

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

Presented by:

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# Georgia Employers: Are You Ready To Tackle FLSA Overtime Rule 2.0?



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# 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, or an additional 0.5, 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 applies

# What's Going On?

- 2014 – President Obama charged the U.S. Labor Department with revising and updating the definitions for certain exemptions under the federal Fair Labor Standards Act
- 2016 – The Department published revised definitions with few (but significant) changes; litigation ensued
- 2019 – The Department has published revised definitions with few (and far less significant) changes that will affect most employers in at least some way on January 1, 2020
- New rules affect the "white collar" exemptions from minimum-wage and overtime
- Management should be thinking about:
  - What this means for the organization
  - What steps to take in response

# "White Collar" Exemptions Affected

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

# Exempt Employee Examples

- Neither singular duties nor job titles determine exemption status, but some examples of employees who might meet the requirements for "white collar" exemptions include:
  - "Executive" Employee: Manager of a department/location (supervises, disciplines, etc.)
  - "Administrative" Employee: Decision-maker for business operations (finance, marketing, etc.)
  - "Learned" Professional: Doctor, Some Engineers, Teacher, Scientist
  - "Creative" Professional: Painter, Musician, Screenwriter
  - "Computer" Employee: Programmer, Software Engineer, Systems Analyst
  - "Highly-Compensated" Employee : Could be a potential back up argument if an employee meets the salary-requirement of most white-collar exemptions, but does not meet all aspects of the duties portion of an exemption.

# What Is Changing?

- Effective January 1, 2020, minimum salary threshold will be \$684 per week (paid on a "salary basis")
- Requirement still applies each pay period (not annualized)
- Effective January 1, 2020, total-annual-compensation threshold for "highly compensated employee" exemption will be \$107,432

# 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 annually or more frequently
  - Cannot do this as to the salaries of employees treated as exempt under the "highly compensated" exception

# What Should You Do?

- Even though the salary jump is not substantial, the changes still require thoughtful implementation.
  - If an employer increases salaries to comply with the new threshold, it might face salary compression in its ranks
  - If an employer will instead pay overtime, it will need to determine straight-time rates and timekeeping processes
  - In either case, it will need to consider the timing of these conversions and related communications
- Even if no changes appear necessary, the new salary threshold still is an opportunity (excuse) for employers to change classifications or pay where compliance is questionable

# Are They Really Exempt?

- Default position: Each employee is non-exempt, that is, each employee is subject to FLSA's timekeeping, minimum wage, and overtime requirements
- Specific requirements apply
- When the classification is challenged, the employer has the legal burden to prove 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
- Independent understanding and analysis of each factor and circumstance are essential

Tip: Need to prioritize your time and resources?

You might decide to further confirm "exempt" tool results, but tentatively adopt "non-exempt" ones

# Another Exemption?

- For example, is FLSA's Section 7(i) overtime exception an option?
  - Employee of a "retail or service establishment", and
  - More than half of employee's compensation in a "representative period" comes from "commissions", and
  - Regular hourly rate in an over-40-hours workweek is more than 1.5 times FLSA minimum wage

# 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

# 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 employees (exempt or not) to focus upon their pay
- 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 \$2,014 per person, per instance
- 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
- Diversion, distraction, disruption
- Adverse publicity

# Other Jurisdictions

- Georgia – A great place for employers
  - No overtime requirement
  - No minimum wage requirement (as long as federal law applies and is higher)
  - No timekeeping requirement
  - Permits employers to pay all wages due weekly, biweekly, or even semi-monthly (fyi, only select employees can be paid on a monthly basis)
  - No specific timeframe for notice, though should be in advance of wage changes
  
- FYI, Florida has a higher minimum wage and North Carolina regulates payroll, but otherwise there is little difference among the states in the Southeast

# Making Changes in Georgia

- Law changes on January 1, 2020
- If an employee has a pay period starting on the 1<sup>st</sup> and the only change is a salary rate increase
  - Administratively easy
  - Advance notice of little concern because it is a definite increase in pay
- Almost all other changes
  - Administratively burdensome to plan and implement
  - Advance notice required

# Date of Transition – One Size Does Not Fit All

- Employers must consider the particular payroll schedule and workweek that apply to the employee
- Timing Tips to Ease the Burden – in order of importance
  - Don't transition mid-workweek
  - Don't transition mid-pay period
  - Provide notice at least a full pay period before the beginning of the pay period in which the change will occur
- If impractical to follow all three tips, consider seeking legal counsel for assistance in running the two payrolls closest to the transition date
- For example, because the new threshold is set for January 1, a Wednesday, most employers should consider making the change in advance – possibly as early as December 15 with notification in November

# 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."

# Final Questions



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# Thank You

Visit our blog at "[www.wage-hour.net](http://www.wage-hour.net)"



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