

2015 Wage and Hour Update: Recent Developments and the Upcoming FLSA Exemption Changes

Squire Patton Boggs
Webinar Series





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■ MINIMUM WAGE INCREASES

- Federal contractors (Executive Order 13658)
 - \$10.10 per hour
 - Applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2015 or to contracts that are awarded outside the solicitation process on or after January 1, 2015.

- State/local increases
 - 21 states, 2 counties and 7 cities have raised the minimum wage during 2015; additional increases coming:
 - June 1 (Delaware, \$8.25)
 - July 1 (Chicago, \$10.00; Maryland, \$8.25; Washington, D.C., \$10.50)
 - August 1 (Minnesota, \$9.00)
 - October 1 (Berkeley, CA, \$11.00)

- Wave of recent cases in New York involving fashion retailers and media giants
- Second Circuit is deciding whether to adopt DOL's test or use a more flexible, totality of the circumstances test, under which the court would evaluate who is the primary beneficiary of the intern-employer relationship
- Federal Circuits use different tests
- LESSON: Review internship program, using DOL factors as a guide. Ensure the interns are the primary beneficiaries of the program.

■ UNPAID INTERNS LITIGATION

- DOL 6 –factor test for interns:
 - The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment
 - The internship experience is for the benefit of the intern
 - The intern does not displace regular employees, but works under close supervision of existing staff
 - The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion, its operations may actually be impeded
 - The intern is not necessarily entitled to a job at the conclusion of the internship
 - The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship
- DOL’s position is that all factors must be met for exemption
- College credit: Does not supplant need to comply with all factors

- **USING SOCIAL MEDIA FOR CLASS ACTION NOTIFICATIONS**
- *Mark v. Gawker Media LLC*, 2014 U.S. Dist. LEXIS 155424 (Nov. 3, 2014 S.D.N.Y.)
- Court approved the use of social media as a mechanism to notify potential class members in a wage and hour dispute
- Because the potential class members were unpaid interns, Gawker did not have complete contact information (like names and mailing addresses) which necessitated an alternative class mechanism.
- Plaintiffs' counsel proposed use of "inflammatory" hashtags (#fairpay, #livingwage), proposed Facebook page whereby prospective plaintiffs would be added as friends (court later rejected the latter).
- LESSON: Retain adequate records of employees' and interns' traditional contact information

FLSA Exemption Changes

- Currently, 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.
- Proposed rule sent to Office of Information and Regulatory Affairs ("OIRA") last week; OIRA has maximum of 90 days to review before publication in Federal Register.

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 OIRA.
- OIRA will then conduct a review of the proposed regulations and publish the final text of the regulation in the Federal Register. Final rule unlikely before 2016.



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



■ 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
 - Field of science
 - Long course of specialized study
- 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



- 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/capabilities
- **Assess potential impact of rule changes**
 - Increased direct payroll costs
 - Increased administrative costs
 - Need for reclassification?



■ **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**

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

- **50 hours**

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

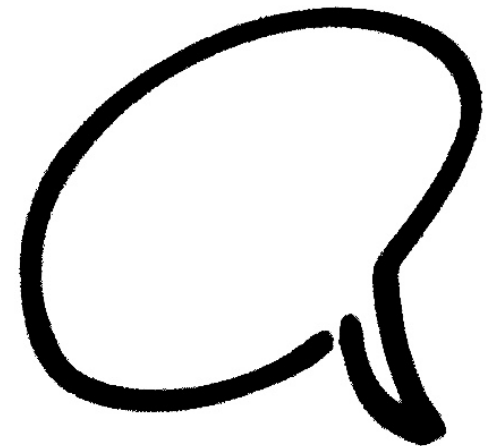
- If not FW method, pay \$12.50 for each overtime hour ($\$500 \div 40$) and would receive \$93.75 in overtime for working 45 hours (total of \$593.75 or an additional \$65.95) and \$187.50 pay for working 50 hours (total of \$687.50 or an additional \$137.50)
- Or, if still qualify as exempt, pay \$50,000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

■ **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 a webinar shortly after the proposed rule is announced
- Join us, and tell us your comments
- Alternatively, send us your comments
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 - Subject: FLSA Proposed Rules



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