



FLSA Classification CHANGE IMPLEMENTATION & COMMUNICATIONS PACKAGE

SEYFARTH
SHAW

DISCLAIMER

This Change Implementation & Communications Package is the product of an extensive collaborative effort between Seyfarth Shaw LLP and Seyfarth Shaw at Work (“SSAW”). The Package contains guidelines and tools crafted to cover the most likely decision-points that we anticipate businesses will confront as they determine, plan, and execute changes in response to the Fair Labor Standards Act’s revised exemption rules, which take effect on December 1, 2016.

Of course, this Package does not cover every possible issue that you might confront. We hope you will not hesitate to contact your lawyers at Seyfarth Shaw to discuss any particularly complicated or exceptional scenario that arises. In addition, if you plan to use these materials as a reference in subsequent matters, you should seek counsel to ensure the laws on which these materials are based have not changed in the interim.

Finally, to the extent you need or would like to consider more targeted communications or training strategies and plans, you should contact SSAW.

TABLE OF CONTENTS

Introduction.....	1
An Overview of the FLSA’s Revised Overtime Exemption Rule.....	3
Developing an Action Plan	9
Reclassifying Employees to Non-Exempt Status.....	17
Determining Pay for Reclassified Employees	21
Determining Back Wage Payments (if Any).....	27
Updating Job Descriptions	31
Eliminating Job Positions (if Necessary)	35
Understanding the Role of VPs and Key Managers	39
Planning Your Communications	41
Understanding Psychological Factors Before You Communicate	43
Sample Announcements and Communications.....	46
A. <i>Sample Internal Announcement</i>	49
B. <i>Sample Emails to High-Level Management</i>	51
C. <i>Sample Email to Managers of Affected Employees</i>	55
D. <i>Sample Email to Employees Whose Salary Will Increase</i>	58
E. <i>Sample Email to Employees Being Reclassified</i>	61
Sample Written Notices and Acknowledgements	65
A. <i>Sample Notice to Reclassified Employees Whose Duties and Pay Will Change</i>	66
B. <i>Sample Notice to Employees Whose Pay, But Not Duties, Will Change</i>	71

TABLE OF CONTENTS

C. <i>Sample Notice to Employees Who Will Remain Exempt and Receive a Raise</i>	76
D. <i>Sample Back Pay Acknowledgement Form</i>	80
Sample Agendas and Talking Points for Discussing the Changes.....	83
A. <i>Agenda and Talking Points for Meetings With Managers</i>	84
B. <i>Agenda and Talking Points for Meetings With Employee Groups</i>	88
C. <i>Agenda and Talking Points for One-on-Ones With Employees</i>	90
High-Level Approaches for Training Programs	93
Sample FAQs	98
A. <i>FAQ for Questions from Employees About the New Rules and the Company’s Response</i>	99
B. <i>FAQ for Questions from Managers of Reclassified Workers</i>	110
C. <i>FAQ for Questions About Overtime Eligibility and Calculation</i>	113
Sample Wage and Hour Policies.....	118
Legal and Budgetary Factors to Keep in Mind	128
Evaluating Duties to Help Decide Between Raising Pay or Reclassifying	130

Updating Job Descriptions

A job description can serve various different goals, such as: (i) delineating tasks that should be performed as part of the primary duty that justifies the job's exempt status; (ii) identifying the essential job functions that an employee must be physically and mentally able to perform (with or without a reasonable accommodation); (iii) establishing expectations by which performance will be evaluated and by which an applicant's fitness will be determined; and (iv) confirming prerequisite education, skills, and experience.

The following list of DO's and DON'Ts have been designed with all of the above in mind:

- ✓ **DO** state the primary purpose or key function of the position near the top of the job description.

This primary purpose or function will be the one by which exempt status will be determined. While it need not be a function performed the majority of the time, it needs to be the most important or key function of the position. If, for example, the position is that of a manager over a particular department or subdivision, the primary purpose may be to manage the operations of and personnel within that department.

- ✓ **DO** list the specific duties and tasks that an employee in the position is expected to perform in fulfilling his or her primary purpose or key function.
- ✓ **DO** organize the list of specific duties and tasks that an employee is expected to perform in order of priority or importance with the most important duty or task listed first and the least important listed last.
- ✓ **DO** ensure that either (i) the list of duties is limited to those that are essential to fulfilling the key function of the position, or (ii) there is a separate section of "essential" job duties that the Company expects all employees in the position to be mentally and physically able to perform with or without reasonable accommodation.

The list of essential job functions is critical to a determination of whether an employee or applicant with a disability can be reasonably accommodated in the position absent undue hardship. Essential functions include those tasks that are fundamental to the job while non-essential functions are marginal tasks that can be distributed to others.

In identifying the essential functions, focus on the time spent, frequency, importance of the function, consequences of failing to perform the function, and the availability of others to perform the task. Non-essential or "other" functions that are still important can be listed in a separate section of the job description.

- ✓ **DO** focus on specific duties and tasks rather than broad concepts or generalized responsibilities.

By way of example only, it would be better to describe a task as “advise client on which default and custom rules to include in timekeeping system,” rather than “provide timely and reliable advice to clients” or “apply critical thinking and problem-solving skills to help develop solutions for clients.”

- ✓ **DO NOT** list every single task that an employee in the position may or may not possibly be required to perform from time to time.

By way of example only, it is unnecessary to note in the description that employees in the subject position may help with the duties of a subordinate in the case of a rare staffing shortage, or may “assist with special projects as assigned.”

- ✓ **DO NOT** list basic tasks that are expected of nearly everyone in any position.

By way of example, there is rarely need to state that employees in the position should adhere to Company policies, follow instructions, or be responsive.

- ✓ **DO** list the positions that directly report to the subject position if an executive exemption may be claimed.

- ✓ **DO NOT** list the same positions as direct reports in the job descriptions for different level managers or supervisors within the same hierarchy.

By way of example only, if a consultant is a direct report of a lead or assistant manager, that consultant should not also be listed as a direct report of the manager, or vice versa.

- ✓ **DO** ensure that the job duties listed in one job description do not conflict with those listed in another.

By way of example only, if one of the duties of a lead or assistant manager is to advise on hiring and firing decisions, the duties of the manager above that lead or assistant manager should include “considering the hiring and firing recommendations of” that lead or assistant manager rather than suggesting that the manager makes hiring and firing decisions alone or after consultation solely with HR.

- ✓ **DO** ensure that the job descriptions are detailed enough that similar positions in different departments sound like different positions despite their analogous roles.

UPDATING JOB DESCRIPTIONS

- ✓ **DO** limit the number of non-exempt duties or tasks included in the job description if the position is one for which the company intends to claim an exemption.
- ✓ **DO**, if possible, describe the types of recommendations or decisions on significant matters that may be expected of employees in the position (beyond hiring, firing, and other personnel changes) if the position is one for which an exemption may be claimed.

By way of example only, it may be appropriate for a job description to note that employees in the position are expected to develop a recommended budget and then manage the budget for their department, team, or projects. It may be also appropriate to say that the position makes or recommends changes to particular types of policies or procedures. The scope or nature of the budget, as well as the types of policies and procedures, should be specified if possible.

- ✓ **DO** have a section for qualifications and job requirements that: (i) lists the particular level of education required of employees in the position; (ii) specifically identifies any particular licenses or certifications required; (iii) notes, if applicable, the number of years of experience in the industry in general, or with the company in particular, that are required; and (iv) includes other necessary skills, like communication skills, mechanical aptitude, math skills, or other specific requirements or standards.
- ✓ **DO** include an accurate list of physical requirements to complete the essential functions of the position (such as the amount of weight that employees will regularly need to be able to lift, the amount of time that will be spent sitting or standing, etc.). Be sure to include any pertinent environmental conditions such as heat, odor, dampness, dirt, fumes, dust, oil, grease, noise, or vibration. Note whether exposure will be occasional, moderate, frequent, or continuous. Also note if any protective devices are required.
- ✓ **DO NOT** add unnecessarily to the list of physical requirements to cover non-essential functions or potential but unlikely scenarios, such as the ability to perform physical duties of the subordinates in instances of unusual, extended periods of staffing shortages.

Planning Your Communications

Communications Overview

A note about developing an effective exemption-focused communications plan/utilizing the texts below

Communications to employees should, as a best practice, be both proactive and responsive in nature. There is no “one size fits all” communication plan, FAQ, or script. Announcements should be tailored and relevant to the recipients. Such communications should focus on the changes that have been decided upon and employ simple, user-friendly language. The content below is conceptual in nature and provides a starting point.

In establishing a communication plan, it is important for the Company to answer four W’s— **w**ho will communicate with whom, **w**hat will they say, **w**hen will they do it, and **w**here will they do it. The Company should develop a timeline for who is to communicate with whom, and when and how, as well as a set of vetted, effective, and safe “response scripts” for questions. The below texts are not intended to serve as a substitute for a targeted, well thought plan.

Part of effective communication planning includes brainstorming the kind of questions managers expect to hear or may have heard in the past when critical changes were announced. Including key managers in the planning process, particularly those who have an “ear to the ground,” can provide valuable insights regarding what kind of questions or concerns will arise.

Once you have collected likely questions from key managers and drafted effective, user-friendly responses, as well as adapted from those provided below, the critical final step is to train your managers on how and when to use these scripts and how to effectively manage newly non-exempt employees. The best way to do that is via high-impact, interactive practice exercise.

Communications and Training Checklist

- Develop Communications Plan
- Develop Communications Calendar
- Develop Training Design Plan
- Develop Training Deployment Calendar
- Implement Training Deployment Calendar