



FLSA Update

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Overview

- The New Regulations
- Recent Case Developments
- Enforcement Trends and Difficult Issues



The New Regulations

- History
 - June 30, 2015: Department of Labor announces Notice of Proposed Rulemaking
 - Thereafter, 60 day comment period (more than 270,000 comments submitted)
 - March, 2016: Final rule submitted to the OMB
 - Summer/Fall, 2016: Final rule expected to be published and take effect 60 days later



The New Regulations

- What is expected to Change?
 - Thresholds for exempt employees expected to rise (both at the minimum “salary level” and at the “highly compensated employee” level)
 - Salary and compensation levels will be indexed to BLS inflation data and updated annually
 - The Department of Labor sought input on, and *may* change, the duties test for the white collar exemptions



The New Regulations

- Salary threshold changes
 - To be exempt, employee must be performing exempt work *and* be paid a bona fide salary in excess of the threshold (currently \$455 a week)
 - Proposed rule is expected to increase the minimum salary threshold to \$970 a week for 2016.
 - New threshold expected to be indexed for inflation and adjusted yearly



The New Regulations

- Salary threshold changes (cont.)
 - The regulations use an abbreviated test for highly compensated employees.
 - Current threshold is total annual compensation of \$100,000, which includes at least \$455 per week paid on a salary basis.
 - New threshold expected to increase to total annual compensation of \$122,148 in 2016, (also indexed for inflation and adjusted annually)



The New Regulations

- Potential changes to the “duties tests” for the “white collar” exemptions
 - While the Department of Labor did not propose any specific changes to the standard duties tests, it did seek comments on whether the current tests are working
 - Some observers believe that the final regulations may include a more restrictive approach to the duties tests (such as adopting the “quantitative” test used in California)



The New Regulations

- Dealing with the higher salary threshold
 - Many employees will get a big raise, either through the addition of overtime or increased salary to meet the threshold
 - More non-exempt employees means more recordkeeping (formerly exempt employees now have to keep time sheets)
 - Addressing morale issues – being exempt really matters to some employees



The New Regulations

- Paying overtime to a salaried, non-exempt employee
 - Option 1: Salary level reflects a set amount of hours (e.g. \$400 per week for a normal week of 40 hours = \$10 per hour)
 - In this scenario, employee's overtime rate would be \$15 per hour (regular rate of \$10 times 1.5)
 - Note: you still have to keep accurate time records



The New Regulations

- Paying overtime to a salaried, non-exempt employee (cont.)
 - Option 2: Salary level reflects payment for *all* hours worked (fluctuating workweek method)
 - In this scenario, if the employee works more than 40 hours, the salary is divided by the total hours worked to calculate the regular rate, and the regular rate is then used to calculate the overtime*

* Assumes no other includable income for that workweek



The New Regulations

- Paying overtime to a salaried, non-exempt employee (cont.)
 - For fluctuating workweek method to apply:
 - Employee must receive a fixed salary that does not vary week to week, not counting overtime premiums (like a bona fide salary)
 - The fixed amount must be sufficient to cover the minimum wage
 - The employer and employee must share a “clear mutual understanding” (preferably in writing) that the employer will pay the fixed salary regardless of number of hours worked.

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The New Regulations

- Paying overtime to a salaried, non-exempt employee (cont.)
 - Example: Salary of \$750; 50 hours worked.
 - Regular Rate: $\$750/50 = \15
 - To calculate overtime, in addition to the salary, pay the employee 50% of the regular rate for the overtime hours: $\$7.50 \times 10 = \75
 - Total compensation due employee: $\$750 + \$75 = \$825$
 - Note: you still have to keep accurate time records

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Recent FLSA Cases

- *Tyson Foods, Inc. v. Bouaphakeo*, U.S. Supreme Court, March 22, 2016
 - Donning and doffing case
 - Issue pertained to the use of representative statistical evidence to support class certification
 - Because no time records were kept, the plaintiffs used a time study to figure the amount of time spent in donning and doffing activities



Recent FLSA Cases

- *Tyson Foods v. Bouaphakeo* (cont.)
 - Tyson argued that the use of representative evidence was improper, and that each class member had to prove his or her actual time spent donning and doffing
 - Court permitted use of representative evidence, because each class member would have to use the same report anyway



Recent FLSA Cases

- *Integrity Staffing Solutions v. Busk*, U.S. Supreme Court, December 9, 2014
 - Issue: whether time spent by warehouse employees waiting to go through security screening at an Amazon.com warehouse is compensable
 - Court unanimously held that it was not, because the security screenings were not the principal activity the employees were engaged to perform, and were not integral and indispensable to the employees' job duties



Enforcement Trends and Difficult Issues

- Joint Employment
 - January 20, 2016: Administrator's Interpretation No. 2016-1
 - Seeks to address the "fissured workplace – where there is increasingly the possibility that more than one employer is benefitting from [the employees'] work
 - FLSA's interpretation of joint employer definition is "as broad as possible."



Enforcement Trends and Difficult Issues

- Joint Employment (cont.)
 - Horizontal Joint Employment (e.g. on-site employment through a temporary employment agency)
 - Vertical Joint Employment (e.g. contractor-subcontractor and franchisor-franchisee arrangements)
 - Impact
 - Aggregation of hours for joint employers
 - Joint and several liability among joint employers
 - Where one employer is larger and more established, the Department of Labor may focus on the larger employer “to achieve statutory coverage, financial recovery, and future compliance”



Enforcement Trends and Difficult Issues

- Per diem payments
 - Both a wage/hour and tax issue, and the Department of Labor is sharing information with the IRS and state tax authorities
 - Per diem payments that are beyond the amount that is “reasonable” for traveling expenses or other expenses must be included in the regular rate.
 - Consider using GSA rates for lodging, meals, and incidental expenses



Enforcement Trends and Difficult Issues

- Off the Clock Work
 - Ways this issue typically arises
 - Non-exempt employee comes in and begins work early or stays late (often, no time clock)
 - Automatic deductions for lunch, but non-exempt employee works through lunch
 - Non-exempt employee performs work remotely by logging in from home or doing work on his/her smart phone



Enforcement Trends and Difficult Issues

- Off the Clock Work (cont.)
 - Relevant standard: whether the employer “suffers or permits” the employee to work
 - Particularly important to have policy requiring employees to report “off the clock” work (such policies have been helpful in defending these cases)
 - If employee works “off the clock,” even if it was unauthorized, the employer must pay for the time. Unauthorized off the clock work is a discipline issue, not a pay issue.



Enforcement Trends and Difficult Issues

- Unpaid Internships
 - High profile issue in the entertainment industry
 - Six criteria to determine when internship may be unpaid
 - Internship similar to training in educational environment
 - Internship is for the benefit of the intern
 - Intern does not displace employees, but works under close supervision of existing staff
 - No immediate advantage to employer derived from intern's activities, and operations may actually be impeded
 - Intern is not necessarily entitled to a job at the end of the internship
 - Understanding between employer and intern that the intern is not entitled to wages



Enforcement Trends and Difficult Issues

- Lawful Deductions from Bona Fide Salary
 - When the employee is absent from work for one or more full days for personal reasons other than sickness or disability
 - When the employee is absent from work for one or more full days due to sickness or disability, if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for salary lost due to illness
 - To offset amounts received for jury duty, witness, or military pay



Enforcement Trends and Difficult Issues

- Lawful Deductions from Bona Fide Salary (cont.)
 - For penalties imposed in good faith for infractions of major safety rules
 - For unpaid disciplinary suspension of one or more full days imposed in good faith for workplace conduct rule violations
 - For days not worked in the initial or terminal week of employment
 - For unpaid leave taken under the Family and Medical Leave Act



Enforcement Trends and Difficult Issues

- Regular Rate Issues
 - All of the following must be included in the regular rate for non-exempt employees:
 - Non-discretionary bonuses
 - Shift differential
 - Production bonuses
 - Safety bonuses
 - Attendance bonuses
 - Longevity pay
 - Retention bonuses



Enforcement Trends and Difficult Issues

- Payment of Bonuses Covering Multiple Workweeks
 - If a bonus payment covers more than one workweek, the payment should be allocated to all of the weeks, and overtime paid for the weeks where the employee worked more than 40 hours
 - Safe harbor: payment of bonuses as a percentage of total earnings (overtime is “baked in” to the calculation)



Enforcement Trends and Difficult Issues

- Travel Time (Non-exempt employees)
 - For a one-day special assignment trip, all travel time is compensable, excluding time the employee would normally commuting to the regular work site
 - For a multi-day trips, travel time during normal working hours is compensable (including travel during normal working hours on nonworking days). To the extent that the employee is working during non-normal working hours (not being a passenger), the time is also compensable.



Enforcement Trends and Difficult Issues

- Reduced Hours During Difficult Times
 - For salaried, exempt employees, the salary basis requires that the salary be paid regardless of hours worked
 - Salary may be changed, but the Department of Labor will question multiple salary changes
 - Furloughs spanning a full workweek are permissible (but, be careful about limited performance of work)



Questions

