



# 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 40<sup>th</sup> 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 40<sup>th</sup> 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 40<sup>th</sup> 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

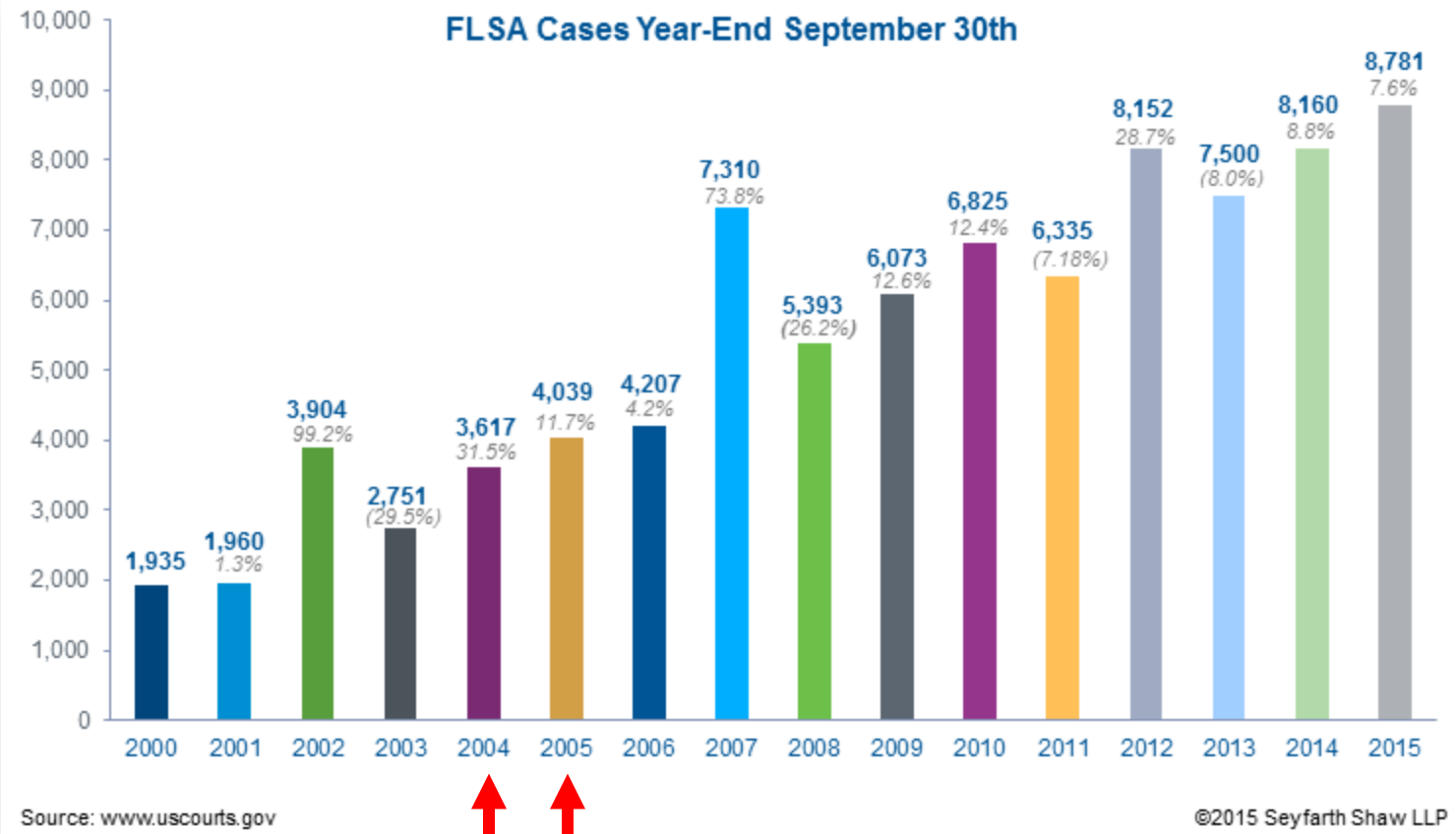
# The Risks Created By The New Rules



# 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



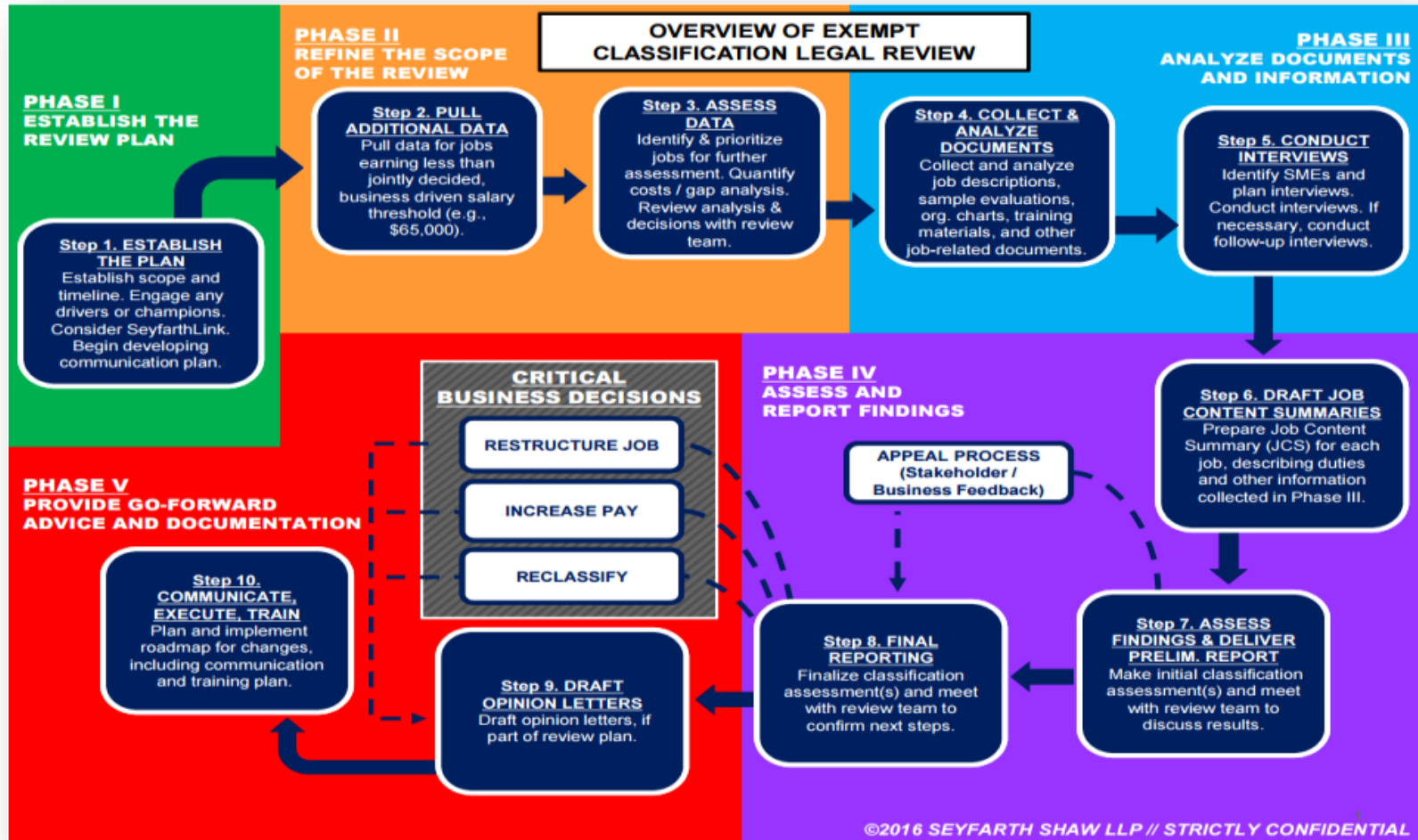
# **Risk Mitigation A Careful Plan**



# 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

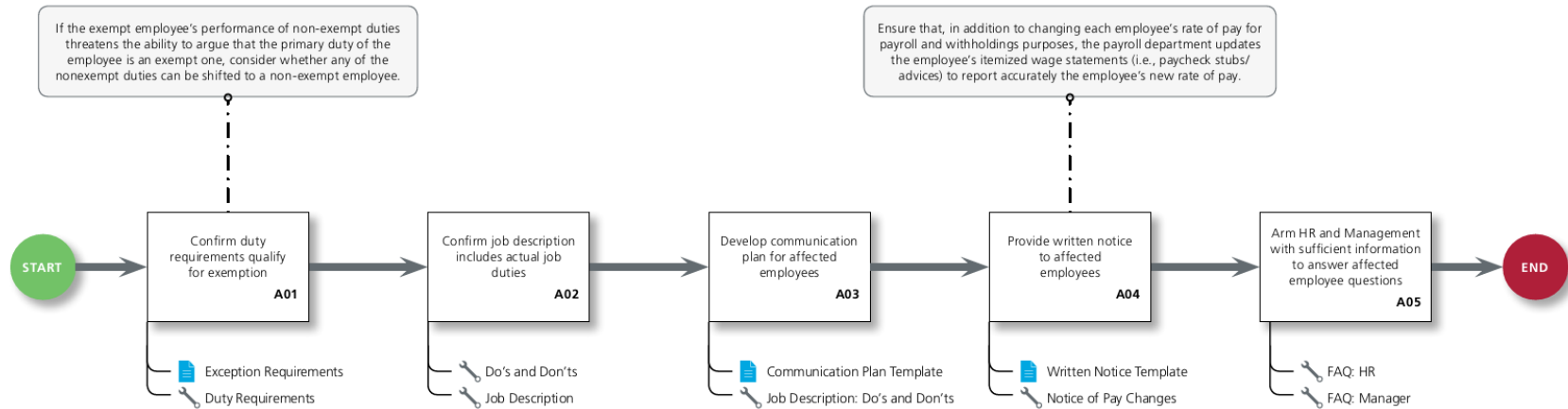


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# Exempt Salary Increase Process Map



## 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](http://www.restaurant.org/overtime)
- Visit Seyfarth's FLSA Exemption Resource Center
  - Go here:  
[www.seyfarth.com/OTRuleResources](http://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

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

**Thank You**



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