

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

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The Fair Labor Standards Act: Exemption Changes and Challenges



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Welcome!



Introductory Remarks by Dr. Stephen Barth
Founder, HospitalityLawyer.com
Professor, Conrad Hilton College, University of Houston

Your Presenters



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 unless tip credit applies).
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 Is Changing?

- Effective December 1, 2016, minimum salary threshold for certain exempt employees 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

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)

Hospitality Positions under Scrutiny

- Mid-level managers in departments such as: housekeeping, food and beverage, front desk, guest services, security
- Chief Engineer
- Executive Chef/Sous Chef

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

Hospitality Positions under Scrutiny

- Human Resources Manager/Coordinator
- Night Auditor
- Controller
- Sales Managers
- Event Planners

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

Hospitality Positions under Scrutiny

- Accounting positions
- Certain culinary positions

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," 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
- Check applicable state and local laws

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

What Should You Do?

- Immediately evaluate exempt employees' current status and develop an action plan
 - Continue to treat some or all as "white collar" exempt? Increase salary to meet new threshold?
 - Treat as exempt on some other basis?
- Consider the FLSA alternatives (but don't forget the applicable laws of other jurisdictions)
- Prepare to change some employees to non-exempt status
- Develop a communications plan

What Else Should You Do?

- Exemptions aside, are you sure you are 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" . . . ?

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

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
- Diversion, distraction, disruption
- Adverse publicity

Questions



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