



They're Here: DOL's Revised Exemption Regulations

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Today's Webinar Plan

- What are the DOL's new FLSA exemption rules?
- What do the new rules mean for restaurants?
- What risks do the new rules create?
- What businesses should do about this?
- Are the rules a done deal?
- Questions and answers



Steps Toward the Final Regulation

- DOL issued Notice of Proposed Rulemaking (NPRM) on July 6, 2015
 - Allowed Comments until September 4, 2015
- The National Restaurant Association and Seyfarth Shaw submitted substantive comments based on feedback from hundreds of restaurateurs and other employers.



Steps Toward the Final Regulation

- DOL's Preamble—part of the 508-page Rule announced last week—contains many references to both the National Restaurant Association and Seyfarth Shaw's comments
- The restaurant industry is mentioned 39 times (mostly with information the Association provided)
- The National Restaurant Association's comments themselves are cited at least 22 times.
- Overall, the final regulation addresses all of our concerns



Our Comments Mattered

- Although many of our recommendations were not accepted, a number were. For example:
 - No changes to the “standard” duties test
 - Inclusion in salary level, though limited, of bonuses, commissions, incentive payments
 - Reduction of NPRM’s proposed minimum salary level increase, but by as much as we wanted
 - Less frequent automatic adjustments to exempt status minimum salary level, but not the elimination of automatic adjustments
 - Substantial extension of effective date

The New Rules

What Do They Say?



Standard Salary Level Increased By More Than 100%

- New annualized salary level will be **\$47,476**
 - This is \$913/week
 - Less than \$50,440 proposed in NPRM
 - Represents 40th percentile of full-time salaried workers in South (as of Q4 of 2015) in apparent nod to employers who commented on regional cost of living variations
- Allows up to 10% of the minimum salary to be met by non-discretionary bonuses, incentive pay or commissions, if made at least on quarterly basis



Unprecedented Decision to Automatically Update Salary Level

- Beginning on January 1, 2020, the salary level required for exemption will be automatically updated **every three years**
 - DOL will post new salary levels 150 days before effective date
- Pegged to the 40th percentile of the lowest-wage region in the BLS data set (historically the South or Midwest)
 - Less disruptive than proposed annual increase and much less disruptive than annual update based on 40th percentile
- In 2020, the salary will increase to the *estimated* annualized level of \$51,168
 - a 7.7% increase over three years
 - similar increase for 2023 would reach \$55,108
 - and a similar increase for 2026 would reach \$59,351



No Changes to the Duties Tests

- In the NPRM, DOL asked several questions regarding the duties tests – particularly the primary duty test – but did not propose specific language
- In the Final Rule, DOL does not make any changes to the duties tests
- Nor are there any changes to the salary basis test
- As under the existing regulations, there still are no exceptions or allowances for:
 - part-time employees
 - employees of non-profits, colleges or universities, or public entities



Employers Have More Than Five Months to Comply

- Effective date is December 1, 2016
- Any upward salary adjustments must be in place before that date to ensure continued application of exempt status
 - Note that December 1 is a Thursday
- For bi-weekly pay, employers will need to adjust pay for pay period that includes December 1, 2016

What Do The New Rules Mean For Restaurants?



Develop a Plan to Reach Crucial Business Decision Points

- In some cases, increase salaries to \$47,476 and continue to treat employees as exempt
- In other cases, reclassify employees to non-exempt status using a variety of pay options
- And in yet other cases, employers may choose to restructure:
 - Jobs
 - Workforce
 - Operations



First Steps of the Plan—Gap Analysis

- Analyze the “salary gap” to determine salary levels for exempt employees and identify any position—not just employee—that falls below the new standard
- Consider the “ripple effect” on upstream and cross-stream jobs
- Analyze the “duties gap,” as well, to determine whether any jobs that are paid at a sufficient salary level might not perform the duties of an exempt role
- Model various compensation plans to determine:
 - Cost of increasing salaries
 - Cost of reclassification



First Steps of the Plan—Plan to Reclassify

- Determine working hours of employees who might be reclassified
 - And how those hours might change as non-exempt employees
 - Review records that may be suggestive of hours worked
 - Consider how those records may be over- and/or under-inclusive
 - Canvass those who manage to-be-converted employees
- Determine potential pay rates and compensation methods for those employees



First Steps of the Plan—How to Pay

- Hourly: Straight hourly rate for hours worked up to 40; 1.5 times regular rate of pay for hours worked in excess of 40
- Salary Plus Overtime: Salary for hours worked up to 40 (or some lower number); 1.5 times regular rate of pay for hours worked in excess of 40
- Fluctuating Workweek: Agreement with employee to pay salary for all straight-time hours worked; $\frac{1}{2}$ time of salary divided by hours worked for OT hours
- Fluctuating Workweek/Static OT Rate: Agreement with employee to pay salary for all straight-time hours worked; $\frac{1}{2}$ time of salary divided by 40 for OT hours



First Steps of the Plan – What to Pay

- Amount of the newly non-exempt employee's rate?
 - Same as before reclassification
 - Will increase labor costs
 - Especially when considering bonuses, commissions, incentive pay
 - Could provide incentive for off-the-clock work
 - May price employee out of the market and lead to no or fewer increases in the future
 - Salary compression with the next grade
 - Lowered to take into account overtime costs
 - Employee will “earn back” the full salary through anticipated overtime
 - But what if overtime isn't worked?
 - What about lowered rate for PTO and holidays?
 - Pay decrease could cause loss in employee morale
 - Communications / employee relations plan is key



First Steps of the Plan—**CAUTION!**

Reclassified employees become NONEXEMPT employees

- This means that, regardless of the method of pay, they are subject to the same wage & hour rules as other non-exempt employees:
 - Must maintain accurate time records (even if no OT worked)
 - Must ensure proper control of employee work, such as:
 - Off-the-clock
 - Meal and rest breaks
 - Travel time
 - Remote access
 - Must pay OT premium for hours work in excess of 40/week
- No method of compensation permits an employer to avoid keeping accurate time records for non-exempt employees



First Steps of the Plan—Restructuring

- To justify increased exempt employee salaries, some jobs will need to take on more responsibilities
- To avoid reclassification, some jobs will need to shed nonexempt responsibilities
- Some jobs will need to be split into two or more roles because overtime costs would be too great
- Some jobs and employees will necessarily be phased out
- As predicted by many critics of the new rule, some businesses will need to close locations, departments, and other aspects of their operations

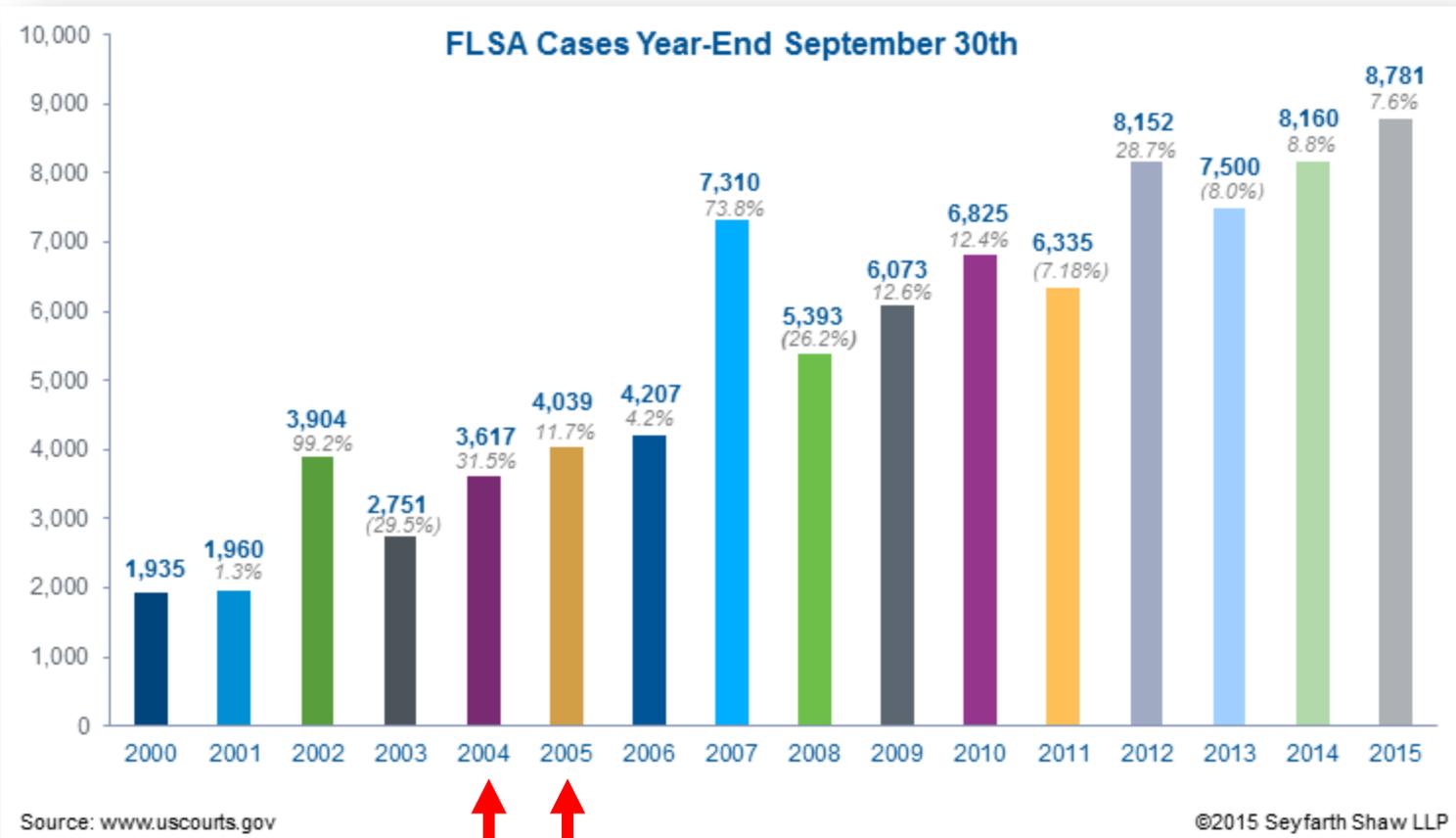
The Risks Created By The New Rules



A Brief History of Wage & Hour Risk

- FLSA – 1938 law that hasn't kept pace with changing times
- Vague and ambiguous text of the statute and DOL regulations has created uncertainty, fueled by inconsistent court decisions
- Low standard for conditional certification often gives plaintiffs leverage for early settlements
- Large high profile settlements / verdicts have provided “windfall” fees and attracted more lawyers to file lawsuits
- 2004 amendments provided increased media attention to the FLSA and led to sharp increase in lawsuits

FLSA Cases: Trending Up





A Plaintiffs' Bar Watching Patiently for Opportunities

- As has been reported—and as we are already seeing from recent demand letters—members of the plaintiffs' bar are ready to pursue new clients' claims generated because of these new rules by:
 - Exempt employees whose pay is not raised who think it should be
 - Exempt employees whose pay is raised, but who think they should be reclassified as non-exempt/overtime-eligible
 - Reclassified employees who question why they weren't classified as nonexempt, and paid overtime, all along
 - Reclassified employees who think they were wrongly “demoted”
 - Reclassified employees who allege off-the-clock work, missed meal/rest breaks, or improperly calculated overtime pay



Each Crucial Business Decision Point Presents Risk

- Determination of who will be paid at a greater salary level
- Reclassification of employees to nonexempt status
- Restructuring of jobs and operations
- Elimination of positions
- Contraction of operations



The Risk of Contagion Is Severe

- Even for members of industries that already pay most exempt employees more than the new threshold, risk will arise from:
 - Press coverage inspiring employees and lawyers to seek avenues to recover damages
 - More lawyers who become aware of and educated about how to file FLSA claims
 - Marketplace chatter that leads to “me-too” concerns among a wide variety of employees

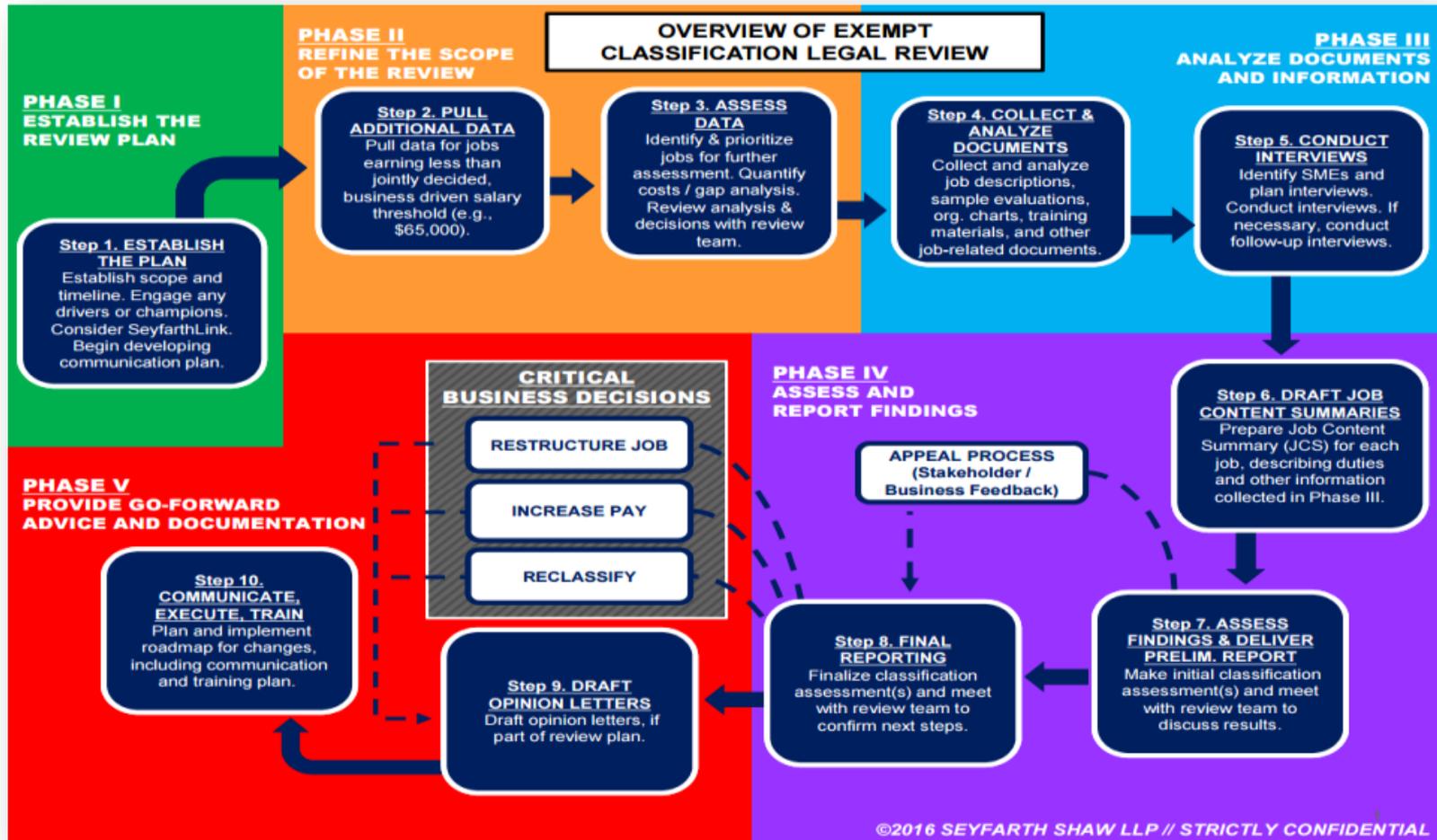
Risk Mitigation A Careful Plan



Careful Execution and Communications Strategies Are Crucial

- **Before** you take your first steps:
 - Identify stakeholders and champions who can help define and reach endgame objectives
 - Develop a communications plan to engage key players
 - Determine your process for achieving objectives before December 1
- **After** you have made the important business decisions about whose pay will increase, who will be reclassified, and what roles / operations might need to be restructured:
 - Develop a detailed implementation and communications strategy

Workflow Chart

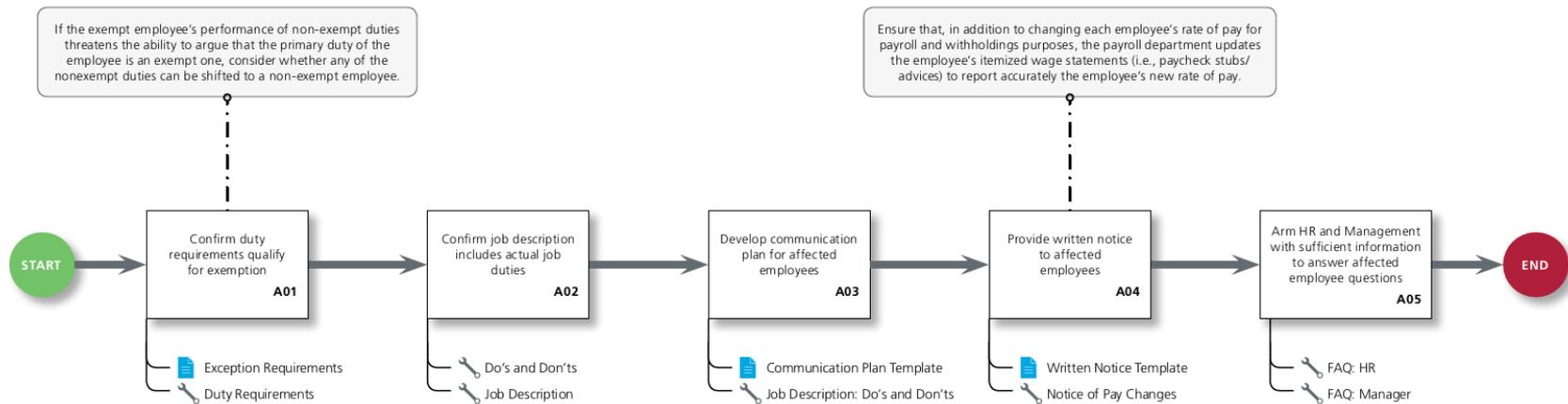


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Exempt Salary Increase Process Map



Steps with Respect to Exempt Employees Receiving a Salary Increase



Online Communication & Other Resources

- Visit The Association Overtime Action Page
 - Go here:
www.restaurant.org/overtime
- Visit Seyfarth's FLSA Exemption Resource Center
 - Go here:
www.seyfarth.com/OTRuleResources





Is This Really Happening?

- Possibility of Litigation
- Congressional Review Act
- Appropriations Riders
- Protecting Workplace Advancement and Opportunity Act
- New Administration



Question & Answer Session

Please submit your questions in the box on the left side of your screen.

Thank You



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