Fair Labor Standard Act
2016 Changes

Tennessee Association of Clerks and Recorders
Advanced Academy

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In the Beginning
FLSA History

• 1st enacted in 1938 as a means of economic recovery after the Depression;
• 1966 extended to schools, hospitals, nursing homes and local transit employees;
• 1974 expanded to include most government employees;
• 1976 application to governments ruled unconstitutional by the Supreme Court;
• 1985 Supreme Court ruled governments are covered.
• 1987, the final regulations were released, though delayed until 8/1992 (docking for leave)

Overtime Regulations

“Except perhaps for the Social Security Act, it is the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country.”

FDR
Rationale for the Change

- Efforts to Grow the Middle Class
  - Higher Wages
  - Tax Cuts for Middle-Class
  - College Affordability
  - Equal Pay
  - Workplace Flexibility
  - Promoting Fair Pay and Safe Workplace
  - Affordable Health Insurance
  - Security in Retirement

Notice of Proposed Rulemaking

- Memorandum directing DOL to update regulation on March 13, 2014.
- DOL held meetings with stakeholders to address:
  - Appropriate salary levels for exemption
  - Changes to the duty test
  - Simplification of regulations.
Notice of Proposed Rulemaking

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Overtime Regulations

- On July 6, 2015 the Department issued proposed regulations concerning the executive, professional, & administrative exemptions.
- About 290,000 comments were submitted
- Regulations were sent to the Office of Mgmt. and Budget’s (OMB) Office of Information and Regulatory Affairs on March 14th, 2016
- OMB’s review typically takes 30 – 90 days
Overtime Regulations
Salary Level Test

• Only May 16, 2016 the Labor Department issued final regulations.
  – The salary basis test would increase from $455/week to $913/week ($47,476 per year)
  – Annual compensation threshold for exempt highly compensated employees would increase from $100,000/year to $134,000/year
  – Effective December 1, 2016

The Overtime Rules Have Changed
Overtime Regulations

• The Labor Department made no changes to:
  – the duties tests;
  – Timekeeping requirements;
  – Part-timers;
  – Salary level job exclusions;

“White Collar” Exemptions

• Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
  – Executive;
  – Administrative;
  – Professional; or
  – Outside Sales capacity.
Three Tests for Exemption

• Salary Basis
• Job Duties
• Salary Level

Salary Basis Test

• Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
• The compensation cannot be reduced because of variations in the quality or quantity of the work performed*
• Must be paid the full salary for any week in which the employee performs any work
• Need not be paid for any workweek when no work is performed
Duties Tests

- Executive
- Administrative
- Professional
- Others
  - Computer
  - Recreational
  - Outside Sales

Executive Duties

- **Primary duty is management** of the enterprise or of a customarily recognized department or subdivision;
- **Customarily and regularly** directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.
Administrative Duties

• 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
• Whose primary duty includes the exercise of **discretion and independent judgment** with respect to matters of significance.

Professional Duties

• actually covers two exemptions:
  – one for “learned professionals” and one for
  – “creative professionals.”
• Whose **primary duty** is to perform work requiring knowledge of an **advanced type in a field of science** or learning customarily acquired by a **prolonged course of specialized intellectual instruction or, requiring invention, imagination, originality or talent** in a recognized field of artistic or creative endeavor. **(regardless of the salary)**
Overtime Regulations
Automatic Salary Adjustments

- DOL proposed to automatically update salary requirements every three (3) years
- Jan. 1, 2020 - $51,000 annually/$980.77 weekly (average 2.4155% annual adjustment to stay current)
Bonus and/or Commission Payments

- Counts toward Minimum Salary Level
  - Non-discretionary bonuses
  - Incentive pay
  - Commissions
- Up to 10% of salary threshold
- Paid at least quarterly
- Catch-up provisions

Discretionary vs. Non-discretionary Bonuses

- Discretionary Bonus
  - Shift differentials
  - Shift premiums
  - Safety bonuses
  - Production bonuses
  - Attendance bonuses
  - Guaranteed bonuses
  - Promised bonuses
  - Profit-sharing bonuses
  - Longevity bonuses
  - Bonuses as % of earnings
  - Commissions
  - SPIFFS
  - Piece-rate pay

- Non-discretionary Bonus
Overtime Regulations

General Impact

<table>
<thead>
<tr>
<th>Affected Workers</th>
<th>Share of Total Affected Workers</th>
<th>Affected Workers as a Share of Workers Subject to FLSA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>4,230,098</td>
<td>100%</td>
</tr>
<tr>
<td>By Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>1,875,516</td>
<td>44.3%</td>
</tr>
<tr>
<td>Female</td>
<td>2,352,092</td>
<td>55.6%</td>
</tr>
<tr>
<td>2.7%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By Age</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under 25</td>
<td>313,405</td>
<td>7.4%</td>
</tr>
<tr>
<td>25-34</td>
<td>1,325,083</td>
<td>31.3%</td>
</tr>
<tr>
<td>25-44</td>
<td>948,612</td>
<td>22.4%</td>
</tr>
<tr>
<td>45-54</td>
<td>896,939</td>
<td>21.2%</td>
</tr>
<tr>
<td>55-64</td>
<td>606,299</td>
<td>14.3%</td>
</tr>
<tr>
<td>65 and over</td>
<td>136,428</td>
<td>3.2%</td>
</tr>
<tr>
<td>2.4%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Overtime Regulations

Governmental Impact

- Lower level managers may now be considered non-exempt and subject to overtime requirements
- Entry level professionals may have to have their compensation increased to the new levels
- Imposed limitations on employee overtime
Overtime Regulations
Fiscal Impact

- More employees will be entitled to overtime
  - DOL estimates almost 4-5 million employees will become non-exempt under the new regulations
    - Will cost employers between $239.6 and $255.3 million per year
- More overtime claims and lawsuits
  - Since 2004 there has been a 40% rise in FLSA suits and 98% increase in collective actions
- Expect an increase in the number of DOL audits.

Overtime Regulations
Fiscal Impact

- In TN more than 100,000 employees are expected to be impacted
Overtime Regulations
Fiscal Impact

FLSA violations can lead to significant employer liability in the form of minimum wage and overtime back wages, as well as FLSA civil money penalties if employers are not careful to properly classify their employees as indicated by the following 2014 statistics:

<table>
<thead>
<tr>
<th></th>
<th>Violation Cases</th>
<th>Back Wages</th>
<th>Number of Employees Receiving Back Wages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum Wage</td>
<td>11,042</td>
<td>$36,732,407</td>
<td>106,184</td>
</tr>
<tr>
<td>Overtime</td>
<td>11,238</td>
<td>$136,239,001</td>
<td>174,365</td>
</tr>
</tbody>
</table>

Overtime Regulations
Compliance Efforts

- What you don’t have to do:
  - Employers don’t have to change employee job titles if you move a position from exempt to non-exempt.
  - You do not have to change job duties.
  - Adjustments do not have to include pay raises.
  - You don’t have to convert to a system that pays more.
Overtime Regulations Compliance Efforts

• Easy Choices now that the final rules are released:
  – Reclassify salaried employees as hourly and pay overtime.
  – Restructure or split jobs into two part-time positions.
  – Give salaried employees a raise to the anticipated threshold.

Overtime Regulations Compliance Efforts

• Easy Choices now that the final rules are released:
  – Utilize Compensatory time
  – Reduce or eliminate overtime hours.
  – Use some combination
Overtime Regulations Compliance Efforts

- ID employees
- Determine overtime exposure
- Conduct cost analysis
- Communicate
Overtime Compensation
Other Considerations

• Time tracking
• Increase in overtime
• OT payment option plans for salaried non-exempt
  – Half time
• Job classification plan
• Current policies
• Other benefits
  – Comp time
  – Leave
Overtime Regulations

!!!Remember!!!!
The final rules are effective December 1, 2016

Misclassified or Not?

• Jim works as a Purchasing Assistant paid $600 per week and does not receive pay for hours worked over 40
• His main job duties include –
  – Processing inventory on his computer
  – Stocking/Restocking items
  – Ordering new merchandise
  – Investigating new Products
Misclassified or Not?

• Jim’s manager has to sign off on all of the inventory prior to the Ordering and returns of products.
• Is Jim misclassified as exempt?

MISCLASSIFIED!

Misclassified or Not?

• Jim is misclassified because he does not exercise “discretion and Independent judgment to significant matters”.

• Also, depending on the date, Jim could be Misclassified because he is only paid $600 per week, after December 1, 2016 regardless of his duties, if his pay did not increase he would be Misclassified.

• Administrative Exemption is one of the most common misclassifications
Department of Labor Audits:
How to Prepare

• DOL Audits can happen by
  – Complaint, or
  – Specific Industry w/violations
    • Construction
    • Trucking
    • Janitorial

• Failure to Maintain Records

• Records
  – Job Descriptions
  – Payroll Records/Time Records
  – Current and Former Employees (2-3 years)
  – Job Titles and descriptions
  – Financial Statements
  – Tax Reports

Audit Yourself

• May reduce potential liability
• New regulations provide an opportunity to re-evaluate the status of our employees
• Know your employees and the work they perform
• Know the time keeping system
• If the employee is non-exempt make sure they are not working off the clock, including checking e-mails
• Know your records are up-to-date
• Make sure an Independent Contractor hasn’t turned into an employee
• If you get audited, seek legal representation
Independent Contractors

- Routinely Misclassified employees as independent contractors
- Suffered or permitted to work by the employer = economically dependent on an employer
- Economically Independent = Independent Contractor
- Broad Definition of Employment under FLSA
- Economic Realities Test

Economic Realities Test

- The extent to which the work performed is an integral part of the employer’s business
- The worker’s opportunity for profit or loss depending on his managerial skills
- The relative investment of the employer and the workers
- Whether the work performed requires special skills and initiative
- The permanency of the relationship
- The nature and degree of control by the employer
Economic Realities Test

• No one factor is determinative
• Courts may look at other factors
• FLSA is meant to include employees rather than exclude employees
  – Broad interpretation
• Totality of the Circumstances

Actual vs. Paper Duties

• Job Description vs. Actual Work
  – Job descriptions and titles are virtually meaningless
  – Actual work is what matters to DOL
• DOL Audits will interview and review actual work vs the job description
• Be prepared
???Questions???

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