



What Do the U.S. Department of Labor's New Overtime Rules Mean for Your Organization?

CESSE Finance and Human Resource Section
November 1, 2016

Speakers:

Ronald Taylor, Partner, Venable LLP
Jennifer Prozinski, Associate, Venable LLP

Background



Overview of the Fair Labor Standards Act

- The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards.
- FLSA requires employers to pay employees at least minimum wage and overtime for all time worked over 40 hours in a workweek unless the employee falls into an exempt category (ex: professional, administrative, executive, computer, outside sales).
- Nonexempt workers are entitled to a minimum wage of not less than \$7.25 an hour. Overtime pay at a rate of not less than 1 1/2 times their regular rate of pay is required after 40 hours of work in a workweek. (State laws may and often do require a higher minimum wage. E.g., DC: \$11.50; MD: \$8.75.)
- Exempt employees must generally satisfy a duties test *and* a salary test.



FLSA – The First 66 Years

- The principal exemptions from overtime and minimum wage requirements were largely untouched. These exemptions required duties involving regular use of independent judgment and discretion (duties test) and payment of compensation on a salary basis (salary test).
- The salary amount needed was very low: \$155 per week. A less demanding duties test was applied if the salary was \$250 per week.



2004 Changes to the Regulations

The U.S. Department of Labor revised the overtime regulations in August 2004. Two key changes:

- The “salary-level” test was amended. Under the new rules, employees had to earn a minimum salary of \$455 per week, or \$23,660 per year.
- *White-collar* employees who earned more than \$100,000 per year became automatically exempt from overtime under the regulations (HCE exemption).



2016 Revisions (Effective Dec. 1, 2016)

The Department of Labor recently revised the overtime regulations to be effective December 1, 2016:

- The minimum wage for the salary test will be increased to \$913 per week or \$47,476 per year.
- The annual compensation required to meet the HCE exemption will be raised to \$134,004 per year.
- The compensation levels for the salary test and the HCE exemption will be pegged to increase automatically.
- The rules reflect that the DOL considers OT a right of employees and are intended to transfer wealth.
- The DOL did not make changes to the duties tests, however.



Who Are Exempt Employees?

- Executive
- Administrative
- Professional
 - Learned
 - Creative
- Computer
- Highly Compensated



Executive Exemption

- Must be compensated on a **salary** basis that is at least **\$913 per week eff. 12/1/16** (\$455 per week currently);
- Primary **duty** must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Must customarily and regularly **direct the work of at least two full-time employees** or their equivalent; and
- Must have the **authority to hire or fire other employees**, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.



Administrative Exemption

- Must be compensated on a **salary basis** that is at least **\$913 per week eff. 12/1/16** (\$455 per week currently);
- Primary **duty** must be 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
- Primary duty must include the exercise of **discretion and independent judgment** with respect to matters of significance.



Professional Exemption

- Learned Professional
- Creative Professional



Learned Professional

- Must be compensated on a **salary** basis that is at least **\$913 per week eff. 12/1/16** (\$455 per week currently);
- Primary **duty** must be the performance of work **requiring advanced knowledge** and work which is predominantly **intellectual** in character and includes the consistent **exercise of discretion and judgment**;
- The advanced knowledge must be in a **field of science or learning** (ex: law, medicine, theology, accounting, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other occupations that have a recognized professional status)
- The advanced knowledge must be customarily acquired by a **prolonged course of specialized intellectual instruction**.



Creative Professional

- Must be compensated on a **salary basis** of at least at **\$913 per week eff. 12/1/16** (\$455 per week currently);
- Primary **duty** must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor



Computer Employee Exemption

Must be compensated at a rate not less than \$913 per week eff. 12/1/16 (\$455 per week currently) **or** on an hourly basis at a rate not less than \$27.63 an hour (currently and after 12/1/16);

Must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field

Primary duty must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
2. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
4. A combination of these duties, the performance of which requires the same level of skills.



Highly Compensated Employees

- HCEs performing **office or non-manual work** and paid total annual compensation of \$134,004 or more eff. 12/1/16 (\$100,000 currently), which must include at least \$913 per week paid on a salary basis (\$455 per week currently), are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee.



Summary: Salary and Duties Test



Salary Basis Test

- To satisfy the salary test for exemption, employees currently must be paid at least \$455 per week or \$23,660 per year. The required amount will increase to \$913 per week and \$47,446 per year effective 12/1/16.
- The salary must be paid “free and clear” to employees. It may be paid in equivalent amounts for periods longer than one week (ex: \$910, or \$1826 bi-weekly). The payment cannot be made more frequently than weekly.
- The employee must regularly receive a predetermined amount of compensation each pay period. This compensation cannot be reduced because of variations in the quality or quantity of the work performed.



Duties Test

- The principal component of the duties test is that the employee must consistently **exercise discretion and judgment**.
- The mere consideration that the employee can create significant damages in the event of a mistake is not the same as having discretion. If the employee is following a procedure spelled out for him or her, the fact that it includes some choices is not likely to be considered to be discretion.



Exemptions Do NOT Apply To:

- “Blue collar” workers who perform work involving repetitive operations with their hands, physical skill, and energy. Non-management employees in production, maintenance, construction, and similar occupations (carpenters, electricians, mechanics, etc.) are not exempt no matter how highly paid they might be.
- Police officers, firefighters, paramedics, correctional officers, rescue workers, and other similar employees, regardless of rank and pay level.
- Thus, exemptions apply **only to** “white collar” employees who meet the salary and duties tests. Exemption does not apply based upon job title alone, but requires a **case-by-case assessment** of an employee’s job duties



Issues Presented by New Rules

- The rules disproportionately effect small business and non-profits
- The automatic escalator does not take into account economic realities
- The automatic escalator could lead to perverse results
- The change will result in people becoming non-exempt
 - Included in this group are part-time employees who pass the duties test but fail the salary test because they are paid less than \$913 per week.
 - Effect on reclassified employees (e.g., benefits, flexibility)



Issues Presented by the New Rule, *con't*

- On September 20, 21 states sued to block enforcement of the rules as to state workers.
- Business groups, including ASAE, have also filed suit to block the rule from taking effect on Dec. 1.
- Attorneys general for the states and the business groups have both requested an expedited summary judgment that would vacate the rule before it takes effect.
- The states argue, among other things:
 - The new rules meddle with how states pay employees and, by increasing costs, could force cuts in state services.
 - The salary threshold ignores the language of the law and what employees actually do.
 - The automatic escalator ignores economic realities and could lead to cuts.



Congress Weighs In?

- Regulatory Relief for Small Businesses, Schools, and Nonprofits Act (H.R. 6094)
 - Would delay implementation of new salary test pay until June 1, 2017.
 - House approved on September 28, 2016.
 - Likely filibuster in Senate.
 - Almost certain veto in White House.
- In addition, Senate bill (S.3464) would stretch out the timeline for implementing the overtime rule over five years. The bill, introduced by Sen. Lamar Alexander (R-TN), would also require an independent study of the rule after the first year of implementation. Should the rule be found to negatively impact American workers and the economy, nonprofit groups (including colleges and universities) could be exempt from further increases.



Avoiding Wage and Hour Pitfalls

- Review job descriptions and actual duties to determine whether employees are appropriately classified.
- Job titles, nomenclature, or job descriptions do NOT establish whether a particular exemption applies. Exempt status must be determined on the basis of whether the employee's compensation and duties meet the requirements of the rule.
- Job descriptions should clearly identify employee's primary and essential duties.
- Job descriptions should be reviewed periodically or after the employee has worked in the position for some time (e.g., several months) to determine whether the job duties originally described continue to be accurate.
- Regular audits of the duties actually performed by employees should help to determine whether employees continue to meet the requirements for exempt status.



Avoiding Pitfalls (cont'd)

- Salaried employees are not always exempt – the employee must also meet the duties test.
- “Supervisors” are not necessarily exempt.
- Not all employees who work with computers qualify for the computer employee exemption.
 - Help desk workers are likely *not* exempt.



A Few Words about “Comp Time”

- Government employers may compensate employees for overtime work with paid time off (comp time) in lieu of monetary payment if certain conditions are met.
- **No such thing as comp time in the private sector**
 - Private employers may give employees time off from work to avoid exceeding 40 hours in a single workweek.
 - If an employee works overtime during the first week of the pay period, the employee may be required to work fewer hours in the next week of the pay period.



Coping with the New Overtime Rules

- Raise salaries to meet the new salary threshold
- Continue to pay the same salary rate plus overtime
- Restructure duties/assignments
- Volunteers/interns (with caution)
- Independent contractors for discrete projects
 - But be wary of misclassification



Why Proper Classification Matters

- Fair Labor Standards Act and State wage and hour laws
- Title VII, ADA, ADEA, and other laws governing employment
- Misclassified employees could raise workforce above statutory thresholds – e.g., 50-employee threshold for FMLA and ACA
- Tax liability
- Unemployment Insurance
- Tort claims



QUESTIONS?



Presenters

VENABLE^{LLP}



Ronald Taylor

Venable LLP

rwaylor@venable.com

410.244.7654



Jennifer Prozinski

Venable LLP

jgprozinski@venable.com

703.905.1973

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.

To view recordings of Venable's nonprofit programs on our YouTube channel, see www.YouTube.com/VenableNonprofits or www.Venable.com/nonprofits/recordings.

Follow [@NonprofitLaw](https://twitter.com/NonprofitLaw) on Twitter for timely posts with nonprofit legal articles, alerts, upcoming and recorded speaking presentations, and relevant nonprofit news and commentary.

