



Revised Overtime Regulations:

How Will Financial Services and Insurance
Industry Employers Be Affected?

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Agenda

- The DOL Proposal
- Impact on Financial Services
- Impact on Insurance
- Next Steps



The DOL Proposal

- Increase in salary level for standard exemptions
 - \$50,400 in 2016 with automatic increases
- Increase in salary level for "highly compensated" exemption
 - \$122,148 in 2016 with automatic increases
- Request for comments on:
 - Duties tests
 - Use of nondiscretionary bonuses to satisfy salary level
- Comments due September 4, 2015



How We Got Here

1938: FLSA passed with exemption for, but no definition of, executive, administrative, and professional (EAP) employees

1940: Regulations implementing exemption include salary basis, salary level, duties tests

1949-2004: Salary level updated 5 times (duties test also updated in 2004)

2014: Per Presidential directive, Secretary of Labor begins 18 months of stakeholder meetings and analysis on updating the FLSA overtime exemptions



What Does this Mean for Employees?

- 4.7 million workers affected by salary or highly-compensated employee test
- 3.5 million of those workers work fewer than 40 hours/week
- 181,000 work occasional overtime
- 931,000 become overtime eligible
- 71,000 get salary increases



Concerns of Employee Advocates

- Excessive hours by EAP-exempt employees
- Disproportionate amounts of time performing routine nonexempt tasks
- No true flexibility and status traditionally associated with such positions



Nondiscretionary Bonuses

- DOL: Should monthly (or more frequent) nondiscretionary bonuses count toward salary level?
- Suggested cap of 10% of salary
- Would not allow discretionary bonuses or commissions to satisfy test
- Unclear how to handle where employee fails to earn bonus



The Duties Tests

“[T]he Department is seeking to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted.”



Key DOL Questions on Duties Tests

- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?
- Should there be a limitation on the amount of nonexempt work?
- Is the concurrent duties regulation (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption?
- Should DOL include additional examples of specific occupations?
- Should DOL eliminate the examples in the 2004 amendments?



What Does this Mean for Financial Services Employers?



Change to 29 C.F.R. § 541.203(b)?

- “Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.”



Fate of DOL Opinion Letter on Financial Advisors?

- Opinion Letter FLSA 2006-43 (November 27, 2006):
 - “Registered representatives” qualify for the administrative exemption
 - Primary duty not sales because work includes collecting and analyzing financial information, advising about investment opportunities, and recommending suitable securities
 - Exercise discretion and independent judgment because they must assess client’s “investment objectives, investment experience, and tolerance for risk” and “compare and evaluate possible investment options and render advice only after all the various possibilities have been considered”



Fate of Mortgage Loan Officers?

- Administrator's Interpretation No. 2010-1 (March 24, 2010):
 - MLOs do not satisfy duties test of administrative exemption because they receive and act on internal leads, collect required financial information, run credit reports, discuss loan terms with customers, compile customer documents for forwarding to underwriter or loan processor, and finalize documents for closings
- DOL proposal does not address Outside Sales exemption



What Does this Mean for Insurers?



Change to 29 C.F.R. § 541.203(a)?

- “Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.”



Possible Positions Impacted

- Adjusters
- Fraud Investigators
- Underwriters
- Processors / Claims Examiners



Next Steps: Pay Practices

- **Prepare for Salary Increases**
 - Establish baseline by identifying all exempt positions under \$50,440 (with and without bonuses and commissions)
 - Determine how salary level may warrant a new profile for more highly paid candidates at exempt levels
- **Plan for Financial Impact**
 - Prepare FY16 budget for increases
 - Assess ability to create IT or comp review processes to keep pace with annual increases
 - Compression of pay scale?



Next Steps: Reclassification?

- Increase salary or reclassify position?
 - Financial impact of salary increase v. additional overtime payments
 - Impact on workforce morale of reclassification
 - Can position be performed within a standard 40 hour workweek
- Prepare to Manage Newly Non-Exempt Employees
 - Limit overtime
 - Ensure accurate timekeeping and no “off the clock” work
 - Adjust compensation to minimize financial impact



Next Steps: Advocacy

- Participate in Comment Process
 - Individual comments
 - SIFMA, American Insurance Association, and other trade association comments?
 - Seyfarth Shaw comments



Resources

- Notice of Proposed Rulemaking:
 - <http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>
- DOL Fact Sheet on Proposed Rule:
 - <http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>
- Seyfarth's Wage & Hour Litigation Blog Post and July 7 Webinar on the overall changes:
 - <http://www.seyfarth.com/publications/RD070215-LE>
 - [Webinar Recording](#)
 - [PowerPoint](#)
- Seyfarth's Financial Services Employment Law Alert
- Seyfarth's Insurance Industry Alert

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