

Today's webinar will
begin shortly. We are
waiting for attendees
to log on.

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FLSA Overtime Regulations – What Franchisees Need to Know



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Today's Speakers

Moderator:

Misty Chally - Executive Director, CFA

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Panelists:



J. Hagood Tighe – Attorney, Fisher & Phillips

Co-chair, National Wage & Hour Practice Group

Labor and employment lawyer handling over 50 class and collective actions throughout the country. Hagood trains supervisors and managers on harassment, EEO, FMLA and other areas. Additionally, he has authored numerous articles and regularly lectures at seminars regarding employment law.



Andria L. Ryan – Attorney, Fisher & Phillips

Co-chair, Hospitality Practice Group

Specializes in day-to-day employment and labor decisions and educating employers about prevention and practical solutions to workplace problems. Former chair of the State Bar of Georgia's Labor and Employment Law Section.

SAVE THE DATE

2020 CFA DAY

Wednesday, May 22

1-7:00 p.m., Washington DC

Includes:

- **Legislative Briefings**
- **One-on-one Meetings with Congressional Offices**
- **Closing Congressional/Networking Reception**

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THE DOL'S NEW OVERTIME RULE

Four Main FLSA Requirements

1. A minimum wage (currently \$7.25 an hour).
2. Premium pay for overtime work.
3. Certain recordkeeping, including accurate time records.
4. Limitations on the employment of minors under 18.

USDOL – A Flurry of Activity

- It has published new dollar thresholds for certain FLSA exemptions with pay requirements
- It has proposed FLSA-based restrictions on certain tip practices

What Are "Exemptions"?

- "Exempt": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt unless an exemption applies

How Did We Get Here, Again?

- 2014 – President Obama charged the U.S. Labor Department with revising and updating the definitions for certain exemptions under the federal Fair Labor Standards Act
- 2016 – The Department published revised definitions with few (but significant) changes; litigation ensued
- 2019 – The Department has published revised definitions with few (and far less significant) changes that will affect most employers in at least some way on *January 1, 2020*
- New rules affect the "white collar" exemptions from minimum-wage and overtime
- Management should be thinking about:
 - What this means for the organization
 - What steps to take in response

"White Collar" Exemptions Affected

- Executive, Administrative, Professional
- Also "Computer Employees", "Highly Compensated" varieties
- Three general requirements for most:
 1. Paid on a "salary basis"
 2. Salary is at least a certain amount
 3. Employee performs specific kinds of work

Exempt Employee Examples

- Neither singular duties nor job titles determine exemption status, but some examples of employees who might meet the requirements for "white collar" exemptions include:
 - "Executive" Employee: Manager of a department/location (supervises, disciplines, etc.)
 - "Administrative" Employee: Decision-maker for business operations (finance, marketing, etc.)
 - "Learned" Professional: Doctor, Some Engineers, Teacher, Scientist
 - "Creative" Professional: Painter, Musician, Screenwriter
 - "Computer" Employee: Programmer, Software Engineer, Systems Analyst
 - "Highly-Compensated" Employee : Could be a potential back up argument if an employee meets the salary-requirement of most white-collar exemptions, but does not meet all aspects of the duties portion of an exemption.

How Are These Exemptions Changing?

- Effective January 1, 2020, minimum salary threshold will be \$684 per week (paid on a "salary basis")
- Requirement still applies each pay period (not annualized)
- Effective January 1, 2020, total-annual-compensation threshold for "highly compensated employee" exemption will be \$107,432

How Are These Exemptions Changing?

- Employers will be able to satisfy up to 10% of the salary threshold from "nondiscretionary bonuses and incentive payments"
 - Includes commissions
 - Can count only those paid annually or more frequently
 - Cannot do this as to the salaries of employees treated as exempt under the "highly compensated" exception

What Should You Do?

- Review all exempt employees to ensure salary of at least \$684/week
 - ❖ If at or above \$684/week, may still be exempt if satisfy the duties test
 - ❖ If below \$684/week, then either
 - ❖ Increase salary to at or above \$684 (and confirm satisfies duties test) OR
 - ❖ Convert to hourly and pay overtime
 - ❖ Bonus/incentive - 10% limit
 - ❖ Still must follow state and local law requirements

What Should You Do?

- Even though the salary jump is not substantial, the changes still require thoughtful implementation.
 - If an employer increases salaries to comply with the new threshold, it might face salary compression in its ranks
- If an employer will instead pay overtime, this requires planning. For example, the employer must do a few things:
 - ❖ Establish hourly rate
 - ❖ Consider labor budget for overtime hours manager will work
 - ❖ Somebody will need to monitor time keeping more closely
 - ❖ Be sure to capture all time worked (even away from store)
 - ❖ If paying bonus or incentive, need to account for such payment as part of overtime calculation
- In either case, it will need to consider the timing of these conversions and related communications
- Even if no changes appear necessary, the new salary threshold still is an opportunity (excuse) for employers to change classifications or pay where compliance is questionable

Are They *Really* Exempt?

- Default position: Each employee is non-exempt, that is, each employee is subject to FLSA's timekeeping, minimum wage, and overtime requirements
- Specific requirements apply
- When the classification is challenged, the employer has the legal burden to prove that each one is met
- Otherwise, the employer loses

Are They *Really* Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do
- Job descriptions alone do not "make employees exempt"

Are They *Really* Exempt?

- Outlines, checklists: Helpful, but aren't the final answer
- Independent understanding and analysis of each factor and circumstance are essential

Tip: Need to prioritize your time and resources?

You might decide to further confirm "exempt" tool results, but tentatively adopt "non-exempt" ones

Another Exemption?

- For example, is FLSA's Section 7(i) overtime exception an option?
 - Employee of a "retail or service establishment", and
 - More than half of employee's compensation in a "representative period" comes from "commissions", and
 - Regular hourly rate in an over-40-hours workweek is more than 1.5 times FLSA minimum wage
- Check applicable state and local laws

What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
 - Pay by-the-hour?
 - Pay a salary as straight-time compensation for all hours?
 - Pay a salary as straight-time compensation for a number of hours?
 - Pay on a commissions-plus-overtime basis?
 - Another approach (for example, a day-rate, job-rate, or piece-rate basis)?

Tip: Remember that the "regular rate" includes more than just base pay

Accurate Timekeeping

- If non-exempt, must keep accurate records of worktime:
 - Know everything that counts
 - Have a system and policies for capturing the time accurately
 - Train employees to follow
 - Train supervisors/managers to enforce
 - Periodically see whether the time records appear to be accurate

USDOL – A Flurry of Activity – More To Come

- It has published new dollar thresholds for certain FLSA exemptions with pay requirements
- It has proposed FLSA-based restrictions on certain tip practices
- It plans to issue regulations regarding regular rate, joint employment, fluctuating workweek, 7(i) exemption

So stay tuned!

What Else Should You Do?

- Exemptions and tips aside, are you sure you're 100% in compliance?
- Publicity will cause employees to focus upon their pay
- Find out now where you stand, especially if it's been a while since you looked

Other Wage and Hour Hot Spots to Guard Against

- Accurately Recording Worktime
- Properly Recording Worktime
- Off the Clock Claims
- Meal and Rest Break Violations
- Tip Credit Notice Violations
- Tip Pools or Sharing
- Deductions
- Exempt Misclassifications
- Independent Contractor Classifications
- State and Local Law Requirements

Some Closing Thoughts

- Don't fall for "conventional wisdom":
 - "The employee *wants* to be exempt."
 - "*Everybody* handles tips this way."
- Consider applicable state and local laws:
 - Might define exemptions differently
 - Might not even have a tip credit
 - Might affect pay-plan options or designs



Final Questions



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Thank You

Visit our blog at "www.wage-hour.net"



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