



ARE YOU READY?
Updates to FLSA Will Take
Effect December 1, 2016

Reinhart
Attorneys at Law

Complimentary Seminar/Webinar | June 15, 2016



ARE YOU READY?
*Updates to FLSA Will Take Effect
December 1, 2016*

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Partnering for your Success

Katie D. Triska is a shareholder in the firm's Labor and Employment Practice. She routinely advises employers on a wide range of employment issues, including successful hiring, employee performance management and termination strategies; development and implementation of anti-harassment and other personnel policies; evaluating reasonable accommodation obligations under the Americans with Disabilities Act (ADA) and state disability laws; and achieving compliance with the Fair Labor Standards Act and state wage and hour laws.



Robert S. Driscoll is an attorney in the firm's Labor and Employment Practice. Rob's practice encompasses a variety of employment topics, including defending employers against claims of unlawful discrimination and/or retaliation, handling disputes over restrictive covenants, drafting non-compete agreements and representing clients in appeals. Rob also counsels employers on wage issues, including guiding employers through government wage investigations, and has defended employers against both class-action and individual wage claims.

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Information

This webinar 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.

Presentation Overview

- Overview of the FLSA
- Key changes of the final rule
- Compliance steps and advice

5

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Overview of the FLSA

6

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Overview of the FLSA (cont.)

- Employers must pay nonexempt employees:
 - Minimum wage
 - Overtime for all hours worked over 40
- Exempts certain white-collar employees from minimum wage and overtime pay requirements

7

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Overview of the FLSA (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
 - Duties Test: Employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations

8

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Overview of the FLSA (cont.)

- To be an exempt highly-compensated employee:
 - Employee is paid more than \$100,000 (current) per year
 - Employee performs office or nonmanual work;
 - Employee customarily and regularly performs one identifiable executive, administrative or professional duty.

9

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Overview of the FLSA (cont.)

- Past Changes
 - Since 1938, the DOL has updated the salary level requirement 7 times
 - The DOL most recently updated the regulations in 2004
 - Raised the salary level requirement for the first time since 1975
 - Abandoned the concept of separate long and short duties tests; opted for one standard duties test

10

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Overview of the FLSA (cont.)

- Background of 2016 Changes
 - 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

11

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Overview of the FLSA (cont.)

- July 2015 Proposed Changes:
 - Increase the salary level requirement for exempt EAP (\$455 to \$970) and HCE employees (\$100,000 to \$122,148)
 - Enact a mechanism for annually updating the salary and compensation level requirements
 - Allow nondiscretionary bonuses and incentive payments to count toward the salary level requirement
 - Requested comments to changes to the standard duties tests
- Over 270,000 comments received in response to proposed rule

12

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Key Changes To The Final Rule

13

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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

14

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Salary Increases

- Raises the salary level requirement for EAPs from the current rate of \$455 per week (\$23,660 per year) to **\$913 per week** (\$47,476 per year)
 - 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 HCEs from the current rate of \$100,000 per year level to **\$134,004 per year**
 - Represents the 90th percentile of weekly earnings of full-time salaried workers nationally

15

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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 EAPs
- Examples:
 - Retention bonuses
 - Commission payments based on a fixed formula

16

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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 HCE requirement to receive at least the salary level requirement each pay period

17

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Inclusion of Bonuses and Commissions (cont.)

- Example:
 - Sally is an exempt professional employee who is paid on a weekly basis and receives a quarterly nondiscretionary bonus.
 - Sally MUST receive, at minimum, \$821.70 per week in salary (90% of \$913).
 - Sally 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.

18

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Inclusion of Bonuses and Commissions (cont.)

- Example:
 - Sally earns a quarterly nondiscretionary bonus of \$2,000.00
 - Her employer STILL may only count \$1,186.90/quarter (\$91.30/week) toward her salary level
 - Her employer STILL MUST pay, at minimum, \$821.70 per week in salary (90% of \$913).

19

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Automatic Updates

- Salary and compensation thresholds will automatically update every 3 years
 - 40th percentile for EAPs
 - 90th percentile for HCEs
- 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 EAPs
 - \$147,524 per year for HCEs

20

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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

21

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Compliance Steps and Recommendations

22

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Act Now

- The Final Rule will become effective December 1, 2016—less than 6 months away!
- Employers should analyze classifications, plan and communicate to employees

23

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Recognize Your Options

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

24

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Steps

- Identify which employees the regulatory changes will affect
 - Pull your compensation data NOW
 - Identify all exempt employees paid below \$913 per week

25

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Steps (cont.)

- Short-term hour tracking OR request employees or immediate supervisors to provide estimates of hours worked
- Assess employees' workloads
- Review organizational charts to see where affected employees fall in comparison to similar jobs in other departments

26

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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?

27

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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

28

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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 employees' pay"

29

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Steps (cont.)

- Analyze your bonus/commission structures
 - Do you need to/want to adjust discretionary to nondiscretionary bonuses?
 - Designate a person to analyze nondiscretionary bonuses and commissions on a quarterly basis

30

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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
- Ensure your timekeeping methods are up to date and you are accurately tracking hours

31

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Example

- Jack is an exempt administrator who is paid an annual salary of \$30,000 per year (\$576.92 per week).
- On average, Jack works 45 hours a week (2340/year).

32

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Example

- Jack's Calculation:
 - If Jack'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, \$17,476/year.

33

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Example

- If Jack is converted to hourly:
 - Jack's employer will be required to pay 260 OT hours
 - If Jack 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)

34

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Example

- John is an exempt professional who is paid an annual salary of \$45,000 per year (\$865.38 per week).
- On average, John works 50 hours a week.

35

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Example

- John's Calculation:
 - If John'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, \$2,476/year

36

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Example

- John's Calculation:
 - If John 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)

37

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Audit Employee Duties

- Consider using this as an opportunity to review the standard duties of affected employees

38

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Questions?



Asking Questions

Type your questions using the "QUESTIONS" section on the webinar panel. We will answer as many questions as possible.