FLSA and Head Start: Implementing the New Overtime Rule

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Overview of Session

- Review of FLSA and Exemptions
- Discussion of Changes
- Identification of FLSA Coverage Issues
- Deciding How to Proceed
- Communicating the Decision
- Training Managers
- Questions
The Fair Labor Standards Act

• The FLSA, along with Department of Labor (DOL) regulations, defines
  ➢ What constitutes work that must be paid
    ✓ Travel time? On-call time? Pre-shift preparations? Email?
  ➢ The minimum wage
    ✓ The minimum wage for employees covered by the FLSA is $7.25 per hour
    ✓ Note, however, that various states and localities set an even higher minimum wage rate
  ➢ When workers earn overtime
    ✓ Generally, when an employee works more than 40 hours in a workweek, he or she must receive a “time and a half” premium for such overtime hours
  ➢ What workers are not covered by the FLSA (i.e., “exempt”)

• This presentation focuses on exemptions from overtime under the FLSA; state-level laws, which, in some states, are stricter than the FLSA, are not discussed
Exemptions to FLSA Overtime Requirements

• The Executive, Administrative, and Professional (EAP) Exemptions
  • Also referred to as the “white-collar” exemptions
  • The EAP exemptions are by far the most prevalent

• Two main questions to determine eligibility:
  ➢ **Salary Test:** Is the employee paid a sufficient **salary level on a salary basis**?
  ➢ **Duties Test:** What is the employee’s **primary duty**?
Salary Level & Salary Basis

- The salary basis test remains unchanged
- The employee’s salary must be predetermined
- The salary cannot be reduced because the employee worked less or did not do a good job
- Deductions are permissible only in limited circumstances
  - Penalties or unpaid disciplinary suspensions for violating major workplace conduct rules
  - Docking exempt employees’ pay in full-day increments less than a week should set off alarm bells
Standard Salary Level Increased By More Than 100%

• New annualized salary level will be $47,476
  • This is $913/week
  • Less than $50,440 proposed in NPRM
  • Represents 40\textsuperscript{th} percentile of full-time non-hourly workers in South (as of Q4 of 2015) in apparent nod to employers who commented on regional cost of living variations

• Allows up to 10\% of the minimum salary to be met by non-discretionary bonuses, incentive pay or commissions, if made at least on quarterly basis
Automatic Updates to Salary Level

• Beginning on January 1, 2020, the salary level required for exemption will be automatically updated **every three years**
  • DOL will post new salary levels 150 days before effective date
  • Pegged to the 40th percentile of the lowest-wage region in the BLS data set (historically the South or Midwest)
    • Less disruptive than proposed annual increase and much less disruptive than annual update based on 40th percentile
• In 2020, the salary will increase to the *estimated* annualized level of $51,168
  • a 7.7% increase over three years
  • similar increase for 2023 would reach $55,108
  • and a similar increase for 2026 would reach $59,351
Highly Compensated Employee Salary Level Increased More Than $34,000

• New Highly-Compensated Salary Level will be $134,004
  • More than $122,100 identified in NPRM
  • Represents 90th percentile of full-time non-hourly workers nationally as of Q4 of 2015
• Requires payment on a salary basis of at least $913/week
• Additional payments to bring to new level can include:
  • Commissions
  • Nondiscretionary bonuses
  • End-of-year catch-up payment
No Changes to the Duties Tests

- In the NPRM, DOL asked several questions regarding the duties tests – particularly the primary duty test – but did not propose specific language.
- In the Final Rule, DOL does not make any changes to the duties tests.
- Nor are there any changes to the salary basis test.
- As under the existing regulations, there still are no exceptions or allowances for:
  - part-time employees
  - employees of non-profits, colleges or universities, or public entities.
The Executive Exemption

Executive Exempt Employee

- Spends time
  - Controlling and reviewing business functions
  - Planning and controlling the budget
  - Supervising and training employees

- Regularly supervises at least two full-time employees or their equivalent

- Hire/Fire decisions
  - Can hire/fire employees
  - Recommendations on hiring, firing, and promotion given "particular weight"
Executive Exemption: Management Duties

• Main task is managing the business or part of the business

• An executive spends his/her day
  ➢ interviewing and training employees
  ➢ directing employees
  ➢ reviewing business data to increase revenue
  ➢ planning and controlling the budget

• Look at
  ➢ How much time the worker spends doing managerial work
  ➢ The worker’s freedom from direct supervision
  ➢ The worker’s pay compared to hourly workers’

• Executives can multitask. Ex. Performing hourly work with an employee for coaching/training is ok
Executives: Supervision

• Mistake to think “this manager supervises 2 employees, so she’s exempt”
  ➢ If you can count on one hand how many employees the manager supervises, you should be careful

• Supervision does not need to be constant, but it cannot be occasional
Executives: Hire/Fire/Promote Authority

- Authority to hire or fire
- Worker’s suggestions and recommendations about hiring, firing, advancement, and promotion given *particular weight*
- Particular weight is
  - When making suggestions and recommendations is part of the employee’s duties
  - When the employee frequently makes recommendations
  - When the employee’s recommendations are relied on in the ultimate decision
Executive Exemption: Job Description v. Reality

Job description says:
• Manage workers
• Responsible for discipline
• Directs and monitors financial performance

But the employee actually:
• Acts as the “lead employee” for non-exempt work
• Creates files for discipline decisions by others
• Compiles reports, data entry

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The Administrative Exemption

Administrative Exempt Employee

- Spends day on management/general business operations
  - Purchasing, advertising, research, quality control, marketing
  - Budgeting, auditing, compliance
  - Personnel management, labor relations

- Uses personal judgment to make important decisions
  - Make/change policies
  - Carry out major assignments for business operations
  - Can accept commitments for employer with significant financial impact
Administrative Exemption: Duties

• Primary duties involve management, business operations, or employer’s customers
  ➢ Work must be directly related to assisting with the running or servicing of the business
  ➢ Does not include working on a manufacturing production line or selling a product in a retail or service establishment

• Work directly related to management or general business operations includes
  ➢ budgeting, insurance, purchasing, advertising, research, personnel management, labor relations, computer network/internet/database administration, auditing, quality control, marketing, safety and health, government relations, legal and regulatory compliance
Administrative Exemption: Judgment

• Employee uses discretion and independent judgment on important issues
  - Discretion and judgment is different from skill and training
  - Tasks can be difficult to perform but not require discretion and judgment
• Discretion and judgment include authority to
  - Make, interpret, and change management policies or operating practices
  - Carry out major assignments related to business operations
  - Perform work that substantially affects business operations
  - Bind the employer (signature authority)
• Independence is ideal, but recommendations for action can satisfy this requirement
Administrative Exemption: Examples

• Employees with the same job title can fall inside or outside the exemption
  ➢ Office managers, administrative assistants, mid-level HR

• Does the employee “steer the ship” or simply prepare and provide information to real decisionmakers?
The Professional Exemption

• Four subcategories
  ➢ Learned professional
  ➢ Creative or artistic professional
  ➢ Teacher
  ➢ Computer professional

• We’ll focus on the “learned professional” & teacher categories
Teachers

• “Primary” duty of “teaching, tutoring, instructing or lecturing in the activity of imparting knowledge”
• Employed and engaged as a teacher in an educational establishment by which the employee is employed.”
• Having a primary duty of teaching generally involves exercising discretion and judgment.
• Although possession of a teaching certificate provides a fairly clear means of identifying employees who qualify for the exemption, the exemption does not require possession of a certificate or even a bachelor’s degree.
• Salary test does not apply.
Teachers

• Employees whose primary duty is to care for the physical needs for the facility’s children would ordinarily not meet the requirements for exception as teachers under the applicable regulations.
Professional Exemption: Learned

• Primary duty involves advanced knowledge gained from specialized intellectual instruction

• **But** a degree alone does not mean the employee is exempt. The employee must use the advanced knowledge in her work

• Does not include employees who could qualify in the future
Employers Given About Five Months to Comply

• Effective date is December 1, 2016

• Any upward salary adjustments must be in place before that date to ensure continued application of exempt status
  • Note that December 1 is a Thursday

• For bi-weekly pay, employers will need to adjust pay for pay period that includes December 1, 2016
FLSA Coverage Issues

• DOL’s position since at least 2001 is that all Head Start and Early Head Start programs are subject to the FLSA

• HHS Memo
Develop a Plan to Reach Crucial Decision Points

• In some cases, increase salaries to $47,476 and continue to treat employees as exempt

• In other cases, reclassify employees to non-exempt status using a variety of pay options

• And in yet other cases, employers may choose to restructure:
  • Jobs
  • Workforce
  • Operations
Salary Gap Analysis

• Analyze the “salary gap” to determine salary levels for exempt employees and identify any position—not just employee—that falls below the new standard
• Consider the “ripple effect” on upstream and cross-stream jobs
• Analyze the “duties gap,” as well, to determine whether any jobs that are paid at a sufficient salary level might not perform the duties of an exempt role
• Model various compensation plans to determine:
  • Cost of increasing salaries
  • Cost of reclassification
Plan to Reclassify

• Determine working hours of employees who might be reclassified
  • And how those hours might change as non-exempt employees
    • Review records that may be suggestive of hours worked
    • Consider how those records may be over- and/or under-inclusive
    • Canvass those who manage to-be-converted employees

• Determine potential pay rates and compensation methods for those employees
How to Pay

- **Hourly**: Straight hourly rate for hours worked up to 40; 1.5 times regular rate of pay for hours worked in excess of 40
- **Salary Plus Overtime**: Salary for hours worked up to 40 (or some lower number); 1.5 times regular rate of pay for hours worked in excess of 40
- **Fluctuating Workweek**: Agreement with employee to pay salary for all straight-time hours worked; ½ time of salary divided by hours worked for OT hours
- **Fluctuating Workweek/Static OT Rate**: Agreement with employee to pay salary for all straight-time hours worked; ½ time of salary divided by 40 for OT hours
What to Pay

• Amount of the newly non-exempt employee’s rate?
  • Same as before reclassification
    • Will increase labor costs
      • Especially when considering bonuses, commissions, incentive pay
    • Could provide incentive for off-the-clock work
    • May price employee out of the market and lead to no or fewer increases in the future
    • Salary compression with the next grade
  • Lowered to take into account overtime costs
    • Employee will “earn back” the full salary through anticipated overtime
    • But what if overtime isn’t worked?
    • What about lowered rate for PTO and holidays?
    • Pay decrease could cause loss in employee morale
  • Communications / employee relations plan is key
Reclassified employees become NONEXEMPT employees

- This means that, regardless of the method of pay, they are subject to the same wage & hour rules as other non-exempt employees:
  - Must maintain accurate time records (even if no OT worked)
  - Must ensure proper control of employee work, such as:
    - Off-the-clock
    - Meal and rest breaks
    - Travel time
    - Remote access
  - Must pay OT premium for hours work in excess of 40/week
  - No method of compensation permits an employer to avoid keeping accurate time records for non-exempt employees
Restructuring

• To justify increased exempt employee salaries, some jobs will need to take on more responsibilities
• To avoid reclassification, some jobs will need to shed nonexempt responsibilities
• Some jobs will need to be split into two or more roles because overtime costs would be too great
• Some jobs and employees will necessarily be phased out
• As predicted by many critics of the new rule, some businesses will need to close locations, departments, and other aspects of their operations
Careful Execution and Communications Strategies Are Crucial

• **Before** you take your first steps:
  • Identify stakeholders and champions who can help define and reach endgame objectives
  • Develop a communications plan to engage key players
  • Determine your process for achieving objectives before December 1

• **After** you have made the important business decisions about whose pay will increase, who will be reclassified, and what roles / operations might need to be restructured:
  • Develop a detailed implementation and communications strategy
Implementation and Communication—Other Resources

• Visit The FLSA Exemption Resource Center
  • Go here: www.seyfarth.com/OTRuleResources
Thank You

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Need assistance?

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