



Adapting To The New FLSA Salary Threshold

Insights

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The new year has brought many things, including an increased threshold for many employees classified as exempt. The federal Fair Labor Standards Act (FLSA) provides for limited exemptions from its timekeeping, minimum wage, and overtime requirements, including the popular salaried, white-collar employee exemptions. For employees that already met (or received increases to meet) the new salary-exempt requirements of \$684/week, it might otherwise be the status quo for 2020.

For employees that were converted to non-exempt, however, many employers will find themselves continuing to evaluate the situation over the coming months. If you might tweak things in the future (or have not converted all affected employees still), here are some FLSA principles to consider as you proceed.

Alternatives Particular To The Healthcare Industry

From the start, many in the healthcare industry have the option of a 14-day work “period” with an 80-hour overtime threshold instead of the standard seven-day workweek’s 40-hour threshold. This statutory alternative at 29 U.S.C. § 207(j) permits hospitals or other qualifying employers to minimize, if not eliminate, FLSA overtime hours if paying 1.5 the regular rate for hours worked in excess of 8 hours in a workday.

Another nuance that is particularly helpful to the healthcare industry is that the federal exemption excludes those engaged in the practice of medicine from any FLSA pay requirement (salary or otherwise). While this salary exception does not extend to other medical providers (nurse practitioners, physician assistants, etc.) who might be exempt under another variation, it does generally include residents and similar practitioners.

“Non-Exempt” Doesn’t Have To Mean “Hourly” Pay

Employers and employees alike commonly assume that “salary = exempt” and “non-exempt = hourly,” but both assumptions are incorrect. Indeed, there are many ways to compensate non-exempt employees in compliance with the FLSA, as long as the employee receives (1) the minimum wage for all hours worked and (2) the overtime premium, which is due on almost all wages. For example, instead of an hourly rate, an employer might structure the base pay in one of these ways:

- ***Paying a salary as straight-time compensation for hours worked up to 40 in a workweek:***
This is akin to paying at an hourly rate with a guarantee of 40 paid hours. The overtime pay on this portion of the employee’s pay is due at 1.5 times the rate figured by dividing the fixed amount

by 40 hours. This can be an attractive compromise when transitioning an employee that desires the consistency of a salary in workweeks that fall below 40 hours.

- ***Paying a salary as straight-time compensation for all hours worked in a workweek:*** The fixed amount is guaranteed for any workweek in which the employee performs any work (subject to limited exceptions). Overtime pay on this portion of the employee's wages is due at 0.5 times the rate figured by dividing the fixed amount by all the hours the employee worked in the workweek. A variation of this "fluctuating" workweek whereby the salary covers only up to a certain threshold (such as a schedule, certain number of days, certain number of hours) might seem appealing, but be forewarned that if properly administered it generally is less desirable than the so-called fluctuating workweek method.
- ***Paying on a day-rate or shift-rate basis:*** The employee is paid a fixed amount as straight-time compensation for *whatever* number of hours they work in a *workday* or with respect to a *shift*. If they work less than the expected hours, the fixed amount is not reduced (*possibly* subject to limited exceptions). Overtime pay on this portion of the employee's wages is due at 0.5 times the rate figured by dividing the total of the fixed daily or shift amounts for the workweek by the hours the employee worked in the workweek.
- ***Paying on a job-rate, task-rate, or piece-rate basis:*** The employee is paid a fixed amount as straight-time compensation based upon each job, task, or piece completed and for all hours worked in the workweek (regardless of the kind or number). Overtime pay on this portion of the employee's wages is due at 0.5 times the rate figured by dividing the total of the fixed job, task, or piece amounts for the workweek by the hours the employee worked in the workweek.

Struggling To Record Time

An employee who previously had no timekeeping requirements understandably might struggle with recording all hours worked. Unfortunately, any methods that make this easier can easily lead to a failure to capture all hours worked and, thus, a failure to pay overtime properly. To that end, here are some issues to consider as you apply non-exempt policies and practices to converted employees.

- ***Even unrecorded or unauthorized time can be hours worked:*** Employers necessarily must rely on their employees to record all hours worked accurately. The burden actually rests with the employer, however, and time cannot be disregarded simply because the employee did not record it or failed to follow the process for obtaining authorization to work extra or difference hours.
- ***Rounding will not save on labor costs:*** The benefits of rounding are minimal today given the sophistication of timekeeping systems, particularly at large healthcare institutions. More importantly, if you round an employee's time it must be done to the nearest-quarter-hour (or smaller interval) based on the clock, not a schedule, even if that favors the employee. Any perceived benefit to a rounding practice should be evaluated carefully.
- ***Requirements versus best practices for timekeeping:*** Much has been made about "exception reporting" where an employee only reports exceptions to the scheduled hours worked. Converted employees often like this method because it typically is more in line with attendance

records (if any) for exempt employees. Technically this method meets the FLSA's recordkeeping requirement, so long as it is essentially not put on autopilot. Just as an employer should occasionally review time entries to ensure that all hours worked are being captured (flagging for closer review entries that consistently are 8 hours per day, for example), an employer should review exception entries to ensure that employees are recording all these instances. In most jobs, an employer should expect some fluctuation in hours naturally.

The FLSA Is the Floor

It is important to remember that other jurisdictions can have higher, stricter, or different wage-hour requirements. For example, some states have a higher salary threshold for the salaried, white-collar exemptions than the FLSA's \$685/week. Others might have different exemptions or exceptions, including that not all have the salary exception related to the practice of medicine. Of course, some jurisdictions also have higher minimum wage rates and/or additional overtime-type requirements. Finally, while the FLSA regulates little in the way of actual wage payments, deductions, and notification of pay terms, many states have detailed requirements and might even have different provisions for non-exempt versus exempt employees.

Conclusion

Employers that were holding out on converting employees in hopes that the new overtime rule would be once again blocked by a court took a substantial risk. At the same time, those that already have done the heavy lifting and opted to convert employees to non-exempt status might not have had sufficient opportunity to evaluate these principles before proceeding.

In either case, we recommend that you consider these principles as the employees settle into their new classification. If you believe you might make further changes this year, now is the time to consult with legal counsel and carefully evaluate which approach best achieves your unique circumstances and objectives.

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