

# WHO ARE YOU CALLING, "MANAGER"? THE PROPOSED WHITE-COLLAR EXEMPTION OVERTIME REGULATIONS

32<sup>nd</sup> Annual Labor & Employment Conference

Paul W. Coughenour

(248) 988-5862

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

Anne-Marie Vercruysse Welch

(248) 988-1810

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

[clarkhill.com](http://clarkhill.com)

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# WHAT IS FLSA & WHY AM I HERE (OR, WHO CARES!)?

- The Fair Labor Standards Act (“FLSA” or “Act”) was enacted in 1938 as part of the federal government’s effort to lift the country out of the Great Depression. Over seventy five 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 employees additional compensation for overtime work, calculated at 1½ times the employee’s regular rate for all hours actually worked over 40 in one week
  3. Employers must keep track of the hours worked by employees (i.e., recordkeeping)

---

# EXEMPTIONS – THE BASICS

- Non-exempt employees: Eligible for overtime
- Exempt employees: Ineligible for overtime
- Dependent on:
  - How they are paid (generally must be on a salary basis)
  - How much they are paid (salary level test)
  - Duties performed
- Remember:
  - Any employee can be paid on a salary basis, but that alone does not mean they are exempt from overtime pay
  - Salaried employees who do not meet the salary and duties test for exemption are entitled to overtime pay
  - The proposal rule doesn't change this

---

# EXEMPTIONS

- “White-collar” exemptions: the FLSA exempts “any employees employed in a bona fide executive, administrative, or professional capacity” 29 U.S.C. § 213(a)(1)
- The “white-collar” exemptions are those exemptions from the FLSA’s minimum wage and overtime pay requirements for the so-called “white-collar” occupations:
  - Executive
  - Administrative
  - Professional
  - Computer employees
  - Outside sales employees

---

# EXEMPTIONS – YOU BEAR THE BURDEN

- **The employer bears the burden** of proving that its employees fall within the applicable FLSA exemption
- *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 837 (6th Cir. 2002)



---

# FLSA HISTORY

- **1938:** FLSA passed with exemption for, but no definition of executive, administrative and professional employees
- **1940:** Regulations implementing exemption include salary basis, salary level and duties tests
- **1949-2004:** Salary level increased 5 times (duties test also updated in 2004)
- **March 13, 2014 Presidential Memorandum to the Secretary of Labor:** Millions of Americans should be paid overtime and are not because the regulations are outdated. *“Therefore, I hereby direct you to propose revisions to **modernize and streamline** the existing overtime regulations . . . and **simplify** the regulations to make them easier for both workers and businesses to understand and apply”*
- Proposed Rule was announced June 30, 2015 and published in the Federal Register July 6, 2015 (80 FR 38516); comments were due September 4, 2015; **over 250,000 comments were submitted**
- Proposed Rules sent to the OMB on March 14, 2016. Final Rule expected **after July 1, 2016** (or later in 2016) (after the elections?); but in time for the rule to take effect before the President leaves office

---

## DOL COMMERCIAL

- <https://blog.dol.gov/2015/07/08/everything-you-need-to-know-about-updating-overtime-pay/>
- <https://blog.dol.gov/2015/08/26/non-profits-and-the-proposed-overtime-rule/>

---

# CURRENT WHITE-COLLAR REGULATIONS

- Current regulations require overtime for employees earning less than \$455/week (\$23,660/year)\*

Biweekly:           \$910.00

Semimonthly:     \$985.83

Monthly:           \$1,971.66

- Former regulations required overtime for employees earning less than \$155/week (\$8,060/year)

\*Poverty line (for a family of four) = \$24,008



# PROPOSED REGULATIONS

- The DOL is proposing to:
  - Raise the minimum salary level required for “white-collar” exemptions to **approximately \$50,440 (or about \$970 per week)**, up from the current \$23,660 (\$455 per week) - **an increase of 113%**

Biweekly:                 \$1,940.00

Semimonthly:           \$2,101.67

Monthly:                 \$4,203.33



- 40th percentile of weekly earnings for full-time salaried workers nationwide
- Automatically “update” (i.e., raise) the above salary levels every year using CPI

---

## CURRENT “HIGHLY PAID EMPLOYEES” SALARY

- Separate test for those earning more than \$100,000/year who may still be entitled to overtime (was \$65,000/year)
- Employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

---

## PROPOSED “HIGHLY PAID EMPLOYEES” SALARY

- Proposed Regulations will set the “Highly Paid Employee” annual salary at the 90th percentile of earnings for full-time salaried workers, or an estimated \$122,148/year (currently \$100,000/year)
- Proposed Regulations retain the requirement that employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

---

## OTHER PROPOSED CHANGES

- DOL considering whether to allow a portion of non-discretionary bonus (10% of salary) paid frequently (at least monthly) to supplement the salary level test
- DOL also considering redefining definition of “Primary Duty”
- “Primary Duty” is currently defined as the job’s “principal, main, major or most important function”
  - Current definition contains a qualitative component but the DOL appears to want a quantitative ratio of exempt to non-exempt work (i.e. > 50% (similar to California law))

---

# IMPACT OF PROPOSED REGULATIONS

- Salaried “exempt” employees that make less than \$970/week or \$50,440/year will be reclassified as non-exempt
  - Entitled to overtime
  - Required to comply with the DOL’s recordkeeping requirements
    - Hours worked each day and total hours worked each week
    - Straight and overtime earnings for the workweek
- DOL estimates almost five million employees will become non-exempt under the new regulations
- Expect more overtime claims and lawsuits
- Expect increase in DOL audits

---

## EFFECTIVE DATE

- If the DOL gets its way, the rules will take effect **60 days** after being published
- Pushback: Wal-Mart, the National Association of Wholesalers and a coalition of businesses and industry groups are lobbying Congress and the Obama administration to implement the overtime rule in increments
- 60-day ramp up period does not give employers enough time to prepare for what's likely to be a broad expansion of overtime eligibility

---

# OPERATIONAL STEPS TO PREPARE

- Prepare for Salary Increase
  - AUDIT!!!!
    - Self audit vs. outside (privileged audit)
    - This is your opportunity to analyze and correct ALL misclassifications (blame it on the new regulations)
  - At the very least, identify all currently exempt employees under \$50,440
  - If they are close to the threshold consider whether to increase their pay
  - If they are not close to the threshold consider how to pay them

---

## DON'T PANIC!

- No duty to guarantee overtime work; you can limit the employee's hours to 40 or fewer each week, so that no overtime would be due
  - These employees can still be lawfully paid their current salary, even if below \$50,440
  - Original purpose of FLSA was to create more jobs; hire away!
- No duty to pay more to a formerly exempt employee who will become non-exempt
- Employers can compute hourly rate so as not to impact labor costs



---

# OPERATIONAL STEPS TO PREPARE

- Other Options:
  1. Convert the employee to hourly and pay overtime over 40 hours
  2. Pay the employee the new salary level to maintain the exemption
  3. Employers can pay a non-exempt employee by other methods (e.g. piece rate, salary, commission) so long the employee receives: (1) at least minimum wage for every hour worked in the workweek; and (2) overtime pay for any hour worked in excess of 40 in the workweek

---

# ALTERNATIVE PAYMENT METHODS

- Fluctuating work week
  - You must pay a fixed salary each week that does not vary based on the number of hours worked
  - You and the employee must share a “clear mutual understanding” [READ: IN WRITING!!!!] that you will pay this fixed salary regardless of the number of hours worked
  - The fixed salary must be sufficiently large to provide compensation that at least equals the minimum wage
  - Your employee’s hours must fluctuate from week to week both above and below 40 hours [MOST IMPORTANT!]
- If all elements of the test are satisfied, you can use a “half-time” overtime calculation
  - WARNING: Some states don’t allow

---

## ALTERNATIVE PAYMENT METHODS - FWW

- Sarah's fixed salary covers all the hours she worked during the week
  - Regular rate =  $\$1,000 / 50 \text{ hours} = \$20.00/\text{hour}$
- Sarah works 50 hours in a given workweek
- Under the fluctuating workweek method, you have already paid Sarah \$20 of the \$30.00 hourly overtime rate by virtue of her base salary for all hours worked, so you only owe her the half-time overtime premium
  - Total pay = Regular salary + 10 hours at half time ( $10 * \$20.00 * 0.5$ )
- $\$1,000 + (\$100) = \$1,100$

---

# ALTERNATIVE PAYMENT METHODS – BELO PLAN

- The nature of the employment must necessitate irregular hours of work
  - “the nature of the employee’s duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week”
- There must be **significant** variations in weekly hours of work both above and below the maximum limit of 40 hours of work
- The regular rate of pay may not be less than the minimum hourly rate
- The employee’s regular rate of pay has to be specified, and can only include hours worked, and not any other form of compensation
- The employer must guarantee time and one-half the regular rate for hours worked over 40
- The maximum number of hours worked for the guaranteed compensation cannot be for more than 60 hours per week. After that, pay must be at time and a half the regular rate.

---

## ALTERNATIVE PAYMENT METHODS – BELO PLAN (CONT.)

\_\_\_\_\_ hereby agrees to employ employee as an \_\_\_\_\_ at a regular hourly rate of \$10.00 per hour for the first 40 hours in any workweek and at the rate of \$15.00 per hour for all hours in excess of 40 in any workweek, with the guarantee that employee will receive, in any week in which he performs any work for \_\_\_\_\_, the sum of \$550.00 as total compensation for all work performed up to and including 50 hours in such workweek.

Employee Signature:

Date:

---

# OPERATIONAL STEPS TO PREPARE

- Plan for financial impact
  - Prepare budget for increases
  - Assess ability to create IT or compensation review processes to keep pace with annual increases
- Assess timekeeping and pay policies and practices to accommodate new nonexempt employees
- Consider morale
  - Employees may see reclassification as a demotion
  - Employees will likely resist timekeeping requirements and attempt to work hidden overtime (responding to emails, etc.)

---

## OPERATIONAL STEPS TO PREPARE (CONT.)

- Consider preparing for duties change
  - Begin to assess the impact of the potential duties test changes on operations
  - Can you limit non-exempt duties performed by managers?
  - Audit training, evaluations and other related documents to ensure they properly capture primary duties
  - Prepare training for newly classified non-exempt employees
  - Timekeeping
  - Meal/rest break requirements
  - Restrictions on working outside of scheduled work hours and requirement to receive written approval in advance of working overtime
  - Deductions for partial day absences

---

# QUESTIONS?



**Paul W. Coughenour**

(248) 988-5862

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



**Anne-Marie Vercruysse Welch**

(248) 988-1810

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



# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL