They’re Here: DOL’s Revised Exemption Regulations

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Alex Passantino, Richard Alfred, Brett Bartlett, Noah Finkel
Today’s Webinar Plan

• What are the DOL’s new FLSA exemption rules?

• What do the new rules mean for businesses?

• 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

- Seyfarth Shaw submitted Comments based on feedback from hundreds of employers who attended roundtable discussions across the country.
Steps Toward the Final Regulation

• Comments mattered

• DOL’s Preamble—part of the 508-page Rule announced this morning--contains many references to Seyfarth Shaw’s Comments, as well as to comments of other law firms and employer organizations

• Final regulation appears to take employer comments to heart

• Although many employer comments were not accepted, a number were. For example (among others):
  • Reduction of NPRM’s proposed minimum salary level increase
  • Less frequent automatic adjustments to exempt status minimum salary level
  • Inclusion in salary level, though limited, of bonuses, commissions, incentive payments
  • 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
Highly Compensated Employee Salary Level Increased More Than $34,000

• New Highly-Compensated Salary Level will be $134,004
  • More than $122,100 identified in NPRM
  • Represents 90th percentile of full-time salaried workers nationally as of Q4 of 2015
• Requires payment on a salary basis of at least $913/week
• Additional payments to bring to new level can include:
  • Commissions
  • Nondiscretionary bonuses
  • End-of-year catch-up payment
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 Businesses?
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; ½ 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; ½ 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
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

FLSA Cases Year-End September 30th

Source: www.uscourts.gov

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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
Implementation and Communication—Other Resources

• Visit The FLSA Exemption Resource Center
  • Go here: www.seyfarth.com/OTRuleResources

• Join us on Thursday for “From Fundamentals to Action”
  • Avoid hidden potholes and begin crafting your own compliant and sustainable implementation and communication strategy now
  • Go here: www.seyfarth.com/OTRuleActions
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

Alex Passantino
Washington, D.C.

Richard Alfred
Boston, MA

Brett Bartlett
Atlanta, GA

Noah Finkel
Chicago, IL

Need assistance?

Email: OTRuleHelp@seyfarth.com