



DirectEmployers

Reclassification by Regulation? Navigating the Department of Labor's Rule on Overtime Expansion

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A Little Useful Background...

- > **HISTORY AND PURPOSE OF THE FAIR LABOR STANDARDS ACT (“FLSA”)**
 - Enacted in 1938
 - Ensures Minimum Wage
 - Provides for Overtime Wages for Hours Worked Over Forty in a Week by Covered Employees
 - Exemptions for Certain Kinds of Employees
 - U.S. Department of Labor Enforces and has Updated by Regulation Through the Years

A Little Useful Background...

> **COMMON CRITERIA FOR MEETING FLSA EXEMPTIONS:**

- Salary Basis Test: Employee gets a fixed, predetermined salary not subject to reduction based on variations in quality/quantity of work.
- Salary Level Test: Employee's salary is at least the regulatory required amount.
- Duties Test: Employee's job duties primarily involve those defined in "exemptions."

A Little Useful Background...

> **THE FLSA EXEMPTIONS (2004):**

- “Executive”
 - https://www.dol.gov/whd/overtime/fs17b_executive.pdf
- “Administrative”
 - https://www.dol.gov/whd/overtime/fs17c_administrative.pdf
- “Professional”
 - https://www.dol.gov/whd/overtime/fs17d_professional.pdf
- “Computer”
 - https://www.dol.gov/whd/overtime/fs17e_computer.pdf
- “Outside Sales”
 - www.dol.gov/whd/overtime/fs17e_computer.pdf
- “Highly Compensated Employee” (“HCE”)
 - https://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf

A Little Useful Background...

> **IMPETUS FOR 2016 REGULATORY AMENDMENTS**

- DOL's 2004 regulatory amendments eliminated "long duties tests" in favor of "standard duties tests" and combined these with current \$455 weekly/\$23,660 annual salary level.
- 3/13/2014 Presidential Memorandum directed DOL to modernize and simplify regulations to ensure FLSA's intended protections.
- 7/6/2015 DOL concluded that 2004 regulatory revisions exempted from overtime many employees whose work was "otherwise indistinguishable from their overtime-eligible colleagues."

DOL's Final Rule Updating Exemptions

> **SO WHAT'S NEW IN 2016?**

- Minimum salary level for all exemptions other than HCE increased to \$913 weekly or \$47,476 annually.
- HCE salary level raised to \$134,004 annually.
- Salary can now include up to 10% nondiscretionary bonus, incentive and/or commission payments if paid at least quarterly.
- Salary levels will be automatically adjusted, on an indexed basis, every three years.

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> **WHAT ELSE CHANGES?**

- Changes to “Salary Basis” - None
- Changes to “Duties” – None
- Changes to “Exemptions” – None other than to applicable “Salary Levels”
- BUT... brand new features:
 - Applicability of nondiscretionary income to “Salary Level.”
 - “Salary Level” adjustments every three years.

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> **CAUTION: AFFECT OF STATE LAW?**

- Employees get the benefit of whichever law is more employee-friendly
- Not likely an issue with the new “Salary Levels” for exemptions, but some States never adopted the 2004 standard duties tests
- Many employers have employees in different States
- SO... BE AWARE OF WHAT APPLIES WHERE

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> **WHEN DO THE NEW REGULATIONS TAKE EFFECT?**

- Effective Date = December 1, 2016
- Until then, “Exemptions” will be, and will appear, the same
- After then, “Salary Level” will change
- SO... THERE IS A LOT TO DO BEFORE 12/1/16!!!

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- > **How should you address these new requirements in your company?**
 - Increase employee salaries?
 - Reduce employee salaries and pay the required overtime?
 - Discontinue the allowance of overtime hours?
 - Use some combination of these responses?

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- > **How should you address these new requirements in your company? (Con't)**
 - Employers more likely to raise salaries for employees who regularly work overtime but earn less than \$47,476 in order to maintain their overtime-exempt status so the employer does not have to pay the overtime premium
 - Employers will likely not raise salaries for employees who rarely work overtime and simply pay the overtime premium whenever necessary
 - Employers not required to change employees' pay to hourly from salaried, even if the employees' classification changes from exempt to overtime eligible
 - Employers may continue to pay newly overtime eligible employees on a salaried basis

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> **How should you address these new requirements in your company? (Con't)**

- Increase employee salaries?
 - Raise employee salary and keep the employee exempt from overtime
 - Does the employee meet the duties test for executive, administrative or professional employees?
 - Good option for those close to the new salary level and who regularly work overtime

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- > **How should you address these new requirements in your company? (Con't)**
 - Additional Guidance for Specialized Employers
 - General guidance for Private Employers:
<https://www.dol.gov/whd/overtime/final2016/general-guidance.pdf>
 - Guidance for Higher Education Employers:
<https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>
 - Guidance for Nonprofit Employers:
<https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>

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> **How should you address these new requirements in your company? (Con't)**

- Reduce employee salaries and pay the required overtime?
 - Consider the potential cost of this option
 - Example for employee with a \$40,000 salary working 10 hours OT each week:
 - $\text{Reduce salary to } \$35,000 / 52 \text{ weeks} = \$673.08 / \text{week}$
 - $\$673.08 / \text{week} = \$16.83 / \text{hour}$
 - $\$16.83 / \text{hour} \times 1.5 \text{ (OT rate)} \times 10 \text{ hours OT} = \$252.45 / \text{week in OT}$
 - $\$252.45 / \text{week} \times 50 \text{ weeks} = \$12,622.50 \text{ Total OT}$

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> **How should you address these new requirements in your company? (Con't)**

- Reduce employee salaries and pay the required overtime? (Con't)
 - Consider the potential cost of this option VS. increasing the individual's salary to the new salary level
 - Current salary = \$40,000/year
 - Increase salary to \$50,000 = \$10,000 increase
 - \$10,000 increased salary cost (with no requirement to pay OT)
- VS
- \$12,622.50 with salary reduction plus OT pay

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> **How should you address these new requirements in your company? (Con't)**

- Reduce employee salaries and pay the required overtime? (Con't)
 - Consider the two major benefits:
 - Reduced cost to increase employee's salary rather than converting to non-exempt
 - Increased employee morale

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> **How should you address these new requirements in your company? (Con't)**

- Discontinue the allowance of overtime hours?
 - How will the work get done?
 - Transfer the work to other exempt employees who are paid over the new salary level?
 - What about the OT those employees are already working?
 - What about the employee morale issues that will inevitably follow?

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> **How should you address these new requirements in your company? (Con't)**

- Logistical issues
- Record-keeping (punch a timeclock?)
- Potential morale issues of previously exempt employees who have been reclassified via regulation to non-exempt positions
- Unexpected pay disparities

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> **How should you address these new requirements in your company? (Con't)**

- Logistical issues
 - Review current job classifications to ensure compliance with exemption requirements – primary duties test did NOT change
 - Evaluate jobs that are currently exempt but don't meet the \$47,476 minimum
 - Consider reclassification of positions, OR
 - Consider increase in compensation

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- > **How should you address these new requirements in your company? (Con't)**
 - Logistical issues (Con't)
 - Benefits
 - Some benefits are based on salary earned; what are the effects on employee benefits if salaries are reduced?
 - Do salaried or exempt employees receive benefits that hourly or non-exempt employees do not?

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> **How should you address these new requirements in your company? (Con't)**

- Recordkeeping

- Will you now require previously exempt employees to punch a timeclock?
- Non-exempt employees are required to keep track of their hours worked
- Employer communication must provide proper directives to ensure understanding of all new requirements for which some employees may be completely unaware

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> **How should you address these new requirements in your company? (Con't)**

– Recordkeeping (Con't)

- Employers must display an official poster outlining the provisions of the Act
- Poster can be found here:
 - <http://www.dol.gov/osbp/sbrefa/poster/main.htm>

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> **How should you address these new requirements in your company? (Con't)**

- Recordkeeping (Con't)
 - Every covered employer must keep certain records for each non-exempt worker
 - No specified form for the records, but records must include certain identifying information about the employee and data about the hours worked and the wages earned
 - The law requires this information to be accurate

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> **How should you address these new requirements in your company? (Con't)**

- Recordkeeping (Con't)
- The following is a listing of the basic records that an employer must maintain:
 - Employee's full name and social security number
 - Address, including zip code
 - Birth date, if younger than 19
 - Sex and occupation
 - Time and day of week when employee's workweek begins
 - Hours worked each day
 - Total hours worked each workweek

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- > **How should you address these new requirements in your company? (Con't)**
 - Recordkeeping (Con't)
 - The following is a listing of the basic records that an employer must maintain: (Con't)
 - Basis on which employee's wages are paid (e.g., "\$9 per hour," "\$440 a week," "piecework")
 - Regular hourly pay rate
 - Total daily or weekly straight-time earnings
 - Total overtime earnings for the workweek
 - All additions to or deductions from the employee's wages
 - Total wages paid each pay period
 - Date of payment and the pay period covered by the payment

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> **How should you address these new requirements in your company? (Con't)**

- Recordkeeping (Con't)
- Record Retention Requirements:
 - Payroll records, collective bargaining agreements, sales and purchase records must be preserved for three years
 - Time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages must be retained for two years
 - Records must be available for inspection by the WHD representatives
 - Records may be kept at the place of employment or in a central records office.

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> **How should you address these new requirements in your company? (Con't)**

- Recordkeeping (Con't)
- Timekeeping:
 - Employers may use any timekeeping method they choose
 - They may use a time clock but this is not required
 - Have a timekeeper keep track of employee's work hours
 - Tell their workers to write their own times on the records
 - Any timekeeping plan is acceptable as long as it is complete and accurate

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- > **How should you address these new requirements in your company? (Con't)**
 - Potential Morale Issues
 - Exempt employees converted to non-exempt could feel less valued
 - Time-reporting could cause reclassified employees to resent their new requirements
 - How should you handle?
 - Explain the legal requirements – reclassification is a result of the federal government's regulatory changes on overtime eligibility
 - Communicate, communicate, communicate

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- > **How should you address these new requirements in your company? (Con't)**
 - How should you handle? (Con't)
 - Explain the positive aspects of overtime eligibility
 - May have the opportunity to have greater earnings for the hours they devote to work now
 - May have additional free time should their company decide to limit amount of overtime worked
 - No reflection whatsoever on the individual employee

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- > **How should you address these new requirements in your company? (Con't)**
 - How should you handle? (Con't)
 - **Important Notes:**
 - Employees in the same job title can be classified differently; exempt and non-exempt
 - Be careful with this solution
 - Non-exempt employees will have the opportunity for greater earnings with OT
 - Review actual job duties and consider development of different job classifications/job titles to keep exempt and non-exempt employees classified accordingly

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> **How should you address these new requirements in your company? (Con't)**

- Potential Pay Disparities (Con't)
 - Salary compression issues must be considered
 - If employee salaries are raised, will you need to increase employee salaries at higher levels to avoid salary compression issues?
 - What about supervisory employees who will now earn less than their subordinates if subordinate salaries are raised to the higher level which now equals the supervisor's salary?

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> **AFFECT ON TELECOMMUTING?**

- Many exempt employees have and regularly use remote access.
- Work from home arrangements are also increasingly popular in many industries.
- Easier with exempts than non-exempts because of record-keeping challenges.
- But, as a practical matter, what happens where exempts become non-exempts?

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> **AFFECT ON USE OF SMART PHONES, LAPTOPS, TABLETS, ETC. FOR WORK?**

- Many exempt employees have and regularly use smart phones for work, especially in outside sales.
- Many managers are issued laptops, tablets, etc. and/or use their own for work.
- Similar record-keeping challenges capturing and recording time spent using these devices during off work hours.
- How to regulate if exempts become non-exempts?

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➤ **Bottom Line:**

- **Lots to do before December 1, 2016**
- **This won't be going away no matter who is elected as President in November!**

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Thank You!

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