

# NEW WHITE COLLAR EXEMPTION REGULATIONS

What Does It Mean for Employers?

Karen L. Karr

(480) 684-1108

kkarr@clarkhill.com

clarkhill.com

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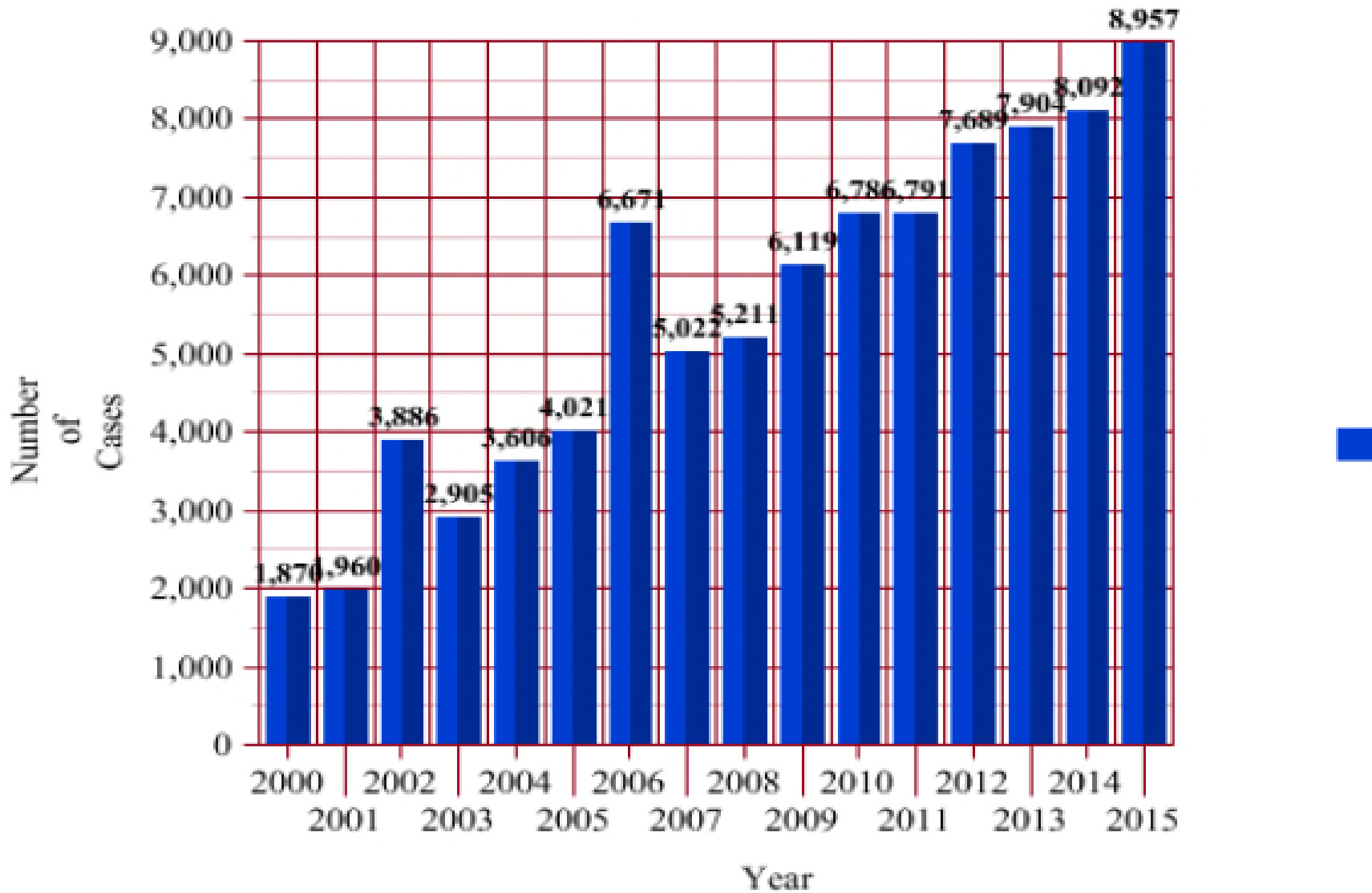
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# WHY DO I CARE?

- The Fair Labor Standards Act (“FLSA” or “Act”) enacted in 1938 as part of the federal government’s effort to lift the country out of the Great Depression
- Over 75 years later, the Act still serves as the centerpiece of wage and hour laws in this country
- The FLSA has three major provisions:
  1. Employers must pay a statutory minimum hourly wage
  2. Employers must pay non-exempt employees additional compensation for overtime work, calculated at 1-1/2 times the employee’s regular rate for all time actually worked over 40 in one week
  3. Employers must keep track of the hours worked by employees

# FLSA Cases Filed (U.S. Courts)



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# LAWSUIT RISK

- The potential exposure for such a lawsuit is high:
  - Back wages (often for a class of employees) going back up to three years
  - An additional amount as liquidated damages
  - AND plaintiff's attorneys' fees (which may exceed the amount paid to the employee(s))
  - PLUS the company's legal defense fees

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## RISK EXAMPLE

- Company A has 10 employees and pays each a salary of \$500.00 per week
- About half the time, they are so busy the employees work 50 hours, but were not paid overtime
- Result: Company A could owe up to \$292,500 (not including attorneys' fees)

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## EXAMPLE CALCULATIONS

- Effective hourly rate: \$12.50 ( $\$500 \div 40$  hours)
- Effective overtime rate: \$18.75 ( $\$12.50 \times 1.5$ )
- Overtime hours per week: 100 (10 hours x 10 employees)
- Total weeks: 78 (3 years x 52 weeks  $\div$  2)
- Total overtime due: \$146,250 ( $\$18.75 \times 100 \times 78$ )
- Liquidated Damages: \$146,250
- TOTAL: \$292,500

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## EXAMPLE CALCULATIONS

- *PLUS* \$100,000 - \$150,000 for plaintiff's attorneys fees!
- *PLUS* an equal amount for your defense costs
- *TOTAL: Devastating*
- *LIABILITY:* corporation, can be personal
- Insurance? Mostly no

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# TODAY YOU WILL LEARN

- How the new rules fit into the existing FLSA structure
- Overview of the new salary rules
- How you can use nondiscretionary bonuses and other payments to meet salary requirements
- What the new “highly compensated employee” rules are
- How the escalator provision will work
- Steps you can take now to prepare for the December 1<sup>st</sup>, 2016 effective date



# THE FLSA STRUCTURE

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# THE FLSA STRUCTURE

- FLSA requires employers to:
  - Track employee time
  - Pay for all working time (as defined)
  - Pay overtime if employee works more than 40 hours during a workweek
- Challenges:
  - Paying overtime is expensive
  - Employees work odd hours and can be hard to track

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# EXEMPTIONS GENERALLY

- There are numerous exceptions to the overtime rule (“exemptions”)
- Those affected by Final Rule: White Collar Exemptions

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# WHITE COLLAR EXEMPTIONS

- Three also require that the employee be paid on a salary basis:
  - Administrative
  - Executive
  - Professional
- Exempt Computer professionals may be salaried

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# THREE REQUIREMENTS

- To be exempt from overtime, the employee must:
  - Satisfy the salary basis test
  - Satisfy the salary level test
  - Satisfy the duties test

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# THREE REQUIREMENTS

- Not all White Collar employees who are paid a salary are exempt:
  - They must meet the duties test for the particular exemption AND
  - Their full salary must be paid every week in which they perform services (with some exceptions)
- Today, we're talking only about the salary level test

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## REASON FOR INCREASE

- March 2014: President Obama directed DOL to update and modernize overtime standards
- DOL researched salary levels and determined that the current rules were not keeping up with inflation
- Some exempt employees could be below the poverty line

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# SALARY IN THE PAST

- The Salary Test has been updated seven times since 1938
- Salary since 2004:
  - \$455 per week
  - \$23,660 annually
- Poverty level:
  - \$23,850 for family of four



# NEW SALARY RULES

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# PROPOSED NEW RULE

- Proposals published July 6<sup>th</sup>, 2015
  - \$955 per week
  - \$50,440 annually
- Over 250,000 comments
- FINAL RULE issued May 18<sup>th</sup>, 2016
- Effective December 1<sup>st</sup>, 2016

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# FINAL NEW RULE

**\$913 per week**

**\$3,956 per month**

**\$47,476 annually**

- More than double the previous rate
- 40% of salaried workers currently earn below this amount

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# ADDITIONAL PAYMENTS

- OLD RULE:
  - Salary must be one, set amount received every week
  
- NEW RULE:
  - Other amounts may be used to reach weekly threshold:
    - Bonuses (only nondiscretionary)
    - Commissions
    - Incentive payments

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## ADDITIONAL PAYMENTS

- Must be paid at least quarterly
- Can count for only 10% of required amount
  - Weekly:  $10\% \times \$913 = \$91.30$  per week
  - Quarterly:  $10\% \times \$11,869 = \$1,186.90$
- So, if employee receives at least \$1,186.90 quarterly in commissions or non-discretionary bonuses, his weekly pay for that quarter could be as low as \$821.70

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## SUMMARY – STANDARD SALARY LEVEL TEST

- Weekly salary raised to \$913
- Up to \$91.30 per week may come from other types of guaranteed income (commissions, nondiscretionary bonuses, and other incentive plans)
- IF NOT: Must pay overtime

# HIGHLY COMPENSATED INDIVIDUALS

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# HIGHLY COMPENSATED INDIVIDUALS

- Some employees paid so much, DOL does not worry that they are being taken advantage of
- For Executive, Administrative and Professional, duties and salary test are different
- DUTIES: Need to perform at least one exempt duty



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# SALARY – HIGHLY COMPENSATED INDIVIDUALS

- OLD RULE: \$100,000 per year
  - \$1,923 per week
  - \$8,333 per month
- NEW RULE: \$134,004
  - \$2,577 per week
  - \$16,080 per month

# THE ESCALATOR PROVISION

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# THE ESCALATOR PROVISION

- OLD RULE: DOL needed to go through rule-making process to increase
- NEW RULE: These amounts will increase every three years
  - Next increase: January 1<sup>st</sup>, 2020
  - Amount of increase:
    - Salary basis: 40th percentile of salaried employees
    - Highly Compensated individuals: 90th percentile of salaried employees

# STEPS YOU CAN TAKE NOW

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# LEARN ABOUT THE FLSA

- Many exemptions, not just professional, administrative and executive
- Rules for identifying exempt employees are grounded in statutes, regulations and sometimes case law that are often obtuse and confusing
- Rules for paying non-exempt employees are detailed, specific and often anti-intuitive

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# ANALYZE

- DOL/Courts evaluate on case-by-case basis
- Identify employees who are obviously exempt
- Identify employees who are obviously not exempt
- For all employees in the gray zone in between, either:
  - Pay them as nonexempt OR
  - Contact a Clark Hill attorney for further legal analysis

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# BROWN BAG LUNCH TRAININGS

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- Focus on YOUR company

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# CONVENTIONAL LEGAL ADVICE

- 1 on 1 analysis and advice
- All positions OR those in the Gray Zone
- Review of job descriptions and interviews
- Who is exempt?
- Provide advice about exemptions
- Solve compensation issues

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# QUESTIONS?



**Karen L. Karr**

(480) 684-1108

[kkarr@clarkhill.com](mailto:kkarr@clarkhill.com)

# THANK YOU

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