

Are Heroes (or others) Exempt? *and other timely questions*

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

WILLIAM FLOYD*

MOLLY CHERRY*

JAMIE HEDGEPATH*

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*Certified Labor and Employment Law Specialists



OVERVIEW

- ▶ New Overtime Rule and Current Exemptions
- ▶ Options for Complying with Overtime Rule
- ▶ Common Pitfalls under the FLSA

PRIMARY FLSA REQUIREMENTS

- ▶ Minimum wage - \$7.25 hour
- ▶ Overtime pay at 1.5 times regular rate of pay for all hours worked over 40 in a workweek
 - ▶ Unless Employee is “Exempt” from the overtime rule.
- ▶ Recordkeeping requirements
- ▶ Requirements for youth employment



NEW DOL OVERTIME RULE

QUESTION # 1



- Gifted with amazing strength and agility
- Bullet-stopping bracelets
- Cool lasso
- Manages travel agency in Tampa, Florida
- Makes a salary of \$40,000

QUESTION # 1 (CONT.)



- Is she paid enough salary to satisfy a FLSA requirement to be “exempt”?
- How about as of December 1, 2016?

DOL'S NEW OVERTIME RULE

"WHITE COLLAR" EXEMPTIONS

- ▶ Raises salary level from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year).
- ▶ Changes take effect **December 1, 2016.**



WHAT IS INCLUDED IN SALARY?

- ▶ Salary is “exclusive of board, lodging or other facilities,” which means free and clear of any claimed credit for non-cash items of value that an employer may provide to the employee.
- ▶ Nondiscretionary bonuses and incentive payments (including commission) can satisfy up to 10 percent of the new standard salary level.
- ▶ “Regular rate” does not include contributions irrevocably made by an employer, trustee, or third person for old age, retirement, life, accident, or health insurance or similar benefits for employees.

QUESTION # 2



- ▶ CEO of Trask Industries
- ▶ International Playboy
- ▶ Receives an annual salary of \$100,000, plus is worth billions

QUESTION # 2 (CONT.)



- ▶ Is he paid enough to be exempt as a “Highly compensated employee”?
- ▶ How about as of December 1, 2016?

- ▶ Final Rule also raises compensation level for highly compensated employees from \$100,000 to \$134,000.

CLASSIFICATION OF EMPLOYEE AS EXEMPT

- ▶ Executive
- ▶ Administrative
- ▶ Professional
- ▶ Other Exemptions:
 - ▶ Computer Employee
 - ▶ Outside Sales
 - ▶ Highly Compensated



THREE TESTS TO CLAIM A WHITE COLLAR EXEMPTION

- ▶ (1) Employee must be paid on a salary basis not subject to reduction based on quality or quantity of work (“salary basis test”);
- ▶ (2) Employee’s salary must meet the minimum salary level (\$913/per week or \$47,476 annually as of Dec. 1, 2016) (“salary level test”); and
- ▶ (3) Employee’s primary job duty must involve the kind of work associated with exempt **executive**, **administrative**, or **professional** employees (the “standard duties test”).

QUESTION # 3



- ▶ Mild mannered news reporter
- ▶ Advanced degrees in journalism from Smallville University
- ▶ Exempt?

QUESTION # 4



- ▶ Works long, hard hours
- ▶ Supports countless employees every day
- ▶ Aply performs non-manual work directly related to management or general business operations
- ▶ Primary duty includes exercise of discretion and independent judgment regarding matters of significance

Executive Exemption

- ▶ The employee must be compensated on a salary basis (as defined in the regulations) at the required rate or higher;
- ▶ The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- ▶ The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- ▶ The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

- ▶ The employee must be compensated on a salary or fee basis (as defined in the regulations) at a at the required rate or higher;
- ▶ The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- ▶ The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned Professional Exemption

- ▶ The employee must be compensated on a salary or fee basis (as defined in the regulations) at the required rate or higher;
- ▶ The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- ▶ The advanced knowledge must be in a field of science or learning; and
- ▶ The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional Exemption

- ▶ The employee must be compensated on a salary or fee basis (as defined in the regulations) at the required rate or higher;
- ▶ The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

POINTS TO KEEP IN MIND

- ▶ Job titles alone never determine exempt status under the FLSA.
- ▶ Receiving a particular salary alone does not indicate that an employee is exempt.
- ▶ You are not required to pay the salary set forth in the new Overtime Rule unless you are claiming a white collar exemption.
- ▶ As long as it is complete and accurate, employers may use any method they choose for tracking and recording hours.

OPTIONS FOR COMPLIANCE

- ▶ (1) No changes to pay or hours necessary where salary level test and standards duties test is met.
- ▶ (2) Maintain exempt status and raise salary to comply with new Overtime Rule.
- ▶ (3) Lose exemption and pay overtime for all hours over 40 in a workweek.

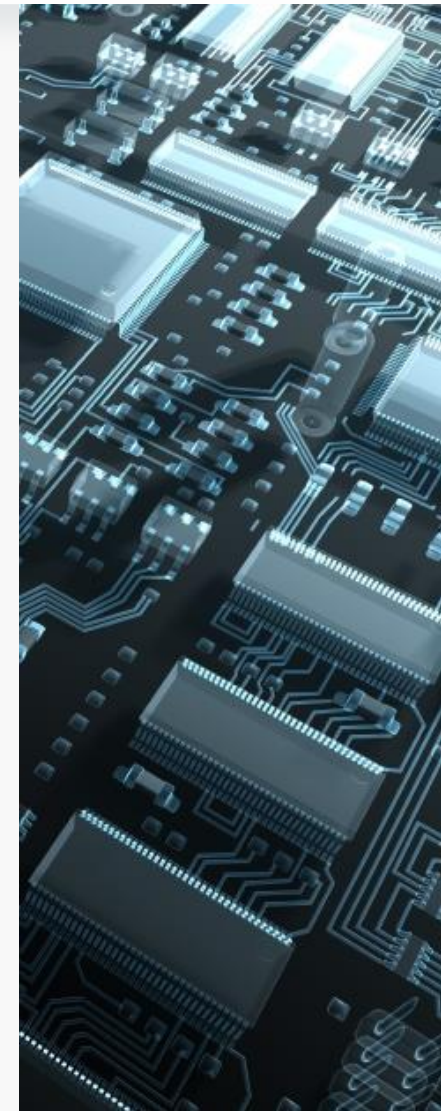


SOME OPTIONS FOR EMPLOYEES WHO BECOME NON-EXEMPT

- ▶ Reorganize workloads and adjust schedules to avoid having employee work overtime.
- ▶ Pay employee hourly rate plus 1.5 times the regular rate of pay for all hours over 40.
- ▶ Pay based on a fluctuating workweek.

REORGANIZE WORKLOADS

- ▶ Reorganize workloads and adjust schedules or spread work hours.
- ▶ Example: John, a manager, currently works from 8:00 am to 6:00 pm Monday— Friday. The employer may wish to adjust John's schedule such that he doesn't begin work until 9:00 am, thus limiting the number of overtime hours he works.



HOURLY RATE PLUS OVERTIME

- ▶ Employers can pay the employee on an hourly basis for all hours worked, with hours over 40 in a workweek being paid at the rate of 1.5 times the regular rate of pay.
- ▶ For employees moving from exempt to non-exempt status, employers may want to make the regular rate with anticipated overtime comparable to the salary the employee was receiving.

HOURLY RATE PLUS OVERTIME

OPTION 1: SIMPLE HOURLY CONVERSION

- ▶ **Convert annual salary to hourly rate**
 - ▶ Divide weekly salary by 40 to identify hourly rate
 - ▶ Pay OT for hours worked over 40
- ▶ **Example:**
 - ▶ John currently earns \$42,000 annually in exempt position.
 - ▶ $\$42,000 / 52 \text{ weeks} = \$807.69 \text{ weekly salary}$
 - ▶ $\$807.69 \text{ weekly} / 40 \text{ hours/week} = \$20.19/\text{hour}$
 - ▶ New hourly rate of \$20.19 for all hours worked up to 40 in a workweek; 1.5x OT rate (\$30.29) for hours over 40
- ▶ **Good option for employees who rarely work OT or whose schedules can be adjusted to work minimal OT**
- ▶ **Higher costs if significant OT; consider workload readjustments**

HOURLY RATE PLUS OVERTIME

OPTION 2: CONVERT TO COST-NEUTRAL HOURLY RATE

- ▶ **Convert annual salary to lower hourly rate to account for OT**
 - ▶ Calculate new hourly rate by breaking average workweek into regular rate and OT rate components to reach same annual pay
 - ▶ New Hourly Rate = [(current weekly salary) / (40 + OT hours x 1.5)]
- ▶ **Example:**
 - ▶ John currently earns \$42,000 annually in exempt position and averages 50 hours of work per week (10 OT hours).
 - ▶ New Hourly Rate = \$807.69 / (40 + 10 OT hours x 1.5)
 - ▶ New hourly rate of **\$14.69** for all hours worked up to 40 in a workweek; 1.5x OT rate (\$22.03) for hours over 40
 - ▶ John's pay will be roughly equivalent so long as he continues to average 50 hours per week
 - ▶ $(\$14.69 \times 40 \text{ hours}) + (\$22.03 \times 10 \text{ OT hours}) = \807.90

FLUCTUATING WORKWEEK

- ▶ Where employees have hours of work that fluctuate from week to week, employers can pay a fixed salary that covers a fluctuating number of hours of straight time.
- ▶ The regular rate of pay will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Overtime hours are one-half of the regular rate in addition to the salary, since straight time for these hours is already included in the salary.

FLUCTUATING WORKWEEK

- ▶ Permits non-exempt employees on a **fixed salary** to be paid a “**half time**” OT premium instead of “time and a half.”
- ▶ Assumes agreement that salary will compensate for **all** hours worked, regardless of how many.
- ▶ Can help control OT costs.



FLUCTUATING WORKWEEK: FOUR REQUIREMENTS

- ▶ The employee must be compensated on a salary basis, meaning he is paid a "fixed amount" regardless of the number of hours he actually works in a given workweek.
- ▶ There is a "clear mutual understanding" between the employee and the employer that the fixed salary will be compensation for all hours worked in a workweek, regardless of the number of hours actually worked.
- ▶ The fixed salary must be large enough to compensate the employee at a rate equal to or greater than the federal minimum wage, even during workweeks when the greatest number of hours are worked.
- ▶ Employer has obligation to keep accurate records.

FLUCTUATING WORKWEEK: CALCULATING OVERTIME PREMIUMS

- ▶ Calculate “regular rate” =
compensation / hours
- ▶ **Half** of regular rate = OT “half time”
premium
- ▶ OT comp owed = OT “half time”
premium x OT hours worked



RECORDKEEPING DUTY

- ▶ No requirement that employees “punch in” and “punch out.” Employer must, however, keep an accurate record of the number of daily hours worked by the employee.
- ▶ For employees who work a fixed schedule, an employer need not track the employee’s exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule, if that is true.



ISSUES WITH CONVERSION

▶ Training

- ▶ Timekeeping procedures (clock in/out, time sheets, etc.)
- ▶ **Compensable time**
 - ▶ Pre/post shift activities
 - ▶ Donning and doffing
 - ▶ Security lines
 - ▶ Computer log on/off
 - ▶ Travel time
 - ▶ Breaks and meal periods (breaks <30 minutes must be paid)
 - ▶ *De minimis* time
- ▶ Limit OT hours: need pre-approval
- ▶ Limit “unauthorized” off-the-clock work / impose discipline
 - ▶ Policies/procedures on checking e-mails and returning calls from home

ISSUES WITH CONVERSION

▶ **Deciding on a method**

- ▶ Treat similar positions/duties alike, or change title and job description
- ▶ Effectively communicate policy changes

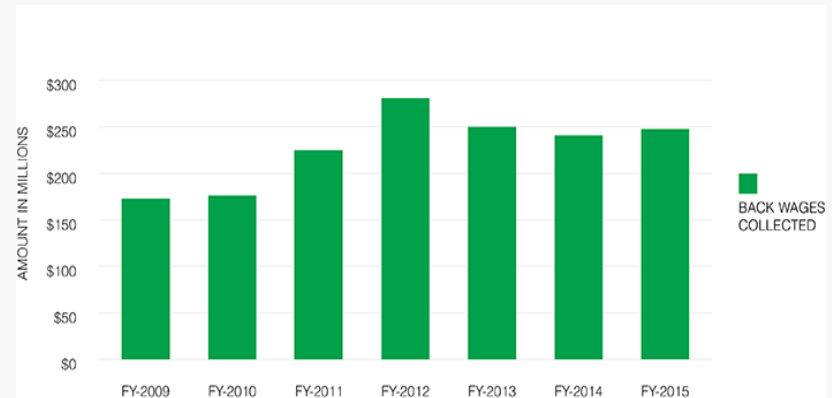
▶ **Communications**

- ▶ Some employees may consider having to record time as “demotion” or see re-classification as evidence of prior misclassification; point to new regulation
- ▶ Consider job descriptions

COMMON PITFALLS UNDER THE FLSA

WHD IS MORE AGGRESSIVE

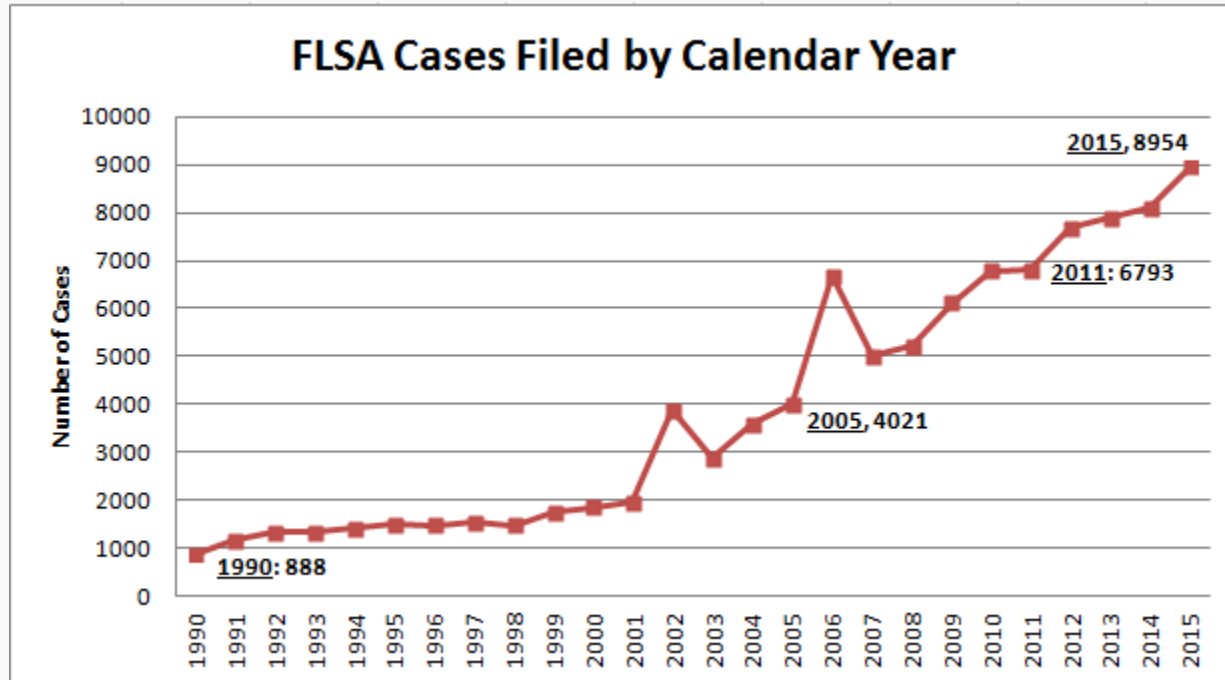
- ▶ Resulting in more:
 - ▶ WHD-initiated investigations
 - ▶ Findings of violation
 - ▶ Back wages collected
- ▶ From WHD website:



we found violations in	79%	of agency-initiated investigations, which is a	21% increase	in Fiscal Year 2015 over Fiscal Year 2009
we found an average of more than	\$8,900 in back wages	in agency-initiated investigations, which is a	21% increase	in Fiscal Year 2015 over Fiscal Year 2009

AS ARE EMPLOYEES' LAWYERS

FLSA LAWSUITS SET NEW RECORD IN 2015



COMMON PITFALLS

- ▶ Exempt Employees
 - ▶ Deductions from pay may invalidate exemption
 - ▶ Misclassification as exempt
- ▶ Non-exempt Employees
 - ▶ Failure to pay minimum wage
 - ▶ Failure to properly calculate overtime rate
 - ▶ Failure to pay employee for all hours worked
- ▶ Misclassification as independent contractor

DEDUCTIONS FROM PAY LIMITED

FOR EXEMPT EMPLOYEES

- ▶ No reduction in pay for variations in quality or quantity of work
- ▶ Pay full salary for any week in which any work performed, regardless of number of days or hours worked
 - ▶ Don't have to pay for any week in which no work performed
 - ▶ Specific permitted deductions allowed



PERMITTED DEDUCTIONS

- ▶ Full day absence for personal reasons
- ▶ Full day absence for sickness or disability if sick leave policy exists and has been exhausted
- ▶ Offset for jury fees, witness fees, or military pay
- ▶ Penalties for violating safety rules of major significance
- ▶ Full day suspension for violating written workplace conduct rules
- ▶ Partial workweek during first or last week of work
- ▶ FMLA leave

SAFE HARBOR POLICY

- ▶ Exemption not lost over salary basis if:
 - ▶ Clearly communicated policy prohibiting improper deductions with complaint mechanism
 - ▶ Reimburse employees for improper deductions
 - ▶ Good faith commitment to comply
- ▶ Not available if employer willfully violates policy by continuing to make improper deductions after complaints



MINIMUM WAGE REQUIREMENT

NON-EXEMPT EMPLOYEES

- ▶ Employee is entitled to statutory minimum wage of \$7.25 per hour.
- ▶ Employer may not make any deduction from wages for an expense that is “primarily for the benefit or convenience of the employer” if such deduction takes the employee’s pay below minimum wage.
- ▶ Similarly, employer may not require employee to incur the expense if doing so takes pay below minimum wage.



“PRIMARILY FOR BENEFIT OR CONVENIENCE OF EMPLOYER”

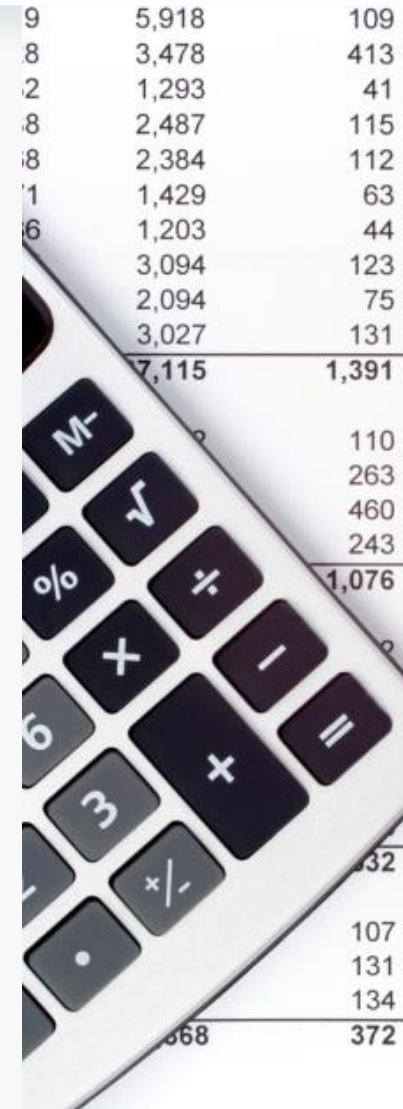
- ▶ uniforms
- ▶ tools used in the employee's work
- ▶ damages to the employer's property by the employee or any other individuals
- ▶ financial losses due to clients/customers not paying bills
- ▶ theft of the employer's property by the employee or other individuals



CALCULATION OF OVERTIME

REGULAR RATE OF PAY

- ▶ Regular rate of pay cannot be less than the minimum wage.
- ▶ Includes all remuneration for employment, including reasonable cost or fair market value of non-cash payments in the form of goods or facilities.
- ▶ Exceptions – not included:
 - ▶ pay for expenses incurred on the employer's behalf
 - ▶ premium payments for overtime work or premiums paid for work on Saturdays, Sundays and holidays
 - ▶ discretionary bonuses, gifts and payments in the nature of gifts on special occasions
 - ▶ payments for occasional periods when no work is performed due to vacation, holidays, or illness



9	5,918	109
8	3,478	413
2	1,293	41
8	2,487	115
8	2,384	112
1	1,429	63
6	1,203	44
	3,094	123
	2,094	75
	3,027	131
	7,115	1,391
		110
		263
		460
		243
		1,076
		32
		107
		131
		134
	368	372

COMPENSATE FOR ALL HOURS

NON-EXEMPT EMPLOYEES

- ▶ Non-exempt employees must be paid for compensable time
- ▶ Work doesn't have to be authorized to be compensable – All hours worked
- ▶ Potentially big consequences for relatively small mistakes

COMPENSABLE TIME: WHAT'S THE RULE?

- ▶ “Hours worked” includes all time “suffered or permitted” on employer’s behalf.
- ▶ All time employee is “necessarily required to be on the employer’s premises, on duty or at a prescribed work place.”
- ▶ Any time between the first duty and last duty is compensable.
- ▶ Examples: training, traveling between jobsites, waiting time, civic activities.
- ▶ Certain pre/post shift activities are compensable.



MISCLASSIFYING EMPLOYEES AS INDEPENDENT CONTRACTORS

- ▶ **Potential liability for years of:**
 - unpaid tax withholdings
 - FICA contributions
 - unemployment tax
 - workers' compensation
 - benefit plans
 - unpaid overtime and/or minimum wages
 - interest, liquidated damages, attorney's fees, penalties, etc. under relevant statutes
- ▶ **Potential criminal penalties and personal liability for corporate officers for intentional misclassification**
- ▶ **Class and collective actions**



DOL “ECONOMIC REALITIES” TEST

- ▶ **Focus on economic dependence**
- ▶ **Broad, fact-specific test– errs on side of finding employment relationship**
- ▶ **6 factors:**
 1. Control
 2. Integral part of operations
 3. Relative levels of investment
 4. Opportunities for profit/loss
 5. Skill and initiative
 6. Permanency of the relationship
- ▶ **July 2015 “Administrator’s Interpretation”**



MANAGING MISCLASSIFICATION

INDEPENDENT CONTRACTORS

- ▶ **Don't treat like employees**
 - ▶ Don't give same badges or uniforms
 - ▶ Don't give business cards with company name or logo
 - ▶ Don't give "new hire paperwork"
 - ▶ Don't give employee handbook
 - ▶ Don't let supervise employees
 - ▶ Don't let do same work as W-2 employees
 - ▶ Keep files separate from employee files
 - ▶ Avoid required hours or training
 - ▶ Don't provide performance evaluations or career advice
 - ▶ Don't include in social functions

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