Are You Prepared to Comply With the New FLSA Mandates?

Developed and presented by:
Heidi Kocher, Esq., MBA, CHC
Liles Parker LLC
Topics

• Background
• Details of new regulations
• Compliance tips
Background

• Fair Labor Standards Act (FLSA) applies to private sector and government employees
• Establishes minimum wage, overtime pay, recordkeeping, and youth employment/child labor standards
• First enacted in 1938
Background

• Federal minimum wage is $7.25 / hour, effective July 2009, for covered non-exempt workers
• After 40 hours per week, covered employees are entitled to overtime at 1.5 times regular rate
• Hours worked include all hours employee is required to be at employer’s premises, on duty, or at a prescribed workplace
Background

• FLSA applies to employers who
  – Have annual sales of $500,000 or greater, or
  – Engage in interstate commerce

• Using US mail or telephone constitutes engaging in interstate commerce
Background

• Exempt vs. non-exempt employees
  – Applies to jobs covered by FLSA
  – Some jobs are excluded from FLSA in law itself. Examples: movie theater employees, most agricultural workers
  – Some jobs are governed by other federal laws. Example: truck drivers governed by Motor Carriers Act
Background

• Exempt vs. non-exempt employees

• Non-exempt employees are entitled to overtime, after 40 hours per week

• Most employees covered by FLSA are considered to be non-exempt

• Some employees are also covered by definition:
  – “Inside” sales employees = non-exempt;
  “outside” sales employees = exempt
Is Employee Exempt?

Determining if an employee is exempt:

1. Must be paid at least $23,600 per year ($455 per week),
   • Employees paid more than $100,000 per year almost certainly exempt
2. Must be paid on salary (not wages) basis, and
3. Must be performing exempt duties
Salary Basis Test

• Paid on salary basis if there is a “guaranteed minimum” can count on receiving for any work week in which person performs any work
  – Doesn’t need to be entire compensation
• Is base pay calculated by dividing yearly compensation by number of paydays?
• Is pay lower in weeks where works fewer hours than normal?
• Not affected by whether pay is expressed in $ per hour but rather whether employee has guaranteed minimum
Salary Basis Test

• Requiring absences to be charged against accrued leave does not equal reduction in pay
  – Doesn’t need to be entire compensation
• Base pay can’t be lowered based on reduced quality or quantity of work, if results from employer’s decision (e.g., temporary worksite closing)
• Employer can’t reduce pay for partial day absences, but can reduce in full day increments
• If improperly reduce pay, employee becomes non-exempt
Salary Basis Test

• “High level” work – not well defined, is a case-by-case analysis
  – Job description and job title do not control
  – Look at actual job duties

• 3 categories of exempt duties: executive, professional, administrative
Salary Basis Test

Executive duties:

• Regularly supervise 2 or more full-time employees or part-time equivalents, and
• Primary duty is management, and
• Has genuine input into employment decisions affecting others
  ➢ Typically management duties: setting schedules, hiring/ firing, determining work methods, setting budgets, deciding on equipment or materials needed, planning work, assessing safety compliance
  ➢ Is the person “in charge” or “the boss”?
Professional Duties

Professional duties:

• “Learned” professions are exempt: lawyers, accountants, teachers, clergy

• Doctors, dentists, RNs, pharmacists, dental hygienists, physician assistants, athletic trainers, “certified medical technologists”
  – Non-exempt: LPNs, COTAs, home health aides, radiology techs, respiratory therapists, medical coders
Professional Duties

**Professional duties test:**

- Work must require advanced knowledge
  - “consistent exercise of discretion or judgment”
- Advanced knowledge must be in field of science or learning
- Advanced knowledge must typically be acquired by prolonged course of specialized intellectual instruction
  - More than 2 year degree and often more than 4 year degree
Professional Duties

“Certified Medical Technologist”

• 3 academic years of pre-professional studies in accredited college or university, plus

• 4th year of professional course work in school of medical technology approved by Council on Medical Education of AMA

• COTAs not “certified medical technologists”, DOL Opinion Letter FLSA2008-17, Dec. 19, 2008
Administrative Duties

Definition of “administrative” duties

• Office or nonmanual work that is directly related to management or general business operations of employer, and

• A primary component is exercise of discretion and independent judgment regarding matters of significance
New FLSA rule

• Notice of Proposed Rulemaking published July 6, 2015
• DOL received over 270,000 comments
• Final rule published May 23, 2016
• Becomes effective December 1, 2016


• Objective: distinguish between non-exempt white collar employees and true EAP employees
• Salary level last updated in 2004
New FLSA rule

- Raises salary threshold for exempt employees to $47,476 per year ($913 per week)
- Employees earning less than $47,476 per year to be paid time and a half, for hours over 40 hours per week
  - Rationale: old minimum salary level was below 2015 federal poverty level of $24,036 for family of 4
- Threshold to rise every 3 years
  - Based on 40th percentile of weekly earnings of full-time salaried workers in lowest wage census region, the South
New FLSA rule

• Calculation of salary threshold
  – Can include nondiscretionary bonuses, incentives and commissions for up to 10% of salary level for exemption

• New terminology:
  – Non-Exempt → overtime-eligible
  – Exempt → overtime-ineligible

• Estimated to affect 4.2 million workers, with annual transfers from employers to employees at $1,189 million
New FLSA Rule

- Number of individuals expected to be eligible for overtime pay

Source: DOL, 2016
New FLSA Rule

• Estimated Impact of One Employee

New FLSA Rule

• Sample Salary Calculations

<table>
<thead>
<tr>
<th>Name</th>
<th>Current Salary</th>
<th>Hours Worked</th>
<th>New Annual Pay Under Final Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tim</td>
<td>$30,000</td>
<td>48 hours/week</td>
<td>$38,991.68</td>
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<tr>
<td>Darnell</td>
<td>$40,000</td>
<td>50 hours/week</td>
<td>$55,000.40</td>
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<tr>
<td>Beth</td>
<td>$45,000</td>
<td>44 hours/week</td>
<td>$51,740.00</td>
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<tr>
<td>Anita</td>
<td>$35,000</td>
<td>60 hours/week</td>
<td>$61,266.40</td>
</tr>
</tbody>
</table>

Compliance

DOL suggestions:

1. Raise salaries of individuals performing exempt tasks to new threshold of $ $47,476 per year

2. Pay overtime-eligible employees time and a half for more than 40 hours
   – Probably requires re-evaluation and reclassification of jobs

3. Limit work hours to over-time eligible employees to 40 hours per week

4. Use a combination of above
Compliance

• Raise salaries of individuals performing exempt tasks to new threshold of $47,476 per year
  – May work well if individual is already paid close to new threshold
• Reclassify current (some) exempt employees as over-time eligible and pay OT
  – Requires evaluation of job duties
  – May result in perceived demotion
  – Beware who is made exempt from overtime; don’t misclassify legally protected categories of workers
  – Perception of pay inequity, both on part of overtime eligible and non-eligible workers
Compliance

• If you reclassify, previously exempt employees now need to track start, stop, break and meal times
  – Employers need to ensure can track this
  – Will need to educate employees

• May wish to adjust newly nonexempt workers’ rates of hourly pay to keep weekly wages (straight time + overtime) same as before
  – May result in less pay when don’t work overtime
  – May not be able to adjust work weeks (30 hours one week, 50 hours next)
Policies to Review/Update

• Job classification (employee, independent contractor)

• Pay structure and Overtime
  – Job classification (overtime eligible, overtime ineligible)
  – Tracking time and attendance, clocking in and out
  – Working off the clock

• Bonuses
  – Discretionary vs. nondiscretionary

• Telecommuting
  – Hours worked
  – Working off the clock
Policies to Review/Update

• After hours, weekend work, approval for overtime
• Timekeeping
• Mobile devices
  – Hours worked
  – Working off the clock
• Travel time
• Contingent staff usage
Employee Conversations

• Have data ready and individualized to employee
• Meet in person
• Be straight-forward in discussions
  – Don’t be vague or fib
• Be very clear about changes and next steps
  – New forms, new policies, new procedures
• Allow employees to ask questions and provide feedback, during initial conversation and later
Employee Conversations

• Sign updated job descriptions and distribute and discuss any new or updated policies & procedures
• Quickly address any issues of excessive overtime or off-the-clock work
• Help overtime-eligible employees prioritize work, if OT is limited or prohibited
• Be ready to discuss role of part-time or temp employees
• Be positive
Employee Conversations

• Give employee raise to threshold
  – Review status as overtime eligible vs. overtime ineligible
  – Discuss changes in law
  – Review any changes in duties (shouldn’t be any)
Employee Conversations

• Reclassify as overtime eligible (“nonexempt”) and don’t limit overtime
  – Review status as overtime eligible vs. overtime ineligible
  – Discuss changes in law
  – Review salary vs. hourly pay
Employee Conversations

• Reclassify as overtime eligible (“nonexempt”) and limit overtime without authorization
  – Review status as overtime eligible vs. overtime ineligible
  – Discuss changes in law
  – Review salary vs. hourly pay
  – Discuss tracking time
  – Clearly indicate need to obtain prior approval for overtime
Compliance

Traps / Concerns / Don’ts

• Convert employees to independent contractors
  – 11 criteria for determining if ICs, “right to control”
  – IRS gets involved
  – Question – does person work for more than 1 employer?
Compliance

Traps / Concerns / Don’ts

• Reclassify employees as overtime-eligible during slow periods and overtime-ineligible during busy periods
  – DOL takes dim view of perceived attempts to cheat workers of wages
  – Relatively frequent changes to classification may lead DOL to charge that position never was exempt/overtime-ineligible
  – Documentation is key
Compliance

Traps / Concerns / Don’ts

• Perceptions of pay inequity
  – Non-exempt employees earning more than exempt
  – More productive exempt employees earning same as less productive colleagues
  – Exempt workers having to pick up extra work, due to limitations on nonexempt workers’ hours

• Don’t forget state or local laws!!
• **Identify** currently exempt employees who earn less than the new annual threshold of $47,476.

• **Estimate** how much overtime those employees currently work.

• **Analyze** your budget to help assess your compensation options.

• **Review** job descriptions for exempt positions to verify that the duties are accurately listed.

SHRM Checklist

- **Ensure** that employees in the same roles aren’t classified differently, because that could prompt discrimination claims.
- **Develop** a communications plan for those moving from exempt to nonexempt status to minimize negative impact on morale.
- **Consider** placing restrictions on overtime and explore ways to track nonexempt workers’ hours.
- **Determine** whether changes are needed in other policies such as telecommuting and mobile device usage to curtail overtime and working off-the-clock.

Recent Developments

• 21 states, led by Texas and Nevada, filed suit in federal court in Sherman, TX, on September 20th to block implementation of new overtime rule
  – Duties test for EAP exemption inadequate
  – Updates every 3 years are indiscriminate
  – Updates will be strain on state budgets

• Texas Attorney General Ken Paxton: “unilaterally rewrit[ing] the law”, may “lead to disastrous consequences for economy”, and is part of a “radical leftist political agenda”

• US Chamber of Commerce and other business groups also filed suit: “layoffs may be necessary”
Recent Developments

- US House of Representatives introduced bill September 20th to delay new overtime rule changes by 6 months (HR 6094), which passed 246-177
- US Senate introduced same bill September 28th
- Senate also introduced bill (S. 2707) to phase in new salary threshold over 5 years, include “pause” year after 1st increase, and prevent indexing of future increases
  - But Congress now in recess until after November election
- Stay tuned!
QUESTIONS?

• Thank you for your attendance!

• Get your questions answered on PMI’s Discussion Forum: http://www.pmimd.com/pmiForums/rules.asp

• Contact information: Heidi Kocher, Esq. Email: hkocher@lilesparkert.com