

Today's webinar will begin shortly. We are waiting for attendees to log on.

Presented by:

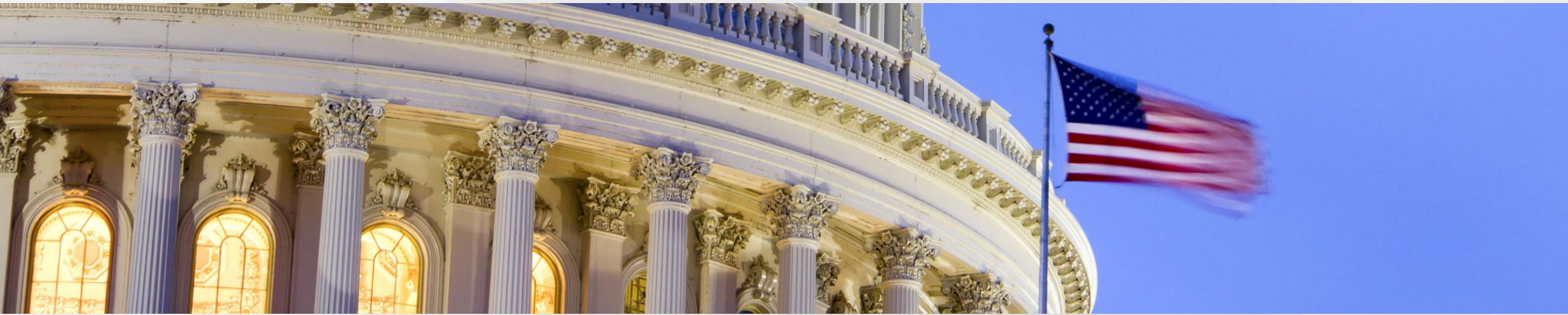
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# The Fair Labor Standards Act: Exemption Changes And Challenges



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# What's Going On?

- 2014 – President Obama charged the U.S. Labor Department with revising and updating the 2004 definitions for certain exemptions under the federal Fair Labor Standards Act
- 2015 – The Department published its proposed changes and received numerous comments
- 2016 – The Department published revised definitions that will affect most employers in at least some way on *December 1, 2016*
- Management should be thinking about:
  - What this means for the organization
  - What steps to take in response

# Four Main FLSA Requirements

1. A minimum wage (currently \$7.25 an hour).
2. Premium pay for overtime work (at a rate of 1.5 times the "regular rate" of pay for over 40 hours worked in a single workweek).
3. Certain recordkeeping, including accurate time records.
4. Limitations on the employment of minors under 18.

# What Are "Exemptions"?

- "Exempt": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies
- New rules affect most "white collar" exemptions from minimum-wage and overtime

# "White Collar" Exemptions Affected

- Executive, Administrative, Professional
- Also "Computer Employees", "Highly Compensated" varieties
- Three general requirements for most of them:
  1. Paid on a "salary basis"
  2. Salary is at least a certain amount
  3. Employee performs specific kinds of work

# Example: Executive Exemption

- Primary duty is managing the enterprise or a customarily-recognized department or unit
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight
- Paid on a "salary basis" at a rate of at least \$455 a week (for now)

# Example: Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- This work includes the exercise of discretion and independent judgment as to matters of significance
- Paid on a "salary basis" at a rate of at least \$455 a week (for now)
- Possibly one of the most often erroneously-applied FLSA exemptions



# Other Examples

- Job titles do not determine exemption status, but some examples of employees who might meet the requirements for other "white collar" exemptions include:
  - "Learned" Professional: Doctor, Some Engineers, Teacher, Scientist
  - "Creative" Professional: Painter, Musician, Screenwriter
  - Computer Employee: Programmer, Software Engineer, Systems Analyst
  - Highly-Compensated: "Project Manager" meets only one of the duties required for the administrative exemption

# What Is Changing?

- Effective December 1, 2016, minimum salary threshold will be \$913 per week (paid on a "salary basis")
- Requirement still applies each pay period (not annualized)
- Effective December 1, 2016, total-annual-compensation threshold for "highly compensated employee" exemption will increase to \$134,004
- Thresholds will be "updated" every three years, with 150 days' notice

# What Is Changing?

- Employers will be able to satisfy up to 10% of the salary threshold from "nondiscretionary bonuses and incentive payments"
- Includes commissions
- Can count only those paid quarterly or more frequently
- Cannot do this as to the salaries of employees treated as exempt under the "highly compensated" exception

# Any Exceptions?

- No, for the most part
- Time-Limited Non-Enforcement Policy for "providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds"
- USDOL won't enforce \$913 threshold for such employers
- Separate USDOL materials on non-profits, governments, higher education provide no exceptions but expand upon USDOL's views

# What Should You Do?

- Immediately evaluate exempt employees' current status, develop action plan – **Effective December 1, 2016**
  - Continue to treat some or all as "white collar" exempt?
  - Treat as exempt on some other basis?
- Consider the FLSA alternatives (but don't forget the applicable laws of other jurisdictions)

# Are They *Really* Exempt?

- Default position: Each employee is non-exempt, that is, each is subject to FLSA's requirements
- Exemptions are strictly interpreted
- Specific requirements apply
- The employer has the legal burden to prove when challenged that each one is met
- Otherwise, the employer loses

# Are They *Really* Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do
- Job descriptions alone do not "make employees exempt"

# Are They *Really* Exempt?

- Outlines, checklists: Helpful, but aren't the final answer
- An illusion of analysis and certainty
- Most points can't be reduced simply to "Yes", "No"
- Quick-and-easy evaluations usually leave serious vulnerabilities
- Independent understanding and analysis of each factor and circumstance are essential



# Another Exemption?

- For example, is FLSA's Section 7(i) overtime exception an option?
  - Employee of a "retail or service establishment"
    - Retail and service establishments are defined as establishments 75% of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.
  - More than half of employee's compensation in a "representative period" comes from "commissions"
  - Regular hourly rate in an over-40-hours workweek is more than 1.5 times FLSA minimum wage

# Other Exemptions?

- Auto Industry
  - Salesmen
  - Partsmen
  - Mechanics
  - Garagemen – *Massachusetts only*

# What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
  - Pay by-the-hour?
  - Pay a salary as straight-time compensation for 40 hours (or some other number)?
  - Pay a salary as straight-time compensation for all hours?
  - Pay on a commissions-plus-overtime basis?
  - Another approach (for example, a day-rate, job-rate, or piece-rate basis)?
  - Check applicable state and local laws

*Tip: Remember that the "regular rate" includes more than just base pay*

# DOL Example – Adjust Wages (Option 1)

- Supervisor at private gym
- Assume satisfies duty test for executive exemption
- Earns \$37,000 per year (**\$711.54/wk**)
- Regularly works 45 hrs/wk

Pay employee hourly at rate of \$15 for 40 hrs/wk and 1.5x for each of 5 hours over 40.

\$600.00 (40hrs x \$15)

\$112.50 (5hrs OT x \$15 1.5)

**\$712.50/wk**

## DOL Example – Adjust Wages (Option 2)

- Supervisor at private gym
- Assume satisfies duty test for executive exemption
- Earns **\$37,000/yr (\$711.54/wk)**
- Regularly works 45 hrs/wk

Pay employee a salary of **\$31,200/yr (\$600/wk)** for 40hrs and 1.5x for each of 5 hrs over 40.

\$600.00 (40hrs/wk = \$15/hr)

\$112.50 (5hrs OT x \$15 x 1.5)

**\$712.50/wk**

# Fluctuating Workweek– Option 3

- Gym supervisor earning salary of **\$37,000**
- \$711.54 straight time compensation for all hours worked.
- Hours fluctuate week to week.
  - Week 1: 34 hrs
  - Week 2: 46 hrs
  - Week 3: 50 hrs
- Supervisor has been paid for all straight time worked.
- Only owe employee premium of .5 for hours worked over 40.

# Fluctuating Workweek– Option 3 (cont.)

- $\text{Salary}/52 = \text{wkly rate}$
- $\text{Wkly rate}/\# \text{ hrs worked} \times .5 \times \# \text{ hrs worked over } 40 = \text{OT due}$ 
  - $\$37,000/52 = \$711.54$
  - Week 1: 34 hrs (paid salary of \$711.54; no overtime due)
  - Week 2: 46 hrs ( $\$711.54/46\text{hrs} = \$15.47 \times .5 \times 6 = \$46.40$  OT due)
  - Week 3: 50 hrs ( $\$711.54/50\text{hrs} = \$14.23 \times .5 \times 10 = \$71.15$  OT due)

# Accurate Timekeeping

- If non-exempt, must keep accurate records of worktime:
  - Know everything that counts
  - Have a system and policies for capturing the time accurately
  - Train employees to follow
  - Train supervisors/managers to enforce
  - Periodically see whether the time records appear to be accurate



# What Else Should You Do?

- Exemptions aside, are you sure you're 100% in compliance?
- Publicity will cause all employees (exempt or not) to focus upon their pay (the 2004 changes did)
- Find out now where you stand, especially if it's been a while since you looked
- Are you sure you are accurately recording worktime, properly computing overtime, making only lawful deductions, correct about all "contractors" . . . ?

# Non-Compliance Consequences

- Back wages, plus equal amount ("liquidated damages")
- Civil money penalties up to \$1,100 per person
- 2-year limitations period, 3 years if "willful"
- Court-ordered compliance in the future (possible "contempt of court" for later violations)

# Assistant Manager Example

Assume 10 Assistant Managers = Class Action

- Earning \$35,100/yr (\$675.00/wk); work 45 hrs/wk
- OT due would be:
  - $\$675/\text{week} \div 45 \text{ hrs} = \$15.00/\text{hr} \times 0.5 \times 5 \text{ hrs} = \$37.50/\text{wk}$
  - $\$37.50 \times 52 \text{ weeks} = \$1,950/\text{yr} \times 10 \text{ ass't mgrs.} = \$19,500$   
 $\times 3 \text{ yrs} = \$58,500 \times 3 \text{ (under MA law)} = \mathbf{\$175,500}$ 
    - plus the plaintiffs' attorneys' fees/costs
    - plus your own attorneys' fees/cost

# Non-Compliance Consequences

- Pay plaintiff's "reasonable" attorney's fees, costs (and yours)
- Possible individual management liability
- Possible criminal penalties
- Diversion, distraction, disruption
- Adverse publicity

# Massachusetts Law

- **Mandatory** triple damages and attorneys' fees for violations.
- **Individual liability** for the president, treasurer and certain officers or agents with responsibility for managing the company.

# Some Closing Thoughts

- Don't fall for "conventional wisdom":
  - "*Everybody* treats this job as exempt."
  - "The employee *wants* to be exempt."
  - "The employee *agreed* to be exempt."
- Consider applicable state and local laws:
  - Might not have the same exemptions
  - Might define exemptions differently
  - Might affect pay-plan options or designs

# Final Questions?



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# Thank You

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