

PREPARING FOR THE FLSA OVERTIME RULES

Presented by | Adam Jensen, Vice President

Agenda

Introduction

- What is the FLSA?

Current State of FLSA

- Salary Basis Test
- Salary Level Test
- Duties Test
- Exceptions

Final Changes

- Increased Salary Level Test
- Use of Bonus Compensation
- Automatic Increases
- Increased HCE Exemption
- No Change to Duties Test
- New Rules Release Date

Agenda

EEO-1 Changes

- New Salary Reporting Requirement

Next Steps and Potential Strategies

Presenter



ADAM JENSEN

Vice President Wisconsin Benefits

ajensen@cottinghambutler.com

608-467-5030

What is the FLSA?

- The Fair Labor Standards Act (FLSA) was passed in 1938 and introduced the forty-hour work week, established the first national minimum wage, guaranteed "time-and-a-half" for overtime in certain jobs, and prohibited most employment of minors in “oppressive child labor”
- FLSA regulates minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments
- The law has been amended a number of times since 1938, including the Equal Pay Act of 1963 that made it illegal to pay workers lower wages strictly on the basis on their sex
- Generally applies to enterprises that have an annual gross volume of sales made or business done of \$500,000

What is the FLSA?

- The Obama administration instructed the Dept. of Labor (DOL) to draft updates to a number of portions of the law
- These changes were released as proposed rules on June 30, 2015 for a 60-day comment period

Current State of FLSA

To be considered exempt and not be paid overtime, DOL requires that Jobs pass a:

1. Salary basis test
2. Salary level test
3. Job duties test

Salary Basis Test

- The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
- Permitted salary deductions- DOL allows employers to “dock” an employee’s salary under certain situations (ex: during the first or last week of employment, while on FMLA, when employee does not have time available under a PTO policy, etc.) but generally exempt employees must be paid for a full day
- An actual practice of making improper deductions from salary will result in the loss of the exemption

Salary Level Test

- The amount of salary paid must meet a minimum specified amount
- The standard salary level required for exemption is currently \$455 a week (\$23,660 for a full-year worker) and was last updated in 2004
- Total annual compensation of at least \$100,000 for highly compensated employees

Duties Test

- Generally must meet certain tests regarding their job duties
- The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations

Exemptions

The most common FLSA minimum Wage and overtime exemption Often called the “541” or “white collar” exemption – applies to certain

- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees

Exemptions

Executive Exemption Duties

- Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof
- Who customarily and regularly directs the work of two or more other employees
- Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight

Exemptions

Administrative Exemption Duties

- Whose 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
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Exemptions

Professional Exemption Duties

Learned Profession

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment
- The advanced knowledge must be in a field of science or learning
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

Creative Profession

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

Exemptions

Professional Exemption Duties

Exceptions Teachers

- Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment
- Salary and salary basis requirements do not apply to bona fide teachers

Academic Administrative Professionals

- Academic administrative professionals are exempt if their primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment.
- To be exempt, academic administrative employees must either be paid on a salary or fee basis of not less than the salary level, or be paid on a salary basis at least equal to the entrance salary for teachers in the same educational establishment

Exemptions

Professional Exemption Duties

Practice of Law or Medicine

- An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession
- The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine

Exemptions

Outside Sales Employees

- Whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer

- Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty

Exemptions

Computer Employees

- The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below
- The employee's primary duty must consist of:
 1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications
 2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications
 3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems
 4. A combination of the aforementioned duties, the performance of which requires the same level of skills

Exemptions

HCE Exemption

•Employees with "total compensation" of at least \$100,000 per year (i.e., a 52-week period) will be considered exempt if:

1. They make at least \$455.00 per week (\$23,660/year) (increasing)
2. They perform "office or non-manual work" and
3. They "customarily and regularly perform" any one or more of the exempt duties of an executive, administrative, or professional employee

Exemptions

Motor Carrier Exemption

•Applies to employees who are:

1. Employed by a motor carrier or motor private carrier, as defined in 49 U.S.C. Section 13102
2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce
3. Not covered by the small vehicle exception

Exemptions

Small Vehicle Exception

- The motor carrier exemption does not apply to an employee of a motor carrier or motor private carrier in any work week that:
- The employee's work, in whole or in part, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles:
 1. Designed or used to transport more than 8 passengers, including the driver, for compensation
 2. Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation
 3. Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation
- The employee performs duties on motor vehicles weighing 10,000 pounds or less

Exemptions

What is Interstate Commerce?

- April 21, 2016 case decided by the 10th Circuit Court of Appeals in *Dehererra vs. Decker Truck Line, Inc.* clarified that truckers who never left the state were involved in interstate commerce because their loads were a leg of what was ultimately interstate commerce

Exemptions

On-Call Employees

- An employee who is required to remain on call on the employer's premises is working while "on call"
- An employee who is permitted to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call and only must be paid if actually contacted and required to work for employer
- Additional constraints on the employee's freedom could require this time to be compensated
- If on-call over the weekend after a 40-hour week, any time worked is payable at the applicable overtime rate

Exemptions

Church and Not for Profit Employees

- FLSA applies to churches and NFPs
- FLSA can apply to protect an employee in one of two ways.
 1. To all employees of an employer who qualifies as a “business enterprise” that has \$500,000 or more in annual gross receipts
 2. To all employees who work in interstate commerce as a substantial part of their duties

Exemptions

Church and Not for Profit Employees

- “Business enterprise” rule only applies if \$500,000 or more in annual gross receipts.
- Includes for-profits who are conducting business, such as running a store, manufacturing goods, providing services, etc.
- Unless a non-profit or church is engaging in similar business-like activity, it will most likely be exempt from enterprise coverage

Exemptions

Church and Not for Profit Employees

- Employees who work in interstate commerce as a substantial part of their duties can be considered to be engaged in interstate commerce when they are “regularly using the mails and telephone for interstate communication, or when regularly traveling across state lines while working
- Must be a “regular and recurrent” part of the employee’s duties, though the Department of Labor has not established strict rules on how this test can be met, since it is a fact-based analysis

Final Changes

- Increased Salary Level Test
- Use of Bonus Compensation
- Automatic Increases
- Increased HCE Exemption
- Change to Duties Test

Final Changes

Increased Salary Level Test

- To restore the effectiveness of the salary level test, the Department proposes to set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers
- The DOL has set the new minimum weekly test amount at \$913 (up from the current \$455 per week) and has set the new minimum annual test amount at \$47,476 (up from the current annual minimum of \$23,660)
- Further, in order to prevent the salary level requirements from again becoming outdated and ineffective between rulemakings, the Department is proposing to automatically update the salary levels every three years

Final Changes

Use of Bonus Compensation

- For the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level
- Bonuses, incentive payments, and commissions must be paid on a quarterly or more frequent basis.
- Such bonuses include for example, nondiscretionary incentive bonuses tied to productivity and profitability
- The final rule will permit employers to make “catch up” payments

Final Changes

Automatic Increases

- To ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers
- The Department originally proposed two different methodologies for updating the standard salary and HCE total annual compensation levels
 1. Set % - keep those levels pegged to the 40th and 90th percentiles of earnings for full-time salaried workers, respectively
 2. Set to CPI-U - adjust the standard salary and HCE compensation amounts based on changes in inflation, as measured by the Consumer Price Index for all Urban Consumers (CPI-U)

Final Changes

Automatic Increases

- The DOL will automatically update the minimum salary amount to keep the salary level amount at the 40th percentile
- Under the final rule, updates will be made once every three years and not annually as stated in the proposed rules
- This will make the exempt/non-exempt minimum salary a moving target for employers
- Future automatic updates will start on January 1, 2020
- Rather than linking automatic increases to changes in the Consumer Price Index (CPI) as stated in the proposed rule, the increases will be based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region- the South

Final Changes

Increased HCE Exemption

- The total annual compensation requirement for highly compensated employees (HCE) will be set at the annual equivalent of the 90th percentile of full-time salaried workers nationally, which is \$134,004 (up from \$100,000 currently)
- Future automatic updates will occur every three years, beginning on January 1, 2020

Final Changes

No Change to Duties Test

- While the Department did propose any specific changes to the standard duties tests, the Department did seek comments on whether the current duties tests were working as intended to screen out employees who are not bona fide "white collar" exempt employees
- Department was considering implementing the California executive exemption duties test
 - Exempt employees must perform exempt job duties more than 50% of the time
- The DOL is not changing any of the existing job duty requirements to qualify for exemption and the change was not adopted in the final rule

Final Rule Release Date

DOL Moved Ahead Early with Final Rules

- Despite prior public announcements that the final Fair Labor Standards Act (FLSA) overtime rules would be announced in July 2016 with a late August effective date, the Dept. of Labor actually sent the final rules to the White House Office of Management and Budget (OMB) for final review early
- The final FLSA overtime rules were received by OMB on 3/14/2016 and had 90 days to review them, but released the final rule earlier than that
- DOL released final rules on 5/17/2016
- The effective date of the Final Rule is December 1, 2016 and all changes will go into effect on this date

New Release Date

Congressional Review Act

- Congressional Review Act allows lawmakers to challenge an agency regulation that they don't like by passing a joint resolution of Disapproval

- If Congress passes a resolution to block a major rule, it automatically stops the rule from taking effect for 60 days

- Major rules are those that result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets

New Release Date

Congressional Review Act

- President must veto via “disapproval memo”, which Congress must then override

- Congressional action unlikely to delay effective date past December 1st

EEO-1 Changes

New Salary Reporting Requirements

- EEOC has published proposed new rules stating that it require employers to report salary data on the EEO-1 report beginning in 2017 as a way to catch employers with discriminatory pay practices

- EEOC proposes to collect pay data by sex, race, and ethnicity by job category from private employers, including federal contractors, with 100 or more employees through the EEO-1 report

EEO-1 Changes

New Salary Reporting Requirements

- The Form EEO-1 is required to be completed annually by large employers (100 or more employees) and federal contractors

EEO-1 Changes

How's the government going to catch you?

-You're going to tell them yourself!

Direct quote from the EEOC website:

“Too often pay discrimination goes undetected because of a lack of accurate information about what people are paid. The proposed pay data collection will provide a much needed tool to identify discriminatory pay practices where they exist in order to ensure that fair pay practices are put in place.”

[Http://www.eeoc.gov/employers/eo1survey/2016_eo-1_proposed_changes_qa.cfm](http://www.eeoc.gov/employers/eo1survey/2016_eo-1_proposed_changes_qa.cfm)

EEO-1 Changes

Who:

- Private employers with more than 100 employees and federal contractors Employers, including federal contractors, with 100 or more employees would submit data about pay
- Federal contractors with 50-99 employees would not report pay data but would continue to report ethnicity, race, and sex by job category
- Consistent with current practice, non-contractor employers with 1-99 employees and federal contractors with 1-49 employees would not be required to file the EEO-1 report

EEO-1 Changes

What:

- Pay data by sex, race, and ethnicity by job category
- Employers would report employees' total W-2 earnings for a 12-month period looking back from a pay period between July 1st and September 30th

EEO-1 Changes

When:

- Employers would submit pay data as of the September 30, 2017 EEO-1 filing deadline

EEO-1 Changes

Penalties:

- Any employer failing or refusing to file Report EEO-1 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the commission. In other words, the EEOC will sue you
- Government contractors that do not file a report could be subject to debarment from their contracts

Next Steps

- Conduct an Audit
- Determine which exempt positions that are currently paid between \$23,660 and \$47,476 annually
- Determine hours worked per week
- Change management for employees who may have to start tracking hours
- Examine policies for employees using electronic devices outside of schedule work hours
- Potentially look at job duties for executive exemptions
- Be aware of state OT and exemption laws

Potential Strategies

- Consider making employees salaried, non-exempt
- Move employees to non-exempt (hourly) and track hours
- Increase employees' salary to \$47,476 or \$134,004
- Consider hiring more employees to cover OT hours
- Decrease salary (same net salary)
- Manage hours worked in workweek to avoid OT

Questions?



ADAM JENSEN

Vice President Wisconsin Benefits

ajensen@cottinghambutler.com

608-467-5030