



Wage & Hour Alert for the Retail Industry: What Retailers Need to Know About The FLSA's Changing Overtime Exemptions

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What the DOL Proposal Contains

DOL issued its Notice of Proposed Rulemaking on July 6, 2015:

- Increase in salary level for standard exemption - \$50,400 in 2016 with automatic increases
- Requests for comments on:
 - Duties tests
 - Whether a time-based test like California is the better approach
 - How to deal with “concurrent duties”
 - Use of nondiscretionary bonuses to satisfy salary level

Comments are currently due September 4, 2015



The next 60 days....

- Seyfarth has published an Alert as well as a **blog related to your industry** regarding possible initial preparations
- Seyfarth is gathering a **comprehensive briefing** for the DOL to reiterate the business concerns with changes to the test and aspects of the new salary proposal
- Seyfarth is holding **roundtables** in all its offices to help the business community connect with each other on these issues and prepare responses to the DOL



Retailers are in the spotlight

- Early news stories highlighted retail manager's pay as inequitable (long hours, low pay)
- President's press release regarding this initiative in 2014 commented on retail managers being expected to work "50 to 60 hours a week" with no overtime pay
- DOL preamble addresses retail cases as rationale for addressing the duties test
- Current median average for retail manager pay is less than proposal at \$38,000
- Significant duties test change could impact major store operations



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



Labor Stakeholder Concerns

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



Salary Level Increase

- Proposal to increase salary level to 40th percentile of all full-time salaried employees
- Would be \$921 per week in 2015
- Expected to be \$970 per week in 2016
- DOL estimates 4.6 million currently exempt workers between \$455 per week and \$921 per week



Automatic Update of Salary Levels

Department proposes two options:

- Using fixed percentile of wage earnings
- Tying to CPI-U



Nondiscretionary Bonuses

- Considering monthly (or more frequent), nondiscretionary bonuses counting towards salary level
- Suggested cap of 10% of salary
- Would not allow discretionary bonuses, commissions to satisfy test
- Unclear how to handle where fail to earn bonus



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



The Duties Tests

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



Three Questions on Duties Tests Particularly Important to Retailers

- 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?
 - More reports/paperwork instituted to “demonstrate” exempt work
- Should there be a limitation on the amount of nonexempt work?
 - Basic customer service by manager would likely be nonexempt task (limit on customer interaction)
 - Ability of manager to work along side team in unloading, stocking shelves impacted
- 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?
 - Managers standing and observing – assigning tasks versus doing



What Does this Mean for Retailers?

- Smaller store formats and lower volume stores will be hardest hit (*i.e.*, stores with less than minimum staffing levels of 3 hourly employees)
- Assistant Retail Managers national average is well below the new salary threshold – is it time to convert Assistants nationally?
 - If you operate in CA, how is it managed there and can that model be financially successful in the Midwest, for example?
- A new time based duties test would create more litigation and could tie up GMs and DMs in bureaucratic paperwork versus driving sales



Possible Retail Positions Impacted

- General Manager
- Assistant Manager

But also,

- Call center supervisors
- DC/FC supervisors
- Other entry level corporate positions making under the salary threshold (analysts, inventory planners, etc.)



Next Steps: Operational (Pay Practices)

- **Prepare for Salary Increase**

- Establish baseline by identifying all managers under \$50,440 (with and without bonuses and commissions)
 - Gap analysis
 - Comp structure change (commission based?)
- Coordinate with the Recruiting Team on possible turnover issues and
- Determine how salary level may warrant a new profile for more highly paid candidates at exempt levels
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- **Plan for Financial Impact**

- Prepare FY16 budget for increases
- Assess ability to create IT or comp review processes to keep pace with annual increases
- Speak with Ops Team on store closures/openings in the next 12 months to ensure these finances are taken in to account
- Consider an audit of other nonexempt pay practices to ensure



Next Steps: Operational (Duties Test)

- **Prepare to Institutionalize Duties Change**

- Review long-term strategy for retail/on-line and analyze change in duties/labor hours/management needs
- Perform work sampling studies to reassess hourly labor needs for store tasks
- Audit your manager training, evaluations, and other collateral documents to ensure they capture the reality of retail management

- **Plan for Operational Change**

- Determine the level of multi-tasking done at store-level and does this vary by staffing and store volume
- Assess need for current management structure --begin transition in lower volume stores to keyholder model?
- Review long-term strategy for retail/on-line and analyze change in duties/labor hours/management needs



Next Steps - Advocacy

- Participate in Comment Process
 - Individual Comments
 - RILA and other trade association comments
 - Seyfarth Shaw Comments
- In the coming weeks, will be hosting informative roundtable discussions in several Seyfarth Shaw offices:
 - *Atlanta, GA: Wednesday, July 29, time TBD*
 - *Boston, MA: Date and time TBD*
 - *Chicago, IL: Wednesday, July 15 (4:00 p.m. - 5:30 p.m.) with reception to follow*
 - *Los Angeles, CA: Date and time TBD*
 - *New York, NY: Thursday, July 23, time TBD*
 - *San Francisco, CA: Thursday, July 23, time TBD*
 - *Washington, D.C.: Wednesday, July 22, time TBD*



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 Retail FLSA Taskforce:
 - RetailQuestions@seyfarth.com

Speaker Contact Information



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