

A Closer Look at the Final Overtime Regulatory Changes

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Agenda



- FLSA Basics
- DOL's Final Rule
- Preparing for Change

FLSA BASICS

The Fair Labor Standards Act



- Federal law that requires employers to pay employees at least the minimum wage and also overtime pay for work over 40 hours in a week
- Since enacted in 1938, the FLSA has included exemptions from the overtime requirements for executive, administrative, professional and outside sales employees “as such terms are defined and delimited from time to time by” DOL regulations

The Fair Labor Standards Act Coverage

- There is no specific exemption from the FLSA's overtime requirements for nonprofits; thus, you must determine if your organization is covered by the FLSA
- Generally, a nonprofit's employees are covered by the FLSA
- 2 separate types of coverage by the FLSA: enterprise and individual

The Fair Labor Standards Act

Enterprise Coverage

- Enterprise coverage: the FLSA applies to businesses with annual sales or business of at least \$500k
 - Does not apply to a nonprofit's charitable activities or its charitable donations/contributions, only to its business activities (such as operating a gift shop or performing services for a fee).
 - Note: certain types of entities ("named enterprises") are covered by the FLSA regardless of their total annual sales or business (hospitals; schools and preschools; government agencies; businesses providing medical or nursing care for residents)

The Fair Labor Standards Act

Individual Coverage

- Individual coverage: the FLSA applies to a nonprofit employee if he or she is engaged in interstate commerce or in the production of goods for interstate commerce, even if he or she is not engaged in such conduct for a business purpose
- Engaging in interstate commerce includes:
 - Making/receiving out-of-state phone calls
 - Sending/receiving interstate mail or email
 - Ordering/receiving goods from out-of-state suppliers
 - Transporting people or property to across state lines
 - Processing credit card transactions
 - Applying for federal grants
- Individual coverage applies independently of enterprise coverage
- A nonprofit's employees are likely covered via the FLSA's individual coverage

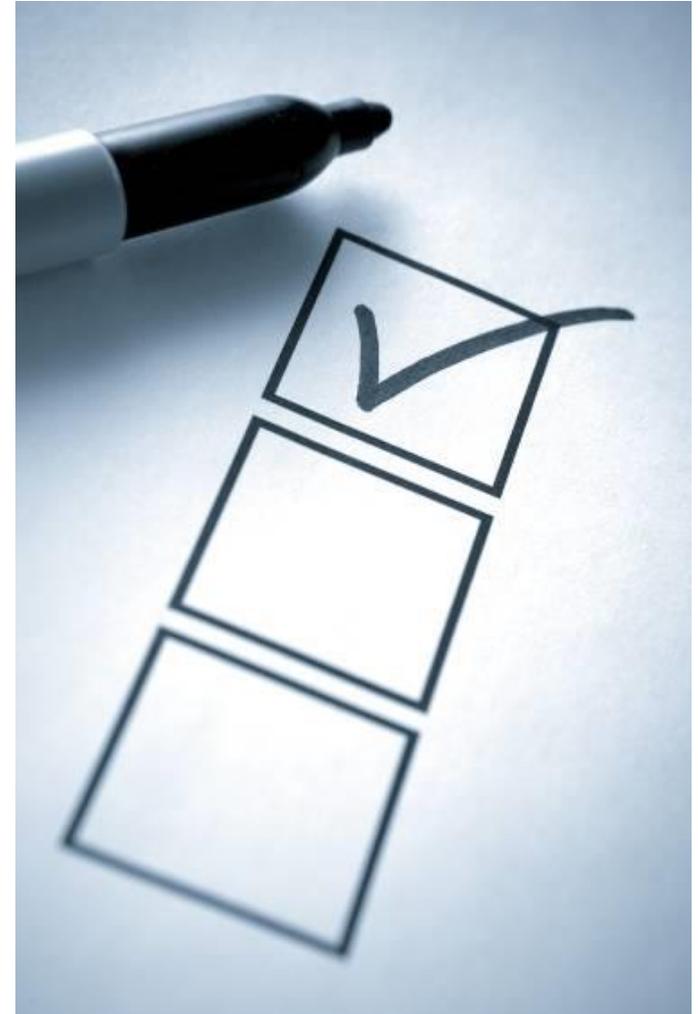
29 C.F.R. Part 541

- DOL has defined the “white collar” (or “EAP”) exemptions in regulations at 29 C.F.R. Part 541
 - Executive
 - Administrative
 - Learned Professional
 - Creative Professional
 - Computer
 - Outside Sales



Three Tests for Exemption

- Salary Level
- Salary Basis
 - Salary level and basis tests do not apply to lawyers, doctors, teachers or outside sales
 - Computer employees can be paid by the hour (\$27.63)
- Duties



DOL FINAL RULE

What is NOT Changing

- No changes to the salary *basis* test
- No changes that impact outside sales, teachers, lawyers or doctors
- No changes to the duties tests



New Minimum Salary Level

\$913 per week (\$47,476 per year)

- Up from the current \$455 per week (\$23,660 per year)
- Set at the 40th percentile of full-time non-hourly paid employees is the lowest wage Census region (South)
- Nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly, can satisfy up to 10% of the minimum salary requirement
- Part-time employees must still receive \$913 a week to maintain exemption



Highly Compensated Employees



\$134,004 total annual compensation

- Up from the current \$100,000
- Set at the 90th percentile of full-time non-hourly paid employees nationwide

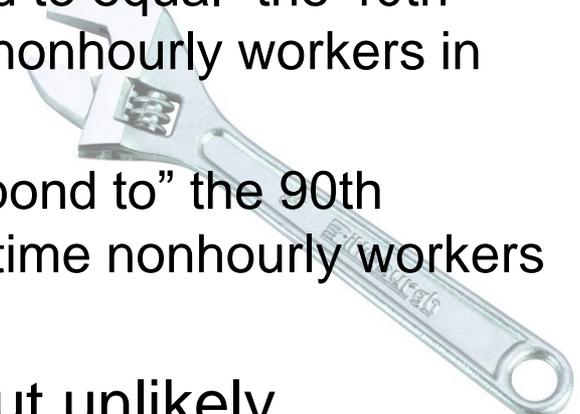
Automatic Salary Level Increases



The salary levels will automatically increase every 3 years, beginning January 1, 2020

How Will Increases Work?

- DOL will provide notice of the new salary levels “not less than 150 days before the January 1st effective date” in the Federal Register and at www.dol.gov/whd
- New levels will be based on BLS Current Population Survey data from the second quarter of the year preceding the update
 - The minimum salary level will be “updated to equal” the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region
 - The HCE level will be “updated to correspond to” the 90th percentile of weekly earnings data of full-time nonhourly workers nationally
- Can the salary level go down? Yes, but unlikely



Effective Date

- December 1, 2016
- Some states require advance notice to employees of changes in pay; Georgia does not (but can certainly do so)

PREPARING FOR CHANGE

Preparing for Change

- Likelihood of some litigation that will challenge the DOL Final Rule, but presume the new rules are ***not*** going to go away
- Determine who to reclassify -- December 1st will be here before you know it
- Don't wait! Start ***NOW!***



Compliance, Step-By-Step

1. Review impact on employee classifications and identify employees who need to be reclassified
2. Modify pay details for appropriate exemption status
3. Review wage-hour policies and processes
4. Communicate the changes
5. Train the reclassified employees and their managers



Identify Jobs for Review

- Jobs paid below \$47,476 annual salary
 - Or, below \$42,728.40 annual salary with at least \$4,747.60 in bonuses and commissions
- Also, consider a job duty review
 - Even if salary level is not an issue, you may have employees who do not meet the duties requirements for exemption under the current regulations
 - Rare opportunity to correct classification issues with reduced risk of triggering litigation



Salary Increase or Reclassify and Pay Overtime?

- Pull salary data/information
- Calculate the cost of increasing salary to \$47,476
 - Consider lowering incentive pay to offset salary increase
- Calculate the cost of overtime
 - How many hours are exempt employees actually working – take into account variations (such as by season)
 - $(\text{Weekly salary} / 40) * 1.5 * \text{expected overtime hours}$



The Cost-Neutral Solution

Weekly Salary / (40 + (OT Hours x 1.5))

- With a good estimate of expected weekly work hours, applying this formula will provide an hourly rate which will result in the same weekly and annual compensation
- Yes, it's legal – DOL gave us this formula in the preamble to the 2003 Notice of Proposed Rulemaking (68 F.R. 15576)

Job Review Process

- Review employee data – salaries, bonuses, direct reports, educational degrees
- Review documents – job descriptions, training materials, performance expectations, policies
- Review workloads and schedules
- Interview SME managers
- Conduct legal analysis (FLSA compliance audit) to determine if job duties qualify for an exemption (under the attorney-client privilege)



After the Reclassification Decision



**So many choices
So little time!**

Compensation Plan Redesign

- Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
- Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
- Are we (or how will we) track all hours worked?
- How will we calculate overtime for salaried non-exempt employees?
 - Divide salary by 40
 - Divide salary by actual hours worked
 - Fluctuating workweek
- Do we need to make changes to any benefits?

Review Policies and Processes

- Policies
 - Off-the-clock work
 - Meal and rest break
 - Travel time
 - Mobile device
 - Training time
 - Flex-Time
- Processes
 - Timekeeping
 - Payroll changes
 - Controlling overtime hours



Communicate the Changes

- Need to communicate with senior management, managers of reclassified employees and the employees themselves
- Key decisions
 - Who will communicate the changes?
 - What will be communicated?
 - How will changes be communicated?
 - When will the changes be communicated
- Prepare talking points and FAQs

Training

- Train the reclassified employees and their managers
 - Wage & hour policies
 - Timekeeping procedures
 - Activities that are compensable work



Thank
You!



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