/general-guidance.pdf>
- DOL Guidance for Non-Profits:
<https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>
- DOL Guidance for Small Businesses:
<https://www.dol.gov/WHD/overtime/final2016/SmallBusinessGuide.pdf>
- DOL Guidance for Higher Education:
<https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>
- DOL Guidance for State and Local Governments:
<https://www.dol.gov/sites/default/files/overtime-government.pdf>
- DOL Q&A on Non-Enforcement Period for Medicaid Funded Service Providers:
<https://www.dol.gov/WHD/overtime/final2016/nonenforcement-faq.htm>
- SHRM Guidance on the Final Overtime Exemption Rule:
<https://www.shrm.org/legalissues/federalresources/pages/overtime-rule-hub.aspx>



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Questions?



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Carmen Couden
Milwaukee, WI
414.297.5568
ccouden@foley.com



Kamran Mirrafati
Los Angeles, CA
213.972.4797
kmirrafati@foley.com

Subscribe to Foley's Labor & Employment Law blog at
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