

OVERTIME OVERHAUL: WHAT YOU NEED TO KNOW ABOUT EXEMPT AND NONEXEMPT STATUS AND OTHER WAGE AND HOUR PITFALLS



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FLSA



- Fair Labor Standards Act (FLSA) – federal law governing wage and hour issues
- Exempt vs. Non-Exempt
- Start with presumption that all employees are non-exempt (non-exempt = comp time/overtime pay for all hours worked over 40 in a work week)

FLSA



- Two Parts to being exempt
 - Must be paid on a salary basis
 - Must meet the duties test

FLSA



- Issues arise in 3 primary ways
 - Employee complaints to employer
 - U.S. Department of Labor audits/investigations
 - Litigation
- Individual liability

Litigation/Enforcement Facts & Figures



- Between 2001 and 2015—over 450% increase in FLSA collective actions in federal court.
- An overwhelming majority of all federal and state court employment law class/collective actions are wage & hour class or collective actions.
- DOL initiated all-time high (42% of all audits) number of audits in 2015, and the DOL found FLSA violations in 79% of audits.

Litigation/Enforcement Facts & Figures



In 2015, wage & hour litigation continued its trend of outpacing all other types of workplace class actions. Collective actions pursued in federal court under the FLSA outnumbered all other types of private class actions in employment-related cases.

- 8,954 FLSA cases filed in 2015.
- Only 397 cases filed in 2001.

Status of DOL Final Rule



Where are we?

DOL Final Rule Timeline



- Released on June 30, 2015
 - Published in Federal Register on July 6, 2015
- 60-day comment period ended on September 4, 2015
- Final Rule issued by DOL on May 17, 2016
 - Effective December 1, 2016
- District Court in Texas granted preliminary injunction on November 22, 2016.
- Enjoined the DOL from implementing and enforcing the Final Rule.

Final Rule



- Increases the minimum salary to **\$47,476/year** (or **\$913/week**) under the salary basis test.
 - This is the 40th percentile of earnings of full-time salaried workers (located in South).
- Increases the total annual compensation of the highly compensated employee to **\$134,034/year**
 - This is the annualized value of the 90th percentile of weekly earnings (nationally) of full-time salaried workers.

Salary Earned in Shorter Period



- DOL Field Operations Handbook – 22g10
 - What if the employee's salary is less than the required amount because it covers a duty period of less than one year?
 - “Exemption is not lost” if the salary, when prorated over the actual duty period, meets the required minimum amount.
 - Does the employee make \$913/week?

Final Rule



- Did NOT establish a mechanism for *annually* updating the salary levels each year based on either the 40th percentile or inflation (based upon the Consumer Price Index).
 - Instituted an automatic update **every three years**, instead.
 - Begins **January 1, 2020**

White Collar Exemptions



- Executive
- Administrative
- Professional - Learned professionals, creative professionals, Teachers in a school system
- Computer Employees
- Outside Sales Employees

Executive Employees



- **Salary:**
 - \$455 per week or equivalent
- **Duties:**
 - Primary duty is the management of the enterprise or a recognized department or subdivision.
 - Customarily and regularly directs the work of two or more other employees.
 - Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).

Administrative Employees



- **Salary:**
 - \$455 per week or equivalent
- **Duties:**
 - Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
 - Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Directly Related to Management or General Business Operations



- Examples include work in functional areas such as:
 - Tax
 - Finance
 - Accounting
 - Budgeting
 - Auditing
 - Insurance
 - Quality control
 - Purchasing
 - Procurement
 - Advertising
 - Marketing
 - Research
 - Employee Benefits
 - Labor Relations
 - Public Relations
 - Government Relations
 - Computer Network
 - Internet & Database administration
 - Legal & Regulatory Compliance
 - Safety & Health
 - Personnel Management
 - Human Resources

The Learned Professional Exemption



- Most must be paid on salary of at least \$455/week or equivalent
- Primary duty test has 3 elements:
 - The employee must perform work requiring advanced knowledge;
 - The advanced knowledge must be in a field of science or learning; and
 - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional Employees



- **Salary:**
 - \$455 per week or equivalent
- **Duties:**
 - Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- **Examples:**
 - Actors, Conductors, soloists
 - Musicians, Composers, novelists

Teachers



- The term “employee employed in a bona fide professional capacity” also includes:
 - Employee with a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge AND
 - Who is employed and engaged as a teacher in an educational establishment
- NOTE: Salary requirements do not apply

Computer Employees Exemption



- Salary:
 - \$455 per week or \$27.63 an hour or equivalent

- Duties:
 - Primary duty of:
 - ✦ (A) application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional applications; or

Computer Employees



- Duties (cont.)
 - ✦ (B) 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; or
 - ✦ (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - ✦ (D) a combination of duties described in (A), (B), and (C), the performance of which requires the same level of skills.

Outside Sales Exemption



- The employee's primary duty must be making sales (as defined in the FLSA), 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; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Salary Basis Test



- The compensation component is defined for executive, administrative, and professional employees by the salary basis test.
- The DOL uses this test to separate exempt and non-exempt employees.

Salary Basis Test



- Exempt employees must be paid on a salary basis.
- Currently, salary must be equal to at least \$23,660 per year (\$455 week).
- Cannot be paid hourly wages.
- An employee is paid on a salary basis if he regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation.
- The amount is not subject to change, regardless of the quality or quantity of work performed in a given week. (NOTE: There are limited exceptions to no docking rule.)

Salary Basis Test



- When can an employer dock the salary of an exempt employee and not violate the salary basis test?
 - When an exempt employee is absent from work for a FULL DAY for personal reasons, other than sickness or disability (partial day for public employee);
 - For absences of a FULL DAY or more occasioned by sickness or disability (including work-related accidents);
 - When an exempt employee violates safety rules of major significance;
 - When an exempt employee is in good faith suspended for a full day or more for infractions of workplace conduct rules;

Salary Basis Test



- When can an employer dock the salary of an exempt employee and not violate the salary basis test?
 - For initial and terminal weeks of employment; and
 - When an exempt employee takes unpaid leave under the FMLA.

Salary Basis Test



- Public Agency Employers and the Salary Basis Test:
 - An exempt employee may have his pay reduced or may be placed on unpaid leave for absences due to personal reasons of less than one full day when leave is not used by the employee because:
 - ✦ permission to use leave has not been sought or permission has been sought and denied;
 - ✦ the employee's accrued leave has been exhausted; or
 - ✦ the employee chooses to use leave without pay;
 - Provided that the employee is paid according to a system set by statute/ordinate/regulation/policy/practice based on principles of public accountability, under which the employee accrues personal and sick leave and which requires the employee's pay to be reduced for such absences.

Common Pitfalls



- Off-the-Clock Work
- Travel Time
- Time spent in lectures, seminars, training, etc.
- When is time spent in these activities “hours worked” and thus compensable?

Off-the-Clock Work



- Common problems
 - When employees work through lunch breaks while they are clocked out
 - ✦ Guidelines on meal periods and rest periods
 - When employees perform work before clocking in OR after clocking out for the day
 - ✦ Work at work
 - ✦ Work at home
 - When employees on unpaid leave are contacted with work-related questions, problems, or issues

Off-the-Clock Work



- Common Problems
 - Meal Periods
 - Before and After Work Hours
 - ✦ Work at home
 - ✦ Work at the office

Off-the-Clock Work



- When employees use their own devices, there is a risk that employees will raise wage & hour claims for time worked “off the clock.”
- Employees have to be paid for “off the clock” work even when the employer did not request it.
- Usual situation: making work-related calls, reading and replying to emails during off-work hours.



Off-the-Clock Work

photosinbox.com



Easy Solution?



No email or
work-related
calls outside of
working hours.

But . . .

Travel Time



- **Home to Work Travel:** Traveling from home before the regular workday and returning at the end of the workday is ordinary “home to work” travel, and is not compensable.
- **Home to Work on a Special One Day Assignment in Another City:** The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel Time



- **Travel That is “All in a Day's Work:”** Time spent in travel as part of their principal activity, such as travel from job site to job site during the workday, is ***work time*** and must be compensated.
- **Travel Away from Home:** Overnight travel is travel away from home. This is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days.

Training Time



- Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if ALL the following criteria are met:
 - Attendance is outside of the employee's regular working hours;
 - Attendance is voluntary;
 - The course, lecture, etc., is not directly related to the employee's job; and
 - The employee does not perform any productive work during such attendance.

Training Time



- **Mandatory vs. Voluntary**
 - **Attendance is not voluntary if:**
 - ✦ It is required by the employer, or
 - ✦ If the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.
- **Mandatory (or involuntary) attendance for training or education is compensable as time worked.**

Compensatory Time



- Not permitted in the private sector
- 1985 Amendments to the FLSA
 - Addresses concerns of state and local government employers regarding costs
 - Protects employees who work overtime

Compensatory Time



- In lieu of overtime pay, public employees may receive comp time – at a rate of at least 1 ½ hours for each OT hour worked.
 - OT compensation to non-exempt employees – **MUST**

Compensatory Time



- Ceiling of 480 hours (equivalent of 320 OT hours worked)
 - Law enforcement
 - Fire protection
 - Emergency response personnel
 - Employees engaged in seasonal activities
- Ceiling of 240 hours (equivalent of 160 OT hours worked)
 - All other public employees

Compensatory Time



- Must be PRIOR agreement/understanding that employees will be compensated with comp time in lieu of payments for overtime.
 - Policy or handbook provision sufficient
 - Do you have signed handbook acknowledgement?

Compensatory Time



- Termination of employment
 - Must pay employees for accrued, unused comp time when their employment terminates.



Compliance

Compliance



- Evaluate whether you have established policies and practices to help avoid investigations and lawsuits
 - ✦ Policies
 - Mandate accurate time keeping by employees
 - Discipline for falsification of time records
 - Signed time card/sheet certifies that time recorded is accurate
 - Require prior authorization for overtime
 - Unauthorized overtime grounds for discipline
 - Salary Basis Safe Harbor
 - Specific requirements for meal breaks and rest breaks
 - Off-the-clock time including remote work issues (phones, emails, tablets, etc.)
 - Process for reporting time worked off-the-clock
 - Require that employees check paychecks/paystubs for errors

Compliance



- ✦ Training
 - HR/Accounting
 - Supervisors
 - Monitor that employees are working all the claimed hours
 - Also monitor that they are not working unreported hours
 - Employees
- ✦ Recordkeeping
 - Retain payroll records for **as long as possible**
 - Retain backup documentation, e.g. time cards, schedules, etc., for as long as possible for **as long as possible**
 - Records must be available for inspection by DOL with 72 hours of notice

Compliance



✦ Internal Audits

- Review your employees' exemption classifications
- Make sure that hours are being properly calculated and classified
- Check job descriptions

Thank You!



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