Countdown to the New DOL Regulations

September 2016
Ready to go?
Or, Ready to Panic?

- December 1\textsuperscript{st} is only 60 days away!
- OMG, we are not ready!
Agenda

Efforts to Stop or Delay the Rule

Preparing for Change

Frequently Asked Questions
Under the FLSA, non-exempt employees must be paid at least the minimum wage (currently, $7.25) for all hours worked and 1 ½ times the regular rate of pay for all hours worked over 40 in a “workweek.”
The “White Collar” Exemptions

“Exempt” executive, administrative, professional, outside sales and computer employees need not be paid overtime.

Three tests for exemption:
• Salary Level
• Salary Basis
• Duties Tests
DOL’s Final Rule

- Minimum salary level increasing from $455 per week ($23,660 annualized) to $913 per week ($47,476 annualized)
- The salary level will automatically increase every 3 years, beginning January 1, 2020
  - DOL estimates the minimum salary level will increase to $51,000 in 2020
  - DOL will provide 150 days notice
What is NOT Changing

• No changes to the salary *basis* test
• No changes that impact outside sales, teachers, lawyers or doctors
• No changes to the duties tests
Efforts to Stop or Delay the Rule
Efforts to Stop the Rule

- Legislation
- Litigation
- Regulation
Pending Legislation

Protecting Workplace Advancement and Opportunity Act

- Introduced March 17th by Senate and House Republicans
- Nullify final rule and require DOL to analyze economic impact
- Prohibit automatic salary increases
Pending Legislation

Overtime Reform and Enhancement Act

• Introduced July 14th by Rep. Kurt Schrader (D-OR), with five Democrat and 3 Republican co-sponsors
• Supported by the Chamber and National Retail Federation
• Phase in the salary level increase over 4 years:
  – $35,984 effective December 1, 2016
  – $39,780 effective December 1, 2017
  – $43,628 effective December 1, 2018
  – $47,476 effective December 1, 2019
• Nullify the automatic salary increases
Pending Legislation

Regulatory Relief for Small Businesses, Schools, and Nonprofits Act

-Introduced September 21st
-Delay the effective date of the regulations until June 1, 2017

Passed the House 246-177
Overtime Reform and Review Act

- Introduced September 29th by Senator Lamar Alexander (R-TN), with 3 Republican co-sponsors
- Phase in the salary level increase over 5 years:
  - $35,984 effective December 1, 2016
  - $39,780 effective December 1, 2018
  - $43,628 effective December 1, 2019
  - $47,476 effective December 1, 2020
- Nullify the automatic salary increases
Litigation

- Two lawsuits filed on September 21st in the Eastern District of Texas
  - Coalition of over 50 business associations, including the National Retail Federation
  - 21 state governors and attorneys general
- Challenging both the high minimum salary level and the automatic salary increases
Countdown to the New DOL Regulations
Preparing for Change

- Bottom line: The new rules are unlikely to go away before December 1\textsuperscript{st}
- Employers should continue to prepare to comply, but may want to delay implementation until the last moment
Compliance, Step-By-Step

1. Identify employees who need a salary increase or to be reclassified
2. Develop new compensation plan for the reclassified employees
3. Review wage-hour policies and processes
4. Communicate the changes
5. Train the reclassified employees and their managers
Salary Increase or Overtime?

• Calculate the cost of increasing salary
  – Consider lowering incentive pay to offset salary increase
  – Consider increasing salary for employees earning over a certain threshold

• Calculate the cost of overtime
  – How many hours are exempt employees are working?
  – How will reclassified employees be paid?
 Compensation Plan Redesign

• Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
• Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
• How will we calculate overtime for the reclassified employees?
• Will we continue to provide incentive compensation?
• Do we need to make changes to any benefits?
Job Duty Review

• Even if salary level is not an issue, you may have employees who do not meet the duties requirements for exemption under the current regulations

• Rare opportunity to correct classification issues with reduced risk of triggering litigation

• With other employees being reclassified because of the salary issue, reclassifications because of job duties should fly under the radar
Review Policies and Processes

• Policies
  – Off-the-clock work
  – Meal and rest break
  – Travel time
  – Mobile device

• Processes
  – Timekeeping
  – Payroll changes
  – Controlling overtime hours
Communicate the Changes

• Need to communicate with senior management, managers of reclassified employees and the employees themselves

• Key decisions
  – Who will communicate the changes?
  – What will be communicated?
  – How will changes be communicated?
  – When will the changes be communicated?

• Prepare talking points and FAQs
Training

• Train the reclassified employees and their managers
  – Wage & hour policies
  – Timekeeping procedures
  – Activities that are compensable work
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Frequently Asked Questions
How Can We Minimize Cost?

- How should we set the hourly rates for reclassified employees?
- Is there a cost-neutral option?
- How do we calculate overtime for non-exempt salaried employees?
Non-Exempt Compensation Options

Non-Exempt Hourly:
Setting the Hourly Rate
- Salary divided by 40
- Salary divided by current hours worked
- Cost-neutral hourly rate

Non-Exempt Salary:
Calculating Overtime
- Salary divided by 40
- Salary divided by actual hours worked
- Fixed salary for fixed hours
- Fluctuating workweek
Comparing the Costs

- Assistant Manager earning $730.77 per week and working 50 hours
- Cost of salary increase is $9,476 ($47,476 - $38,000)
## Non-Exempt Hourly

### Current Salary / 40
- $730.77 / 40 = $18.27
- Regular = $18.27 x 40 = $730.77
- OT = $18.27 x 1.5 x 10 = $274.04
- Total weekly: $1,004.81
- Total annual: **$52,250**

Cost: **$14,250**

### Current Salary / 50
- $730.77 / 47 = $14.62
- Regular = $14.62 x 40 = $584.80
- OT = $14.62 x 1.5 x 10 = $219.23
- Total weekly: $804.03
- Total annual: **$41,809**

Cost: **$3,809**

### Cost-Neutral
- $730.77 / (40 + (10 x 1.5)) = $13.29
- Regular = $13.29 x 40 = $531.60
- OT = $13.29 x 1.5 x 10 = $199.35
- Total weekly: $730.95
- Total annual: **$38,009**

Cost: **$9**
Non-Exempt Salary

Salary / 40
- OT Rate = $730.77 / 40 = $18.27
- OT = $18.27 x 1.5 x 10 = $274.04
- Total weekly: $1,004.81
- Total annual: $52,250
  Cost: $14,250

Salary / 50
- OT Rate = $730.77 / 50 = $14.62
- OT = $14.62 x 1.5 x 10 = $219.23
- Total weekly: $950
- Total annual: $49,400
  Cost: $11,400

Fluctuating/Fixed
- OT Rate = $730.77 / 50 = $14.62
- OT = $14.62 x 0.5 x 10 = $73.08
- Total weekly: $803.84
- Total annual: $41,800
  Cost: $3,800
Fixed Versus Fluctuating

Fixed
- Hours worked over the “fixed” hours must be paid at 1.5
- No prohibition on bonuses or commissions
- Can deduct from salary when an employee works less than 40 hours

Fluctuating
- All overtime hours are paid at 0.5
- May not be able to pay bonuses or commissions
- Cannot deduct from salary when an employee works less than 40 hours
Can We Count Bonuses, Commissions or other Benefits Towards the $913?

• What is the 10% bonus provision?
• How does that work?
• What “quarter” can we use?
• Can we count other benefits such as car allowances or vacation pay?
• What is a non-discretionary bonus?
• What happens if we make a mistake?
Bonuses and Commissions

- Nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly, can satisfy up to 10 percent of the minimum salary requirement
- No other benefits count toward the minimum salary level
The Mechanics

• Each workweek, the employer must pay the exempt employee a salary of at least 90% of the minimum salary level – $821.70 ($42,728.40 annualized)

• At the end of the quarter, salary plus all bonuses/commissions must equal $11,869 ($47,476 ÷ 4)

• The employer must make up any shortfall in the first pay period of the next quarter.

• The employer can designate the quarter – any 13 consecutive weeks.
Nondiscretionary Bonuses

• Most bonuses are nondiscretionary as defined by the FLSA regulations

• Bonus are only “discretionary” if:
  – Not announced to employees in advance; and
  – The amount of the payment is not determined using any type of formula related to company performance, employee performance, hours worked, et al.

• A bonus is not discretionary if employees expect to receive such payments regularly
Consequence of a Mistake

If you make a mistake, employees will lose the exemption and be owed overtime for the quarter.
Do we still have to comply with state laws on exemptions?
What About State Law?

- 18 States have duties requirements that differ from the federal
- 4 states (AK, CA, CT & NY) currently have a minimum salary level higher than the current $455, but lower than the new $913 per week

Employees must be paid overtime unless exempt under both the federal FLSA and State Law
**California Minimum Salary Level**

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<thead>
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<th>Year</th>
<th>Federal Exempt Wage</th>
<th>California Minimum Wage</th>
<th>California Exempt Wage</th>
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<td>2017</td>
<td>$47,476</td>
<td>$11</td>
<td>$43,680</td>
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<tr>
<td>2018</td>
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<tr>
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<td>$15</td>
<td>$62,400</td>
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</tbody>
</table>
When Should We Implement?

• When is the effective date?
• What if the effective date is in the middle of our workweek?
• When should we give our employees notice of the changes?
• Should we wait to see if the rule is nullified by legislation or litigation?
Effective Date

- Officially – Thursday, December 1, 2016
- But, DOL has taken the position that if you reclassify in the middle of the workweek, employees who work more than 40 in the workweek must be paid overtime
- So the actual effective date is the beginning of your workweek that contains December 1st (e.g. Saturday, November 26 or Sunday, November 27)
But remember, some states require advance notice to employees of changes in pay

- In some states only applies to reductions in pay
- Most common is one pay period
- Longest is 30 days in Missouri for reductions in pay
Should We Wait for the Legislation or Litigation?

• Run, do not walk, towards compliance
• Be prepared to implement by December 1
Do We Have to Pay the Reclassified Employees for …

- Travel time?
- Training and meeting time?
- Reading and sending emails outside of normal work hours?
- Civic and charitable activities?
Travel Time

• Under the FLSA, non-exempt employees must be paid for:
  – Travel between job sites during the work day
  – Travel to another city one-day assignments
  – Overnight travel during the employee’s normal work hours (on a work or non-work day)

• Some states laws require all travel time to be paid except the normal commute
Training/Meeting Time

• Training and meeting time is compensable work hours unless all four of the following requirements are met:
  • Attendance is outside regular working hours
  • Attendance is voluntary
  • The training/meeting is not job related
  • The employee does not perform any productive work during the training/meeting
Pre- and Post-Shift Activities

• Work:
  – Booting up and turning off the computer
  – Reading emails
  – Shift-change conversations
  – Donning/doffing

• Not work:
  – Commuting
  – Walking from the parking lot to the work station
  – Waiting to punch a time clock
Charitable and Civic Activities

Time spent by an employee participating in charitable or civic activities must be paid unless:

- Participating in the activity is voluntary, and
- Occurs outside normal working hours
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