

The Final Rule

Fair Labor Standards Act Update

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INTEGRITY - COLLABORATION - COMPREHENSIVE

The Disclaimer

- This presentation provides general information about legal issues. It should not be construed as legal advice or a legal opinion. Attendees should seek legal counsel concerning specific factual situations confronting them.

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Presentation Overview

- Very Brief Overview of the Fair Labor Standards Act (“FLSA”)
- Key changes of the Final Rule
- Compliance steps and strategies

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FLSA Overview

- Employers must pay nonexempt employees:
 - Minimum wage
 - Overtime for all hours worked over 40 hours in a workweek
- Fair Labor Standards Act exempts certain white-collar employees from minimum wage and overtime pay requirements

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FLSA Overview cont.

- To be exempt under the FLSA:
 - **Salary Test:** Employee must be paid a predetermined and fixed minimum salary that is not subject to reduction because of quality or quantity of work performed (“salary basis test”) and be paid at least a specified weekly standard salary level (“salary level test”); and
 - **Duties Test:** Employee's job duties must primarily involve executive, administrative or professional duties as defined by the FLSA regulations

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Overview cont.

- Be an exempt Highly-Compensated Employee:
Employee is paid more than \$100,000 (current) per year; Employee performs office or non-manual work; Employee customarily and regularly performs one identifiable executive, administrative or professional duty.

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Proposed Changes/Final Rule

- In March 2014, President Obama issued a memorandum directing the DOL to "modernize and simplify" the FLSA's overtime and minimum wage requirements
- The DOL engaged in an outreach program, conducting a series of listening sessions to determine how to best "modernize and simplify" the rules
- On July 6, 2015, the DOL issued a proposed rule regarding the FLSA's overtime regulations

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Final Rule

- On May 23, 2016, the Final Rule was published in the Federal Register
- Changes go into effect on December 1, 2016
- Changes affect the salary test

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Salary Test Increases

- Raises the salary level requirement for Executive, Administrative and Professionals from the current rate of \$455 per week (\$23,660 per year) to **\$913 per week** (\$47,476 per year)

This represents the 40th percentile of weekly earnings of full-time salaried workers in the United States' lowest wage census region.

- Raises the salary level requirement for Highly Compensated Employees from the current rate of \$100,000 per year level to **\$134,004 per year**

This represents the 90th percentile of weekly earnings of full-time salaried workers nationally.

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Inclusion of Bonuses and Commissions

- The DOL will now permit nondiscretionary bonuses and incentive payments (including commissions) to count toward the salary level requirement for Executive, Administrative and Professionals
- Examples:
 - Retention bonuses
 - Commission payments based on a fixed formula

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Inclusion of Bonuses and Commissions cont.

- Can only count toward 10% of the standard weekly salary
- Must be paid at least quarterly
- Allows for a quarterly "catch-up" payment within one pay period of the end of a quarter
- This does not:
 - Allow discretionary bonuses to count toward the salary level requirement
 - Change the Highly Compensated Employees requirement to receive at least the salary level requirement each pay period

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Example:

- Mary is an exempt professional employee who is paid on a weekly basis and receives a quarterly nondiscretionary bonus.
 - Mary **MUST** receive, at minimum, \$821.70 per week in salary (90% of \$913.00).
 - Mary **MUST** receive a nondiscretionary bonus of \$1,186.90/quarter (\$91.30/week x 13 weeks) within one pay period after the close of the quarter

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Example Cont.

- If Mary earns a quarterly nondiscretionary bonus of \$2,000.00
 - Her employer STILL may only count \$1186.90/quarter (\$91.30/week) toward her salary level
 - Her employer STILL MUST pay, at minimum, \$821.70 per week in salary (90% of \$913).

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Automatic Updates of Salary Threshold

- Salary and compensation thresholds will automatically update every 3 years
 - 40th percentile for Executive, Administrative, Professionals
 - 90th percentile for Highly Compensated Employees
- The DOL will publish updated rates at least 150 days in advance
- January 1, 2020 - first automatic update
 - Estimated to set the salary level requirement at:
 - \$984 per week (\$51,168 per year) for Executive, Administrative, Professionals
 - \$147,524 per year for Highly Compensated Employees

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Not Changed

- Standard duties test
- No examples added to the regulations
- No quantitative limitation on the performance of nonexempt work
- Permissible v. impermissible deductions (For example, deductions for personal, full-day absences for reasons other than sickness or disability, or disciplinary suspensions for infraction of *major* safety rules.)

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Compliance Steps

- Either:
 1. Increase pay for workers to meet the new salary level requirement;OR
 2. Reclassify employees as nonexempt

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Suggested Steps

- Identify which employees the regulatory changes will affect
 - Pull your compensation data
 - Identify all exempt employees paid below \$913 per week
 - request employees or immediate supervisors to provide estimates of hours worked, or track time
- Assess employees' workloads
- Review organizational charts to see where affected employees fall in comparison to similar jobs in other departments

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Steps Cont.

- Consider operations and budget
 - Will you increase salaries to meet the new threshold?
 - Will you convert to hourly?
- What will be your estimated overtime wages?
- Will you hire additional employees to reduce overtime?
- Will you adjust employee workloads and/or transfer duties?
- Will you reduce equivalent hourly pay so employees' hourly wages plus overtime still equals their current salaries?

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Steps Cont.

- Consider whether employees will be subject to different fringe benefit plans as nonexempt employees
- Consider morale and ripple effects
 - Analyze impact across departments
 - Analyze pay differentials between affected employees and their superiors
- Consider whether changes could make you more vulnerable to union organizing

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Steps Cont.

- Communicate possible changes to employees
 - Designate a person to communicate the plan to employees
 - Plan out the communication/reasoning:
 - "This is required by law"
 - "This is not a demotion"
 - "This is the company's effort to maintain the employee's pay"
- Analyze your bonus/commission structures
 - Do you need to/want to adjust discretionary to nondiscretionary bonuses?
 - analyze nondiscretionary bonuses and commissions on a quarterly basis

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Steps Cont.

- Review, edit and disseminate employee handbooks and policies
 - Overtime
 - Off-the-clock work
 - Meal and rest breaks
 - Travel time
 - Mobile devices
 - Pre/post-shift activities
 - On-call policies
 - Guam limitations on shift work (must be completed within 14 hours)
- Ensure your timekeeping methods are up to date and you are accurately tracking hours

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Example

- Joe is an exempt administrator who is paid an annual salary of \$30,000 per year (\$576.92 per week).
- On average, Joe works 45 hours a week (2340/year).
- Joe's Calculation:
 - If Joe's salary is raised to meet the minimum threshold of \$913 per week (\$47,476/year) the employer will have an additional cost of \$336.08/week, or \$17,476/year.

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Joe cont.

- If Joe is converted to hourly:
 - Joe's employer will be required to pay 260 OT hours
 - If Joe is converted to hourly at a rate of \$13.00, employer will pay:
 - \$5,070 in overtime wages per year ((5 hr x \$19.50) x 52 weeks),
 - \$27,040 in regular wages ((40 hr x \$13.00) x 52 weeks)
- Total Wages = \$32,110/year (\$617.50/week)
- Additional cost to employer: \$2,110/year (\$40.58/week)

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Example 2

- Jane is an exempt professional who is paid an annual salary of \$45,000 per year (\$865.38 per week).
- On average, Jane works 50 hours a week.
- Jane's Calculation:
 - If Jane's salary is raised to meet the minimum threshold to \$913 per week (\$47,476/year) the employer will have an additional cost of \$47.62 /week, or \$2,476/year

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Jane Cont.

- Jane's Calculation:
 - If Jane is converted to hourly at \$17.00: \$35,360 in regular wages ((40 hrs x \$17.00) x 52 weeks), \$13,260 in overtime wages per year ((10 hrs x \$25.50) x 52 weeks)
- Total wages = \$48,620/year (\$935/week)
- Additional cost to employer: \$3,620/year
- (\$69.62/week)

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Audit Employee Duties

- Consider using this as an opportunity to review the standard duties of affected employees. The duties tests remain unchanged under the Final Rule. These tests are summarized on the following slides.
Excellent resources are: www.dol.gov/whd and www.shrm.org.

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Executive Exemption

- To qualify for the executive exemption, an employee must receive compensation on a salary basis of not less than \$913 per week (the equivalent of \$47,476 a year), and have the primary duty of managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. Additionally, the employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent (for example, one full-time and two half-time employees are equivalent to two full-time employees), and 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. See **WHD Fact Sheet 17B**

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Administrative Exemption

- To qualify for the administrative exemption, an employee must receive at least \$913 a week (the equivalent of \$47,476 a year) on a salary or fee basis, and 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. Additionally, the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. See 29 CFR 541.203 for examples, and **WHD Fact Sheet 17C** for additional information.

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Professional Exemption

- There are several different kinds of exempt “professional” employees. These include “learned professionals”, “creative professionals”, teachers, and employees practicing law or medicine. Under the Final Rule, exempt professional employees must receive at least \$913 a week (the equivalent of \$47,476 a year) on a salary or fee basis, and must primarily perform work that either requires advanced knowledge in a field of science or learning, usually obtained through a degree, or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
- Many businesses may employ certain professionals who will be unaffected by the new salary level. Specifically, the salary level and salary basis requirements do not apply to teachers, lawyers, or doctors (“bona fide practitioners of law or medicine”). **See WHD Fact Sheet 17D**

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Any Questions?

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