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October 4
2016

How To Address The New FLSA Overtime-Exemption Requirements



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 from \$100,000 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,” including commissions
- Can count only those paid quarterly or more frequently
- Must ensure that total of such payments during the quarter at least equals the amount of the credit taken
- Cannot do this as to the salaries of employees treated as exempt under the “highly compensated” exception



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



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



Are They **Really** Exempt?

- Job Descriptions Do Not “Make” Employees Exempt.
- Current, Accurate, Well-Written Ones Can:
 - Help Management Make A Good Decision,
 - Play A Role In Defending Exempt Status.
- Unrealistic, Inaccurate, Puffed-Up, Old, Or Poorly-Written Ones Can:
 - Lead To An Incorrect Decision,
 - Hurt Defense Efforts.



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



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)?

Tip: Remember that the “regular rate” includes more than just base pay



State and Local Laws

- Florida Minimum Wage Act/Amendment
 - Currently \$8.05 / hour
 - Adjusted each year based on rate of inflation
 - If no inflation, stays the same as prior year



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 \$1,894 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
- "The Three Ds": Diversion, distraction, disruption
- Adverse publicity



Helpful Resources

- <https://www.dol.gov/whd/overtime/final2016/>

U.S. Department of Labor Wage and Hour Division



The Department announced a Final Rule focused primarily on updating the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt. For more information, see <http://www.dol.gov/whd/overtime/final2016/>.

Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from [minimum wage](#) and [overtime pay](#) provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, [29 CFR Part 541](#).

The [FLSA](#) requires that most employees in the United States be paid at least the [federal minimum wage](#) for all hours worked and [overtime pay](#) at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both [minimum wage](#) and [overtime pay](#) for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for [administrative](#), [professional](#), [computer](#) and [outside sales](#) employees, and for more information on the [salary basis](#) requirement.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a [salary basis](#) (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity

FS 17B

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



Visit our blog at www.wage-hour.net

THANK YOU
FOR THIS OPPORTUNITY

Lisa MCGlynn

lmcglynn@fisherphillips.com

(954) 847-4723