

**“THE OVERTIME LAW HAS CHANGED! THE NEW
RULES BECOME EFFECTIVE DECEMBER 1, 2016”**

Presented by:

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A. Fair Labor Standards Act (“FLSA”) (Federal Law enacted in 1938)

- **FLSA:** An employee in the United States is entitled to receive 1.5x times their regular rate of pay *unless* they are exempt.
- Your business must have annual revenues of \$500,000 (enterprise coverage), but even when there is no enterprise coverage, employees may be protected by the FLSA if their work regularly involves them in commerce between States ("interstate commerce").
- **Exemptions:** The most common are the executive, professional and administrative (also referred to as “white collar” exemptions). The exemption is determined not by occupational title or job classification, **but rather by the duties and salary of the individual employee involved.** See [29 C.F.R. § 541.2.](#)

A. Fair Labor Standards Act (“FLSA”) (Federal Law enacted in 1938) (cont.)

- “President of _____”
- “Senior Manager of _____”
- “Head of _____”
- “Director of _____”

THESE DO NOT MATTER!

A. Fair Labor Standards Act (“FLSA”) (Federal Law enacted in 1938) (cont.)

- **What types of Employees do I need to worry about?**
You’re typically going to be concerned about your supervisory and mid-level management folks and not your hourly laborers or senior executives/officers.
- **Eliminate the notion that just because you may pay a “salary” that you do not have to pay Overtime.**

A. Fair Labor Standards Act (“FLSA”) (Federal Law enacted in 1938) (cont.)

- **Current Test:**

- 1) Compensated on a salary or fee basis at a rate of not less than **\$455 per week (set in 2004);**
- 2) *Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and*
- 3) *Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance?*

B. On February 12, 2014 – Obama issued an Executive Order establishing a Minimum Wage for *Federal Contractors*

- From \$7.25 - \$10.10 per hour, beginning January 1, 2015.
- Florida's current minimum wage is \$8.05/hr.

C. What has happened in the private and public sector with wages since May 2014? The following have all increased their minimum wages:

- **Private Employers:** McDonald's, Aetna, WalMart, TJ Maxx, Target, Starbucks, Ikea, Gap, Costco, Ben & Jerry's and Whole Foods.
- **Public Employers:** Seattle, Washington (\$15/hr. phased in by 2021), Los Angeles, San Francisco, and Oakland, California (\$15/hr. by 2020) and Chicago, Illinois (\$15/hr. by 2020).

D. March 13, 2014 – Obama issued Memorandum to Secretary of Labor (Tom Perez).

- White Collar exemptions have not kept up with our modern economy, and, as such, millions of Americans lack the protections of overtime and even the right to the minimum wage.
 - 1) Ordered: modernize and streamline the existing overtime regulations.
 - 2) Intended Result: Increase the number of workers who qualify for OT pay.
 - A) \$455/week or \$23,660 annually is below the annual poverty line for a family of four.
 - B) The \$455/week salary will likely be increased.
 - 3) **What Happened?: JUNE 30, 2015 – DOL issued the new regulations, and they were published on July 6, 2015. Comments period expired on September 4, 2015. Rule to go into effect on December 1, 2016.**

E. The New DOL Regulations were published by the DOL on May 17, 2016:

- ***The \$455/week or \$23,600 annual salary will increase to \$913/week or \$47,476 annually.***
- **The changes become effective on December 1, 2016.**
- The last time the salary basis test changed was in 2004. But now, there will be future automatic updates to those thresholds, which will ***occur every three years, beginning on January 1, 2020.***
- A year ago, it was expected that the “duties test” would also change. That is NOT GOING TO HAPPEN at this point. The only material change is the salary basis test.

F. Should I care?

- If you want to be a good corporate citizen and not be distracted by potential litigation, you need to get out in front of these changes and plan accordingly.
- This issue is front and center: It's all over the news, private and public employers are making the headlines by increasing their wages and Plaintiff's lawyers are looking for your disgruntled current and former employees. You cannot afford to ignore these changes.
- These lawsuits are not only a distraction, but they are very costly. The Plaintiff's attorneys will be able to recover attorneys' fees, not you, the Employer.

G. What Should I Do?

- You should assess where your company is as far as Wage & Hour compliance by:
 - 1) Do a wage & hour audit, update your policies, hiring practices (and advertisements) and job descriptions.
 - 2) If you use independent contractors, verify if they are properly classified;
 - 3) Make sure you have accurate, up-to-date employee data, including historical data (at least 3 years' worth);
 - 4) Make sure your exempt and nonexempt employees are properly classified (again, it's the perfect time to do an audit);
 - 5) Evaluate your OT policies – are you following them?
 - 6) How are you tracking time? The DOL has created a timesheet application that allows employees to independently track their hours. If you're using manual or outdated timekeeping systems, you may have a potential problem.

G. What Should I Do? (cont.)

- Yeah, Yeah, Yeah – that seems awfully involved. What can I do immediately?
 - 1) Keep status quo, but pay your exempt employees overtime who fall below the salary increase.
 - 2) Reclassify and limit overtime possibilities. Trade-off -> you may have to hire more employees (which isn't cheap).
 - 3) Give raises to meet the new salary basis.

H. Does Any of This Impact My Obligations Under the Affordable Care Act (ACA)?

- Yes, forty (40) hours is the magic number for the OT threshold, but certain employers will have to provide health coverage to all employees working an average of thirty (30) hours.
- The DOL will be rolling out enforcement tools to determine whether Employers are using time shaving methods to get around the 30 hour requirement.
- The DOL will also look to see whether employees are classified correctly – i.e. is the Employer purposefully misclassifying the individual as an independent contractor to avoid the obligations of the ACA.

I. Thanks, but How do I Deal With All of This?

- Create an environment of awareness. Often even when an Employer can demonstrate good intent, failure to pay attention to detail can be costly.
- Really take a hard assessment of what goes on in the home office and out in the field. If you have sound policies in place, ask yourself if they are being followed. If not, then there's a problem.
- TRAINING – it's absolutely critical that employees and management are up to speed with your policies.
- Automate your systems to avoid human error.

J. Again, all great information, but where can I learn more?

- www.dol.gov
- www.shrm.org
- Call or e-mail me.

K. How a Typical FLSA case arises:

- **Denial of unemployment claims** – go see a lawyer, and may end up with an FLSA claim.
- **“Wrongful termination”** – generally no cause of action for “wrongful termination,” but after speaking with a lawyer, a FLSA case may arise. *“They weren’t nice to me.”*
- **“Discrimination”** – generally very difficult cases to prove, but again, after speaking with a lawyer, a FLSA case may be filed.
- **“Hostile work environment”** – generally speaking another difficult case to prove that may lead to a FLSA Claim.
- **“Retaliation”** - Complaints involving failure to pay overtime and/or minimum wage can be oral or in writing to form a basis for retaliation (exception rather than the prevailing rule). **Be very careful here. I envision a lot more retaliation suits coming next year as employers try and navigate these changes. Some employees may not like the results – careful on how you deal with them.**