

The FLSA's "White Collar" Exemptions: Basics and Latest Developments



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Presentation Outline

- What Is Going On?
- Fair Labor Standards Act (“FLSA”) Basics
- White Collar Exemptions
- Examples of Exemptions
- What Should You Do?

What Is Going On?

- 2014 – President Obama charged the U.S. Labor Department (“USDOL”) with revising and updating the 2004 definitions for certain exemptions under the federal Fair Labor Standards Act
- 2015 – USDOL published proposed changes and received numerous comments
- 2016 – USDOL published revised definitions set to go into effect on *December 1, 2016*
- Texas federal court granted a preliminary injunction on November 22, 2016 temporarily putting these changes on hold
- USDOL filed an appeal on December 1, 2016
- Employers must understand that changes could be revised

FLSA BASICS

- Four Main Requirements-
 - A minimum wage (currently \$7.25 an hour).
 - 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).
 - Certain recordkeeping, including accurate time records.
 - Limitations on the employment of minors under 18.
- Default Rule- Everybody is *non-exempt*, unless an exemption clearly applies.

FLSA Basics: What Are "Exemptions"?

- "Exemption": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some (like "white collar" exemptions) apply to the minimum-wage and overtime requirements
- **REMEMBER-** Default rule is everybody is *non-exempt*, unless an exemption clearly applies

"White Collar" Exemptions

- 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

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
- 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

If You Haven't Already. . .

- 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
- 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)?
 - Accurate Timekeeping: If non-exempt, must keep accurate records of worktime
 - Train employees to follow and train supervisors/manager to enforce

What Else Should You Do?

- Exemptions aside, are you sure you're 100% in compliance?
- Publicity is causing all 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 \$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
- Diversion, distraction, disruption
- Adverse publicity

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



ANY FINAL QUESTIONS?????

Thank You

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