

New DOL Salary Requirements for Exempt Employees

June 14, 2016

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Agenda

- Introductions
- Background – Current Law until 11/30/16
- Final Rule – What's new as of 12/1/16
- Next steps and options
- Legal claims
- Q&A

Background

- The law
 - Fair Labor Standards Act (federal)
 - State law
 - Conflict? Best for employee.

Background

- Covered employer:
 - Annual revenue of at least \$500,000
 - Hospitals, medical or nursing care for residents, schools and preschools, and government agencies

OR

- Covered employee:
 - Work involves “interstate commerce”

Background

- Non-exempt
 - Record hours worked
 - Must pay at least minimum wage for all hours worked
 - Must pay overtime at 1.5x regular rate of pay for all hours worked over 40 in workweek
 - Can pay hourly, salary or other, but most are paid hourly

Background

- Exempt
 - Need not record hours worked
 - Not entitled to overtime pay
 - Must qualify for exempt status under at least one FLSA exemption

Background

- Primary FLSA Exemptions
 - Executive Exemption
 - Administrative Exemption
 - Professional Exemption
 - Computer Exemption
 - Highly Compensated Exemption

Background

- Executive Exemption
 - Annualized salary of at least \$23,660 (\$455/week); AND
 - Required job duties

Background

- Administrative Exemption
 - Annualized salary (or fee basis) of at least \$23,660 (\$455/week); AND
 - Required job duties

Background

- Professional Exemption
 - Annualized salary (or fee basis) of at least \$23,660 (\$455/week); AND
 - Required job duties

Background

- Computer Exemption
 - Annualized salary (or fee basis) of at least \$23,660 (\$455/week) *OR* hourly rate of at least \$27.63; AND
 - Required job duties

Background

- Highly Compensated Exemption
 - Annualized salary (or fee basis) of at least \$23,660 (\$455/week);
 - Total annual compensation of at least \$100,000; AND
 - Required exempt job duty
 - But only use in Minnesota if meet Minnesota job duties tests

What's New as of 12/1/16

- Exempt Employees:
 - No change in the required job duties
 - Big change in the required salary

New Required Salary

- As of 12/1/16:
 - Annual Salary: \$47,476
 - Weekly Salary: \$913
 - Bi-weekly Salary: \$1,826
 - Semi-monthly Salary: \$1,978
 - Monthly Salary: \$3,956

New Required Salary

- Special rules for
 - American Samoa
 - \$767 per week as of 12/1/16
 - Motion picture producing industry
 - \$1,397 per week as of 12/1/16
 - Computer employees:
 - \$27.63 per hour

New Required Salary

- Special rules for
 - Administrative EEs of Educational Establishments:
 - Salary or fee equivalent of \$913/week, OR
 - Salary at least equal to the entrance salary for teachers in the educational establishment by which employed
- Teachers (29 CFR 541.303), physicians and attorneys (29 CFR 541.304) are not covered by the salary requirements

New Required Salary

- Up to 10% can be
 - Nondiscretionary bonuses
 - Incentives
 - Commissions
- Which must be paid
 - No less than quarterly
 - No later than first pay period after end of a quarter

New Required Salary

- Must receive the minimum weekly salary amount (\$913)
- Exempt EE also may receive additional pay:
 - Commission on sales
 - Percentage of sales or profits
 - Extra pay for extra hours worked
 - Hourly pay, flat sum, bonus, time and a half

New Required Salary

- The new salary amount:
 - Based on the “40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region, exclusive of board, lodging or other facilities.”

New Required Salary

- Beginning 1/1/20 and every 3 years thereafter:
 - The Secretary of Labor will update
 - Must be published in the Federal Register by 150 days before the January 1st effective date (August 3rd of the prior calendar year)

New Required Salary

- “Fee” is acceptable alternative for
 - Administrative, professional, computer
- How to determine:
 - Fee paid \div weekly hours worked = Minimum required weekly salary if EE worked 40 hours (\$913/week)

New Required Salary

- Salary basis rules still apply:
 - No deduction for quality or quantity
 - Full weekly salary regardless of hours worked
 - No salary for week if perform no work
 - No deduction for ER-caused absences

New Required Salary

- Be sure you include in the employee handbook/personnel manual:
 - Safe harbor language regarding inadvertent deductions to the salary of exempt EEs

New Required Salary

- Applies to both FT and PT
 - Example:
 - Professional exempt physical therapist works two days per week for 16 hours
 - Currently paid weekly salary of \$800
 - Under the new salary rules, must be paid \$913/week or converted to “salaried, non-exempt” and track hours and receive OT after 40 hours
 - (Remember that benefit plans may use different methods for tracking work hours than FLSA)

Highly Compensated EEs (Under FLSA; not 401K)

- Other than Minnesota:
 - \$134,004 total annual compensation (with weekly salary of \$913), AND
 - At least one exempt duty
- Consider carefully whether may be used in Minnesota
 - Same required compensation,
 - But, EE must meet Minnesota-required duties test

New Required Salary

- DOL will not enforce new required salary until March 17, 2019 for
 - Providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds

New Required Salary

- But DOL will enforce
 - Job duties tests
 - \$455 per week, and
 - All other FLSA provisions for these ERs

Non-Profits and the New Required Salary

- Enterprise coverage under FLSA
 - Not covered if only provide charitable services (i.e., no sales made/business done)
 - Temporary shelter, clothing and food to homeless, counseling services to sexual assault and domestic violence victims, disaster relief, etc.

Non-Profits and the New Required Salary

- Enterprise coverage under FLSA:
 - All hospitals, institutions that care for older adults and people with disabilities who reside on premises, schools for children with disabilities, etc.
 - Others covered if have sales made or business done annually of \$500,000+
 - Gift shop, sale of donated clothing, operate restaurant, etc.

Non-Profits and the New Required Salary

- Individual coverage under FLSA:
 - Even if the organization is not covered, each individual who engages in interstate commerce or in the production of goods for interstate commerce is covered
 - Making out-of-state phone calls
 - Receiving/sending interstate mail/email
 - Ordering/receiving goods from out-of-state
 - Handling credit card transactions or doing the accounting/bookkeeping for such activities
 - Etc.

Next Steps and Options

- Where do the new regulations leave us?
- Reality check:
 - Internal/external complaints
 - Federal DOL audit risk
 - State DOL audit risk

Next Steps and Options

- What are the recommended next steps?
- Assess and audit current practices
- Consider options and determine action items
- Communicate to affected employees

Next Steps and Options

- Audit of:
 - Exempt/nonexempt classifications
 - Current compensation
 - Assess economic impact
 - Timekeeping processes
 - Bonuses and commission payments
 - Review of policies

Action Items and Options

- Update/correct practices based on audit results
 - Timekeeping, breaks, off-site work, misclassification based on duties, etc.
 - Dec. 1 Opportunity to correct with potentially fewer red flags

Action Items and Options

- Reclassification as nonexempt
 - Reclassification may be required
 - Can continue to pay salary, change to hourly (or other method), but must pay overtime
 - Can adjust rate of pay
 - Can manage hours worked
 - Must track hours worked

Action Items and Options

- Continue exempt status
 - Increase salary
 - Consider nondiscretionary bonuses and commissions
 - Process for future salary adjustments
 - State law considerations

Factors To Consider

- Financial impact
- Travel time
- Comp time
- Off-hours work
- Administrative burden
- Perception by employees

Communication

- Review and revise policies
 - Communicate and enforce policies prohibiting off-the-clock work, unauthorized overtime by nonexempt employees
- Reclassified employees
- Other employees

Litigation Risks

- Costs of getting it wrong:
 - Back wages – up to 3 years
 - Liquidated (double) damages
 - Attorneys' fees and costs
 - Court costs
 - Litigation costs – Discovery, court reporters, deposition transcripts, experts
 - Mediation costs

Litigation Risks

- Types of actions:
 - Single-plaintiff action
 - Collective action
 - Opt in
 - All “similarly-situated” individuals
 - Conditional certification and judicial notice
 - Class action
 - Automatically included, unless “opt-out”

Litigation Risks

- **Strict-liability standard**
 - Not a defense:
 - Ignorance
 - Confusion/misunderstanding
 - Good intentions
 - Agreements/employee requests

Litigation Risks

- **Strict-liability standard**
 - Defense to damages only:
 - Good faith/not willful
 - What did you do to try to get it right?
 - » Advice of counsel?
 - » Audits?
 - Effect:
 - 2-year statute of limitation instead of 3
 - No liquidated damages

Questions?

Presenters



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