

NEW WHITE COLLAR EXEMPTION REGULATIONS

What Does It Mean for Employers?

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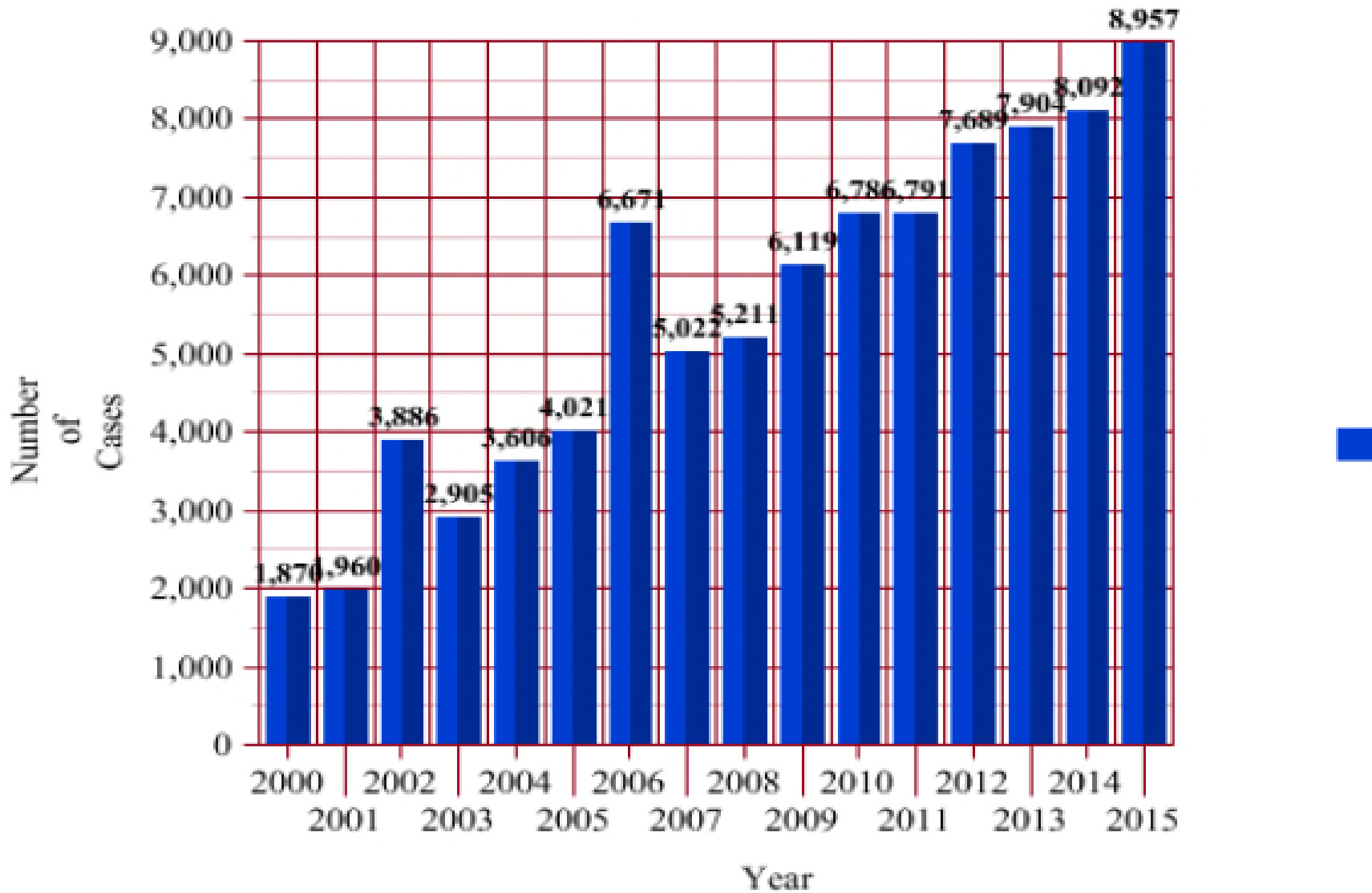
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WHY DO I CARE?

- 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)



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

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)

EXAMPLE CALCULATIONS

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

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

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 1st, 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

EXEMPTIONS GENERALLY

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

WHITE COLLAR EXEMPTIONS

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

THREE REQUIREMENTS

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

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

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

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 6th, 2015
 - \$955 per week
 - \$50,440 annually
- Over 250,000 comments
- FINAL RULE issued May 18th, 2016
- Effective December 1st, 2016

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

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

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

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

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 1st, 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

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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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

QUESTIONS?



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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.

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