



Risk Management Services

E-ALERT

Guidance for Employers, Including Non-Profit Organizations, on Paying Overtime Under the Fair Labor Standards Act in Light of New Rules Extending Overtime Coverage

By Kevin C. Donovan, Esq. | A costly economic tidal wave is about to engulf US employers. Effective December 1, 2016, thousands of employers will be required by federal government action to give substantial raises to many of their employees in the form of overtime pay. Millions of employees, including managers and office professionals, who were previously not entitled to overtime will fall within the qualifications set forth in the federal Fair Labor Standards Act (FLSA).

A new federal rule issued under the FLSA will make these salaried workers—whose exemption from overtime was always assumed and whom employers relied in creating their budgets, pricing, and financial plans—overtime eligible for the first time. The impact on employers, including non-profits operating on tight budgets, could be substantial. While the FLSA does not apply to all non-profits, the law does not exempt these organizations as a class. FLSA may apply if the non-profit conducts commercial activities to raise funds or fits within a statutory definition of a “Named Enterprise,” which includes hospitals; institutions for the care of the sick, the elderly, and those with disabilities who reside on premises; and schools for disabled children, preschools, secondary schools, and institutions of higher learning. This E-Alert addresses the new rule and suggests employer options to limit exposure to higher overtime costs.

This E-Alert also explains when the FLSA applies to employers, including non-profits, and summarizes current overtime exemption rules that, although untouched by the new developments, warrant review by employers to ensure FLSA compliance in an era of frequent government wage-and-hour audits and frequent lawsuits brought by employees, either individually or as a class, who believe they have been treated unfairly.

Referrals to government fact sheets and other publications providing further explanations and details also are included.

The New Rule and its Expected Impact

So-called “white-collar” workers have been and will continue to be exempt from federal overtime payment requirements. Currently, to meet this exemption the employee must (1) be paid on a “salaried basis” (strictly defined in regulations); (2) receive a salary of at least \$455/week (equal to \$23,660 per year), and (3) perform certain defined duties. Under the new rule, the minimum salary level is increased to \$913 per week (\$47,476 per year). Employees who are currently exempt if they are paid at least \$23,660 annually on a salary basis and perform certain defined duties will no longer be exempt as of December 1, 2016 unless their salaries are doubled. The new rule also establishes a mechanism for automatically updating the salary level every three years.

Coverage of the FLSA

The FLSA applies to employees in two ways. An employee may work for an employer that is a covered “enterprise,” or individual employees of the employer may be covered, even if the enterprise as a whole is not. See [“Coverage under the Fair Labor Standards Act \(FLSA\)”](#) for more information.

Enterprise Coverage

All employees are FLSA protected if their employer has annual revenue (sales made or business done, of at least \$500,000).

Non-profit organizations are not automatically exempt from the FLSA. The US Department of Labor (DOL), however, only considers activities performed for a “business purpose” in determining enterprise coverage. If a charity engages in business operations (e.g. a gift shop or a school) that generate revenue of at least \$500,000 annually, the charitable organization is a covered enterprise. Income that a charitable organization receives through non-business purposes and uses for charitable purposes is not factored into the \$500,000 threshold.

As noted, employees of Named Enterprises are generally covered regardless of the dollar-volume of business. These include hospitals; institutions primarily engaged in the care of the sick, the elderly, and those with disabilities who reside on premises; and schools for disabled children, preschools, secondary schools, and institutions of higher learning.

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Individual Coverage

Individual employees may be protected by the FLSA depending on the nature of their specific employment activities. An employee who engages in interstate commerce or in the production of goods for interstate commerce is covered by the FLSA. Such activities could include making out-of-state calls, other interstate communications (e-mail, regular mail, credit card transactions), or ordering or receiving goods – even donated goods – from out of state.

This example is provided by the DOL:

An employee works at a homeless shelter that regularly receives food and clothing donations from corporations located across state borders. The employee's job duties consist of receiving and logging these donations. The employee is individually covered by the FLSA and entitled to its protections, including receiving minimum wage and overtime unless a specific exemption applies.

The degree of involvement with interstate activities will be taken into account in determining individual coverage.

The White-Collar Exemptions

Certain categories of employees are exempt from the overtime requirements (and minimum wage requirements). These white-collar employees are exempt from the FLSA if they perform the defined duties of "professionals," "administrators," or "executives."

These exemptions are subject to detailed rules that must be consulted; but generally, exempt professionals' primary duty must be work that requires either (1) advanced knowledge in a field of science or learning or (2) invention, imagination, originality, or talent in a recognized field. An administrator's primary duty must include the exercise of discretion and independent judgment with matters of significance to the business. An executive's primary duty must be managing the enterprise or a distinct department and the supervision of at least two subordinates.

In addition to the foregoing "primary duties" test, white-collar employees must be paid on a "salaried basis," meaning that their compensation generally is not subject to change based on the number of hours worked in a week.

Finally, as noted, the exempt white-collar workers must be paid a minimum salary, soon to rise substantially.

Further details about these white-collar exemptions can be found in ["Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act \(FLSA\)."](#)

Impact of the New Minimum Salary Rule

The new rule does not alter the duties or salaried basis tests (which have their own nuances and exceptions) to meet the white-collar exemptions. As noted, the rule does substantially increase the minimum salary requirement to a new level of \$913 per week (\$47,476 per year).

Up to ten percent of the new minimum salary amount may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions, provided that they are paid quarterly or more frequently.

The new rule also raises the minimum salary level for so-called "highly compensated employees"— who are subject to a more minimal duties test—from \$100,000 to \$134,004 annually. The ten percent rule does not apply to satisfy this new minimum. Thus, employees who could be exempt, regardless of the nature of their duties, if they made more than \$100,000 a year will no longer be exempt unless their salaries are increased by thirty-four percent.

Many employers soon will have to start treating formerly overtime-exempt employees as eligible for overtime. Procedures must be put in place to calculate hours worked (to capture hours over forty in a week) and the resulting overtime due. How the employer manages those employees, including oversight of their activities and what level of time/effort is expected of them, must also be considered.

Options

After the initial analysis of whether a non-profit is an enterprise covered by the FLSA or a Named Enterprise, the next step is to prepare for the impact of the new rule. There are several ways employers can address this impending change to their overtime requirements.

Evaluate Current Operations and Confirm Nothing Need be Done but Still Monitor Hours

It may be that the employer has employees who are properly being treated as overtime-exempt under the current rules, who will not satisfy the new minimum salary rule, but who do not work more than forty hours in a week. These employees need not be paid overtime because they do not work overtime. They should be advised, however, of their new non-exempt status and instructed that they are not authorized to work more than forty hours a week without advance approval (presumably the employer's policy is already in place regarding hourly workers). Under the new structure their hours will have to be recorded, and they should be required to certify the number of hours they work each week. Policies should be in place to warn managers and assure employees that no one is authorized to tell employees to work "off the clock," and any such improper order must be promptly reported to management. An employer is not permitted to turn a "blind eye" to employees who work more than forty hours. If an employee works more than forty hours and the employer is found to have known it (or had reason to know), the employee must be paid overtime, even if the employee says that he or she does not expect to be paid. The remedy for those working overtime without authorization is discipline, not withholding overtime pay.

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It is important to understand how to handle this situation because loyal employees may want to work more than their allotted forty hours to complete their tasks and foster the mission of the employer (especially those with a charitable goal). They may not take breaks or lunches, or they may simply be used to working unpaid overtime. They may truly see no reason to change former habits just because they are suddenly entitled to overtime. These are admirable traits, but the law requires overtime payment when due. Also, it always is possible that today's loyal employee may become disgruntled upon being disciplined or discharged, and suddenly claim—correctly or not— he or she has been working “off the clock” for a substantial period of time. Without proper record keeping and overtime policies in place, an employer may be hard-pressed to prove a negative.

Raise Salaries

Another option for those employers who soon will have employees who are eligible for overtime is to raise their salaries to meet the higher minimum. While the simplest approach, this may be cost-prohibitive for employers, especially non-profit organizations, that may already operate on tight budgets.

Lower Salaries

By contrast, employers facing the requirement to pay overtime are free to reduce an employee's base salary, so long as the base salary does not fall below the higher of either the state or federal minimum wage. The goal could be to calculate expected overtime due based on the employee's typical overtime hours and reduce his or her base pay so that the total of base plus typical overtime will roughly equal what the employee currently makes on a salary-only basis.

An employer may not reduce an employee's pay below the highest applicable minimum wage and may not continually adjust wages each week to evade paying what its employees otherwise would be due. A straight reduction in salary (or other basis of pay) to save money, however, is permitted under the FLSA.

The employer should take into account (1) any contracts, express or implied, it may have with its employees; (2) the need to clearly explain the new compensation, preferably in writing (as some states require); and (3) the impact on morale if the new wage scale is not properly explained and implemented. A well-planned and clearly explained wage reduction is a viable option for non-profit employers with a dedicated staff.

Adjust Work Schedules/Workloads

Rather than adjusting wages up or down, an employer can address and possibly entirely escape the coming overtime requirement by adjusting employee schedules and workloads or by hiring additional employees. An employer is not required to ensure that its employees work overtime and may adjust schedules and practices to ensure overtime is not worked.

Again, however, the employer must take steps to prevent any overtime being worked against its direction and must ensure that employees are paid for any overtime they actually work.

Maintain Current Salaries, with Overtime after Forty Hours

An employer also may decide to keep salaries as they are, even if it means the employee becomes overtime-eligible, and then pay overtime on top of that salary for hours over forty.

There are multiple ways to implement this approach, and the one an employer chooses will depend in part on how much overtime the previously exempt employees normally work.

For example, on the rare occasion overtime occurs the employer may simply pay the same salary and then add overtime for hours over forty to any employee who usually does not work overtime.

The employer and employee also could agree that the fixed salary covers more than forty hours a week—a method useful for employees who consistently work the same amount of overtime each week. For employees whose schedules fluctuate each week, it will be important to track their hours to ensure compliance with the FLSA. The advice of legal counsel or a human resources consultant should be sought for the more unusual methods of ensuring proper overtime is paid.

Final Issues and Practical Guidance

Preexisting employment contracts and collective bargaining agreements, if any, should be reviewed before implementing changes to employee salaries and schedules.

Any changes should be applied uniformly to help avoid charges of unlawful discrimination.

Some of the affected employees may complain about the changes. Be aware that employees' workplace complaints may be protected by both the FLSA's anti-retaliation provisions and by the National Labor Relations Act as “concerted action” seeking to protest and improve working conditions.

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State wage and hour laws must be checked as such laws may impose different or stricter requirements.

The upcoming change in the overtime rules can be seen as a lawsuit avoidance opportunity for employers. The DOL in recent years has increased its wage-and-hour enforcement efforts against employers accused of not complying with the FLSA, including allegedly failing to pay overtime or misclassification of workers as exempt when their actual duties fail to support their being treated as such. There has been a rise in the number of wage-and-hour class actions being filed against employers by private attorneys.

The new rule gives employers an incentive to review not only their current overtime policies and practices and the adequacy of their record keeping procedures but also the status of those currently treated as exempt from overtime. If upon review—ideally backed by legal advice—an employer has doubts as to whether a particular employee meets all of the white-collar or other exemptions from overtime rules, this is a prime time to convert the employee to non-exempt status. This change in the law also allows the employer to explain to the employee, who might feel upset by the perceived loss of “status,” why the employer must convert him or her to hourly status while making the employee overtime eligible.

Conclusion

As shown, the new federal rule presents employers with challenges, choices, and opportunities. Now is the right time to confront the upcoming changes and make decisions that help ensure the workplace is operating consistent with the law.

Highlights of the new rule can be found in [“Final Rule, Overtime: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act.”](#)

Those employers, particularly non-profit organizations, that wish an even more detailed discussion of the foregoing issues, should see [“Guidance for Nonprofit Organizations on Paying Overtime under the Fair Labor Standards Act.”](#)

¹ The U.S. Department of Labor estimates that the increase in the minimum salary will result in an additional 4.2 million workers who are currently exempt suddenly becoming eligible for overtime pay.

² 29 USCS § 203(s)(1)(B).

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