

FLSA Exemption Changes: The Proposed Rules Are Coming

Squire Patton Boggs
Webinar Series





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- Employers must pay employees at least the federal minimum wage (currently \$7.25/hour) and overtime at a rate of at least 1.5 times the employee's regular rate for any hours worked over 40 in a week, unless exempt.
- The most common exemptions are the executive, administrative, professional, outside sales exemptions > “white collar” exemptions.
- President Obama issued a directive to the Secretary of Labor last March to modernize and streamline the existing white collar exemptions. Regulations have not been updated since 2004.
- First in a series of webinars to educate and assist employers in familiarizing themselves with and preparing for the impact of the upcoming rule changes.

The Rule-Making Process in Washington

- After Proposed Rules > 30-day public comment period.
- DOL drafts final regulation, taking into account public comments.
- DOL will hear testimony regarding the proposed changes before issuing a final version to the Office of Information and Regulatory Affairs ("OIRA").
- OIRA will then conduct a review of the proposed regulations and publish the final text of the regulation in the Federal Register.



Background -- Refresher

- The current “white-collar” exemption tests
 - Salary
 - Primary Duties



Current Salary Test

- Predetermined Minimum \$455/week (\$23,660/year)
- No Docking Except
 - Full sick days if sick policy
 - Full personal days
 - First and last week employment
 - Full weeks
 - Violation of written work rules
 - FMLA leave



Current Duties Tests

■ Executive Exemption

- Managing – Enterprise or Department
- Primary Duty
- Supervising two or more full-time employees
 - Hiring or firing authority or
 - Recommendations given weight



■ Administrative Exemption

- Office or non-manual Work
- Primary Duty: management policies or general business operations
- Discretion and independent judgment regarding matters of significance

■ Outside Sales Exemption

- Primary duty making sales/orders
- Customarily and regularly away from employer's place of biz



Current Duties Test

■ Professional Exemption

- Teaching
- Advanced Knowledge
 - Field of science
 - Long course of specialized study
- Original and Creative



■ Computer Employees Exemption

- Primary Duty Consists of:
 - Systems analysis or
 - Designing or modifying computer systems or programs based upon user or system specifications or
 - A combination of these duties



Anticipated Changes

- DOL expected to change the FLSA's overtime rules in two significant respects:
 - **(1) raising the minimum salary threshold** for overtime exemption significantly; and
 - **(2) modification/ elimination of the current “primary duty” test** used to determine whether an employee qualifies under a white collar exemption.

■ Raising salary threshold

- Anticipate raise from \$455/week to \$800-1000/week
 - Several noted economists, former Secretary of Labor wrote to the DOL recently advocating a threshold of “about \$50,000” (~\$960/week)
 - Former Economic Policy Institute economist Heidi Shierholtz (now Labor Secretary Perez’s CE) advocated last fall for \$984/week (\$51,168/year)
 - Jan. 29, 2015 letter from 26 senators advocated \$1,090/week (\$56,680/year)
- Two states already higher (CA - \$720/week; NY - \$600/week)

- **Modifying/eliminating “primary duty” standard**
 - DOL may adopt a strict “division of labor” test > spend at least 50 percent of their working hours performing “executive, administrative or professional duties”
 - E.g., assistant manager at a restaurant is responsible for hiring, firing, promoting and evaluating employees, but spends only 25% of her time performing those functions and the majority of her remaining time engaged in customer service activities, the assistant manager would likely be classified as non-exempt
 - Currently used in California

Impact of Anticipated Changes

- Raising salary increase number of employees classed as non-exempt and raise payroll costs
- Changing to “division of labor” test or other modified “primary duties” test will likely increase timekeeping/recordkeeping burden
 - Time tracking by/of exempt employees?
 - Task tracking by/or exempt employees?
- Other administrative changes
 - Reviewing/revising employee handbooks/policies
 - Reviewing/changing job functions of “grey area” employees

Preparing For The Rule Changes

- **Review and evaluate:**
 - Current workforce composition
 - Current workforce classification
 - Current time/task-keeping procedures/c
- **Assess potential impact of rule change**
 - Increased direct payroll costs
 - Increased administrative costs
 - Need for reclassification?



- **Get Creative**

- **Fluctuating workweek agreement -- nonexempt**

- hours must fluctuate and must have a mutual understanding salary covers straight time for all hours actually worked – whether over or under 40 hours per week.
- RR is calculated by dividing salary by actual hours worked in a given workweek. Need only pay an additional one-half time for hours worked in excess of 40 hours. RR will fluctuate from week to week depending upon hours worked; more hours worked, the lower the regular rate.
- While poses difficulties in administration, can result in greater cost savings to the employer
- Watch for deduction and add-on issues; NOT YOUR 541 RULES!
- But some states (like PA) do not permit

Preparing For The Rule Changes

- **Example** : EE receives salary of \$500 per week and works 45 hours, would be paid at \$5.56 extra per overtime hour. The same employee working 50 hours would be paid at only \$5.00 extra per overtime hour.

- **45 hours**

- $\$500 \div 45 \text{ hours}$ = \$11.11 regular rate
- $\$11.11 \div 2$ = \$5.56 half-time rate
- $\$5.56 \times 5 \text{ overtime hours}$ = \$27.80 overtime pay
- **Total payment** = **\$527.80**

- **50 hours**

- $\$500 \div 50 \text{ hours}$ = \$10 regular rate
- $\$10 \div 2$ = \$5 half-time rate
- $\$5 \times 10 \text{ overtime hours}$ = \$50.00 overtime pay
- **Total payment** = **\$550.00**

- If not FW method, pay \$12.50 for each overtime hour ($\$500 \div 40$) and would receive \$93.75 in overtime for working 45 hours (total of \$593.75 or an additional \$65.95) and \$187.50 pay for working 50 hours (total of \$687.50 or an additional \$137.50)
- Or, if still qualify as exempt, pay \$50,000 annually (or new min salary level) but entitled to salary deduction rules.

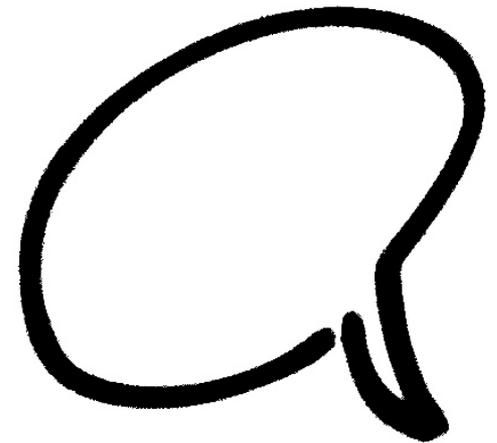
- **Get Creative (continued)**

- **Belo Agreement**

- similar to FW requirement
- allows payment of guaranteed salary compensating for overtime for an agreed-upon number of hours up to 60 per week
- Hours must necessarily vary between over 40 and under 40 hours
- office employees generally not going to qualify
- Irregular fixed schedules

Impacting the Final Rule

- Will hold another webinar shortly after the proposed rule is announced
- Join us, and tell us your comments
- Alternatively, send us your comments
 - jill.kirila@squirepb.com
 - Subject: FLSA Proposed Rules



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