

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

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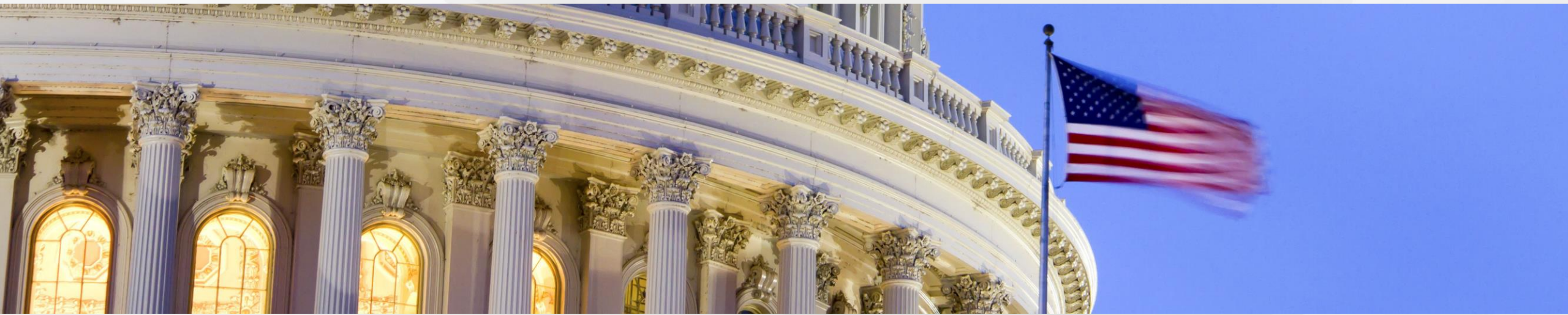


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The Fair Labor Standards Act: Exemption Changes And Challenges

What's Going On?

- U.S. Labor Department published new definitions for certain exemptions under the federal Fair Labor Standards Act
- Last changed in 2004
- Revisions will affect most employers in at least some way
- 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)
- General Managers are often exempt under this exemption

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
- Usually does not apply to store employees

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

Nondiscretionary Bonuses and Incentive payments

- Employers will be able to satisfy up to 10% of the salary threshold from "nondiscretionary bonuses and incentive payments"
- 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

What if the Bonus Earned is not Enough?

- If an employee does not earn enough in nondiscretionary bonuses and incentive payments in a given quarter to retain their exempt status the USDOL permits a "catch-up" payment at the end of the quarter.
- The employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level for the preceding 13 week period).
- Any such catch-up payment will count only toward the prior quarter's salary amount and not toward the salary amount in the quarter in which it was paid.
- If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the quarter.

Nondiscretionary Bonuses and Incentive payments

- Should I use this with my managers to satisfy the minimum salary threshold of \$913 per week?
 - If the bonus only takes the manager to the minimum threshold, you must consider whether it will be effective.
 - If the bonus allows the manager to earn more than the minimum threshold, then it is worth considering.

What Should You Do?

- Immediately evaluate exempt employees' current status, develop action plan
 - 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?

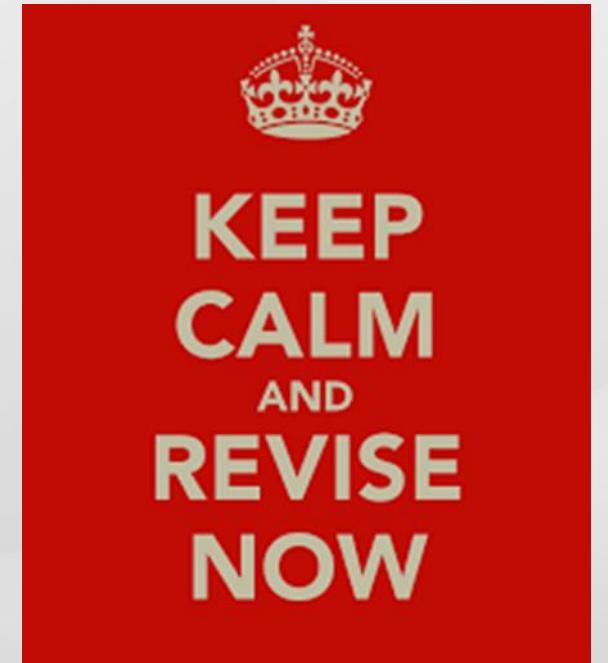
- Default position: Each employee is non-exempt, that is, each is subject to FLSA's requirements
- Exemptions are strictly interpreted
- Specific requirements apply
- The employer has the legal burden to prove when challenged that each one is met
- Otherwise, the employer loses

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
- 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



Hagood, all of our Assistant Managers are paid a salary. They typically work 40 – 50 hours per week. Are we ok if we just adjust their salaries to the new threshold?



What about our billing clerk? He is paid a salary and typically works 35 hours per week. However, we have found that at the end of the month and at year end, he can work in excess of 45 hours per week. We pay him a salary because of the potential for variation in hours. His pay doesn't make the new threshold, do we have to pay him overtime?

Hagood, we really just don't want to pay our employees to meet this new threshold, can we just change their title to "Manager" and be done with it?



Are They Really Exempt?

- Assistant Managers – almost never exempt under old or new law
- Managers – often exempt if they can meet the minimum salary threshold of \$913 per week
- Office Employees – accounting clerks and executive assistants almost never exempt under old or new law

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?
 - Check applicable state and local laws

What About Bonuses for Non-Exempt?

- Nondiscretionary bonuses and incentive payments for non-exempt employees must be accounted for in overtime calculations.
- If an employee gets a \$50 bonus for a week in which they worked 50 hours, then the regular rate would be \$1.00 higher for overtime purposes. So you would owe an additional \$0.50 hour on the 10 hours of overtime.
- Refer to our White Paper for methods of calculating

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)

Non-Compliance Consequences

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

Thank You

Visit our blog at "www.wage-hour.net"



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