



# FLSA and Head Start: Implementing the New Overtime Rule

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*Alex Passantino*



# 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<sup>th</sup> 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 40<sup>th</sup> 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 40<sup>th</sup> 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

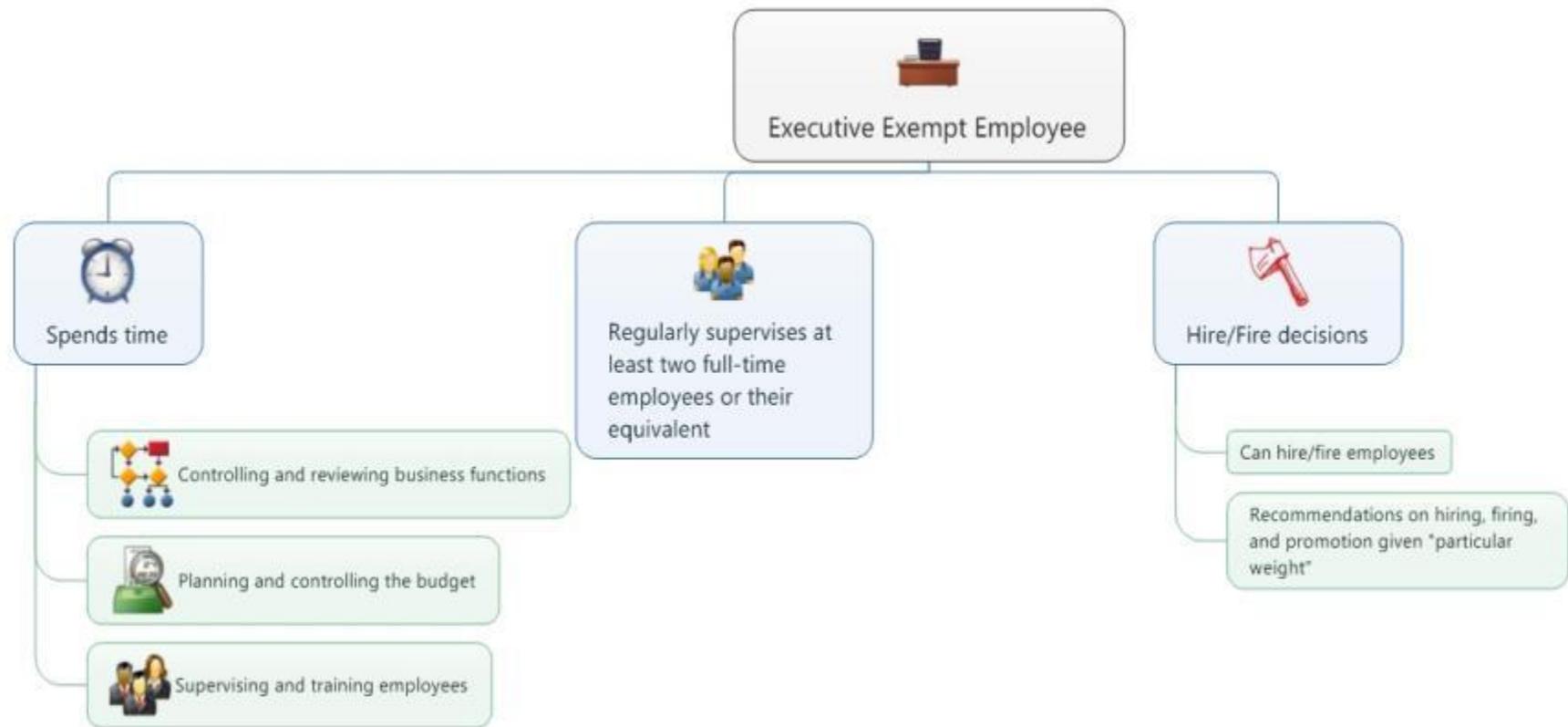
- **New Highly-Compensated Salary Level will be \$134,004**
  - More than \$122,100 identified in NPRM
  - Represents 90<sup>th</sup> percentile of full-time non-hourly workers nationally as of Q4 of 2015
- Requires payment on a salary basis of at least \$913/week
- Additional payments to bring to new 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 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

# The Administrative Exemption





# 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

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- 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;  $\frac{1}{2}$  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;  $\frac{1}{2}$  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



# ***CAUTION!***

## **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](http://www.seyfarth.com/OTRuleResources)





# Thank You



**Alex Passantino**  
apassantino@seyfarth.com

Need assistance?

Email: **OTRuleHelp@seyfarth.com**