

SOME OLD AND NEW FLSA REGS: THE GOVERNMENT'S CONTINUING EFFORT TO MAKE YOUR JOB IMPOSSIBLE



Presented by:

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What's Going On?

- 2014 – President Obama charged the U.S. Department of Labor with revising and updating the 2004 definitions for certain exemptions under the federal Fair Labor Standards Act.
- 2015 – The DOL published its proposed changes and received hundreds of thousands of comments on the proposed changes.
- 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 does this mean for the organization?
 - What steps do we need to take in response?



Developments Under The FLSA

Under the FLSA, all employees are entitled to overtime pay (1.5 times the employee's regular rate) for all hours worked over 40 in a "workweek" unless the employee fits within one of the overtime "EXEMPTIONS" and earns a guaranteed weekly salary.



Developments Under the FLSA

Generally, the available “white collar exemptions” from overtime include:

Executive and managerial employees;

Administrative employees;

Professional employees.

For an employee to be “exempt” under any of these general exemptions, then the employee must be both:

1. Paid on a guaranteed **salaried basis**; and
2. Meet the “duties” test of one or more of the exemptions.

An employee must meet both to be considered “exempt.”

Exemptions Generally

- Exemptions **relate to individual employees** rather than general job classifications.
- Based upon **actual** work performed, and **real** facts:
 - ❖ Job descriptions do not “make employees exempt”
 - ✓ **But detailed, accurate, current** job information can be important in the analysis
 - ❖ DOL and plaintiffs’ lawyers will dig into the work the employees **actually perform** (regardless of what the job description says they perform)
 - ❖ Assistant Manager has the power to fire! Really? How many times did he/she fire someone last year?

Executive Exemption

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

- The employee must be paid a guaranteed salary of at least \$913 per week (or \$47,476 per year). The current level is \$455/week or \$23,660/yr;
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department;
- The employee must customarily and regularly direct the work of at least 2 or more FTEs;
- The employee must have the actual or functional authority in areas of hiring, firing, advancement, promotion or any other change of status.
- Assistant Managers in all retail businesses have and continue to be a fertile ground for challenge on the “duties” test. Employers have lost numerous cases on this issue.

Administrative Exemption

- To qualify for the administrative exemption, all of the following tests must be met:
 - The employee must be paid a guaranteed salary of least \$913.00 per week;
 - The employee's primary duty must be the performance of office or non-manual work directly related to management or general business operations;
 - The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

- To qualify for the learned professional exemption, all of the following tests must be met:
 - The employee must be paid a guaranteed salary of least \$913.00 per week;
 - The employee's primary duty must be the performance of work which is predominantly intellectual in character and requires the consistent exercise of discretion and judgment;
 - The advanced knowledge must be in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction;
 - The employee must actually be using the advanced knowledge in the performance of his or her job duties.

What Does Being Paid On A “Salaried Basis” Mean?

- Salary must be a predetermined and guaranteed amount;
- Weekly salary must be paid “free and clear” every week of employment;
 - Salary cannot be subject to reduction based on the quality or quantity of the employee’s work;
 - Employee must be paid the full salary in any workweek in which any work is performed;
 - Deductions are only allowed for limited reasons set forth in the regulations:
 - Full personal days off; sick days (if policy); violation of safety rules; violation of serious workplace conduct rules; jury/witness fees; military pay; unpaid FMLA; first and last week of employment;
 - Safe Harbor provision to resolve improper deductions.

The New DOL Salary Rule

Effective December 1, 2016, the minimum salary requirement for the white-collar exemptions will be:

\$913 per week (\$47,476/yr)

This is the largest increase ever in the amount required to meet the salaried test – over a 100% increase from the current level.

Additionally, the new rule is structured to increase the salary regularly. It will go up from here. Under the current regulations the salary level will increase every three years.

The Problem Faced By Many Restaurants: The “Salaried” Assistant Manager

Many restaurants employ “Assistant Managers” making between \$30,000 and \$45,000 per year. Traditionally, they are paid on a “salaried basis” and it is claimed they are exempt from overtime under the Executive/Managerial exemption.

Under the new rule, this employee **MUST** be paid at least \$913.00 per week (\$47,476 per year) to retain his or her exempt status. **If the employee does not get paid that amount, then they are no longer paid on a “salaried basis” and therefore they are not “exempt.”**

Some bonus or incentive payments, up to 10% of the weekly salary, can be utilized but the guaranteed salary must be “squared up” by the end of each quarter.

How Do You Comply?

Three options:

Increase the salary level to \$913 per week;

Or, pay an hourly rate, keep track of the hours worked, and pay them overtime for all hours over 40 in a workweek;

Or, continue to pay the employee a weekly guaranteed salary and pay additional overtime compensation based upon the employee's hourly "regular rate" each workweek.

How Do You Convert From a Salary to Hourly?

Sue, a Manager, is paid a salary of \$40,000 a year (or \$769.23 per week) and works 55 hours per week, on average.

Convert Sue to an hourly employee:

Pay Sue an hourly wage of \$12.50;

$\$12.50 \times 40 \text{ hours} = \500 in straight time compensation;

$\$12.50 \times 1.5 = \18.75 – this is the overtime premium;

$\$18.75 \times 15 \text{ overtime hours worked} = \281.25 in overtime compensation;

Total wages for the workweek = \$781.25 (compare to \$769.23 above);

Must keep track of Sue's working time on a weekly basis.

This conversion will place the burden on employers to watch for “clock riding.”

How Do You Calculate Overtime If The Employee Stays on a Salary?

You decide to pay Sue a weekly salary of \$673.08 (or \$35,000 a year) under the assumption that Sue will work 55 hours per week, on average;

Inform Sue in writing that the weekly salary covers all hours worked in the workweek, not just for first 40 hours, but she will be paid overtime for working over 40 hours in a week;

$\$673.08$ divided by 55 hours = $\$12.24$. This is the “regular rate” for all hours worked for that workweek.

The overtime premium is $\$6.12 \times 15$ overtime hours = $\$91.80$ for that workweek.

Total compensation for that workweek is $\$764.88$. This annualizes to approximately the same salary level ($\$40,000$) that Sue earned prior to the conversion.

If you utilize this method: 1) you cannot take deductions for workweeks in which Sue works less than 40 hours in the week; 2) You must keep track of Sue’s work time; 3) The hourly regular rate will change each week depending on how many overtime hours Sue works.

Salaried Employees Still Must Meet the Duties Test To Be Exempt

Remember, even if you raise the employee's salary to the \$913 per week minimum salary level, the employee must still meet one or more of the "duties test" to be considered exempt from overtime.

Misclassification of employees is the # 1 violation under the FLSA, and most misclassification issues are caused by a misunderstanding of the "duties test" for exempt employees.

In FY 2015, the DOL found noncompliance issues in 80% of investigations.

FLSA Hot Topic: Tips and The Tip Credit

- Who is eligible to be a tipped employee for purpose of taking a tip credit?
- What do you have to do to make sure someone is eligible so that you can take a tip credit?
- What are the rules for tip pooling?
- Can you ever keep any of the tips?
- What is the difference between a “tip” and a “service charge”?
- How about non-tipped side duties or orientation and mandatory meetings?

Tip Credit Mandatory Disclosures

The following information **MUST** be provided to a tipped employee, preferably in writing, before you may use the tip credit:

- 1) The amount of cash wage the employer is paying a tipped employee, which must be at least \$2.13 per hour;
- 2) The additional amount claimed as a tip credit, which cannot exceed \$5.12 an hour;
- 3) That the tip credit cannot exceed the amount of tips actually received by the tipped employee;
- 4) That all tips received by the tipped employee will be retained by the employee except for those tips contributed to a valid tip pooling arrangement that is limited to employees who customarily and regularly receive tips; and
- 5) That the tip credit will not apply to any tipped employee unless the employee has been informed of the tip credit provisions.

TIP CREDIT AND TIP POOL NOTIFICATION

I understand that I am employed in an occupation where I will customarily and regularly receive tips. I acknowledge that, for my work as a _____, I will receive a cash hourly wage of \$_____ per hour and that a tip credit will be taken by the Company to cover the remaining part of the federal minimum wage for my hours worked related to this position.

The tip credit will be the difference between my cash hourly wage and the federal minimum wage. For example, if my cash hourly wage is **\$3.25** per hour, the Restaurant will take a tip credit of **\$4.00** per hour, provided that I have actually received tips in this amount. If my tips do not bring me up to the minimum wage, the Company will make up the difference to bring me up to the minimum wage. If the state or federal minimum wage increases, the tip credit will be the difference between my cash hourly wage at the time and the new minimum wage.

Overtime compensation will be paid for all hours worked over 40 in a work week. The Company's "work week" for all tipped employees runs from _____ until _____. Overtime will be paid at the rate of one-and-a-half (1.5) times the full federal minimum wage, minus the tip credit.



I understand that I am entitled to retain all of the tips that I receive from customers, except in the case of my contributions to a valid tip pool among employees who customarily receive tips, and less mandatory credit card processing fees charged by the bank for customers who leave tips on a credit card. I understand that my contribution to the tip pool will be _____ for each shift I work, and that this money will be shared only among employees who customarily receive tips. If anyone, including a Manager or Supervisor, attempts to take any tip of a tipped employee, I will report such an incident immediately and directly to _____. I understand that in no event will the Company take a tip credit that exceeds the actual tips I receive and I also understand the Company cannot utilize a tip credit without informing me of these provisions.

I understand the law requires me to report 100% of the tips I receive. I understand that I am required to truthfully report to the Company **all** tips I receive each shift, except for the tips that I contribute to the tip pool. In the event I do not do so, I will be subjecting myself to potential tax and other liability. Failure to properly report tips, including purposefully underreporting tips, will result in corrective action, up to and including termination from employment.

Employee Name

Employee Signature

The Tip Pool Must be Valid

A Restaurant can mandate that tipped employees contribute to a tip pool that is shared among other employees who customarily receive tips (Host, Bussers, Service Bartenders, etc., but not “back of the house” employees);

Owners, managers, and supervisors, particularly if paid on a salaried basis, cannot be included in the tip pool or take money from the tip pool;

There is no longer a limit on how much a Restaurant can require that the tipped employee contribute to the tip pool;

An employee must be notified of the required tip pool contribution amount and that the Restaurant cannot retain any of the employee’s tips for any other purpose.

Paying Overtime To Tipped Employees

Tipped employees are considered minimum wage employees regardless whether they make over \$7.25 per hour with their tips.

Never calculate overtime compensation for tipped employees on the base hourly wage.

Overtime compensation must be calculated on the minimum wage, minus the tip credit taken:

Tipped employee works 50 hours in a workweek;

Employer pays \$2.13 per hour;

$\$7.25 \times 1.5 = 10.88$ an hour - $\$5.12 = \5.76 per hour o/t premium;

Employee is owed \$57.60 in overtime compensation for that work week;

Or, add \$2.13 and \$3.63 (half the minimum wage) = \$5.76/hour.



Thank You



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