

Preparing for the New Overtime Regulations

Presented By:

Caren Skversky Marlowe

LABOR & EMPLOYMENT
LAW

FROM A DIFFERENT
ANGLE

Ogletree
Deakins

June , 2016

Today's Goals

- **Summary of the new rules**
- **Preparing for December**
- **The 5 Step Program**
- **Communicating changes to employees**
- **Dealing with common issues**

The Final Rule

- **Effective December 1, 2016**
- **Raises salary threshold from \$455/week to \$913/week (\$47,476 per year)**
 - **Highly compensated employee exemption is now \$134,004 per year**
- **Automatic update to salary level every three years**
 - **DOL will post new levels 150 days in advance**

The Final Rule

■ Bonuses

- Employers will be able to meet up to 10% of the salary threshold by non-discretionary bonuses, incentive pay or commissions
 - These payments must be made on a quarterly or more frequent basis
 - Employer can make a catch-up payment no later than the first pay period at the end of the quarter to make up for any shortfall



The Final Rule – Unaffected Provisions

- **No Change to duties test**
- **Outside Sales – no change to provision that minimum pay is not required**
- **Computer Professionals – no change to hourly rate of \$27.63 or more**
- **Licensed Professionals – no change – still no salary requirement**
- **Retail Employees paid on commission – no change**



Preparing for December

According to the Department of Labor:

“Each affected establishment will need one hour to get up to speed with the changes.”

Preparing for December

- **Consider your budgets**
 - **What can the company afford to do**
 - **Consider costs for implementing changes/overhead**
 - **Consider costs to absorb and manage more overtime**

Preparing for December

- **Prepare to deal with morale issues**
 - **Going back to punching a clock may be seen as a loss of status**
 - **Employees may lose flexibility with schedules and autonomy**
 - **May see an increase in turnover**

Preparing for December

- **Consider the impact on services and business**
 - **Will new non-exempt employees be as productive working 40-hour/wk?**
 - **If no:**
 - **Will you decrease their pay and allow overtime?**
 - **Will you be lenient and allow overtime?**
 - **Will you lessen their workloads?**



The 5 Step Program for Compliance

- 1. Team and timeline**
- 2. Run a Report**
- 3. Generate options**
- 4. Pick options and get buy-in**
- 5. Implement, communicate and train**

Step 1: Team and a Timeline

- **Team should consist of Human Resources, Legal and Operations**
 - Those who will be part of the solution
 - Engage key stakeholders early in the process, educate and get their buy-in
 - Desirable to have legal oversight in an effort to maintain privilege for the review
- **Set weekly and monthly goals between now and December 1**

Step 2: Run a Report

- **Determine which employees are below the new salary levels and which are within \$5000 above the new levels**
- **Create a list by employee, position, salary, duties of impacted employees, and estimated weekly hours worked**
- **Review job descriptions for affected employees**

Step 3: Generate Options

- **Options for compliance**
 - **Increase salary to \$47,476**
 - **Reclassify employees to non-exempt using one of a variety of pay options**
 - **Restructure**
 - **Jobs**
 - **Workforce**
 - **Operations**
- **Develop models of various scenarios to determine cost and prudence of your options**

Step 3: Generate Options

- **Salary Increase to \$47,476 or above**
 - **Confirm duties test is met (when did you last perform an audit??)**
 - **Consider adding duties to account for the salary increase**
 - **Consider wage compression issues for employees in the same or similar salary band whose salaries are slightly above the new amount**
 - **Consider how salary increase will impact merit increases/pay raises**

Step 3: Generate Options

- **Reclassification - identifying the hours worked**
 - **Try to accurately model the cost of reclassification - identify the number of hours impacted employees work**
 - **Look at swipe records, computer use records, etc.**
 - **Time studies – talk to manager**
 - **If you cannot get good data on hours worked, run several models based on hours worked assumptions**

Step 3: Generate Options

- **Common reclassification pay options to run in your model**
 - **Option A: Hourly – straight hourly rate for hours worked up to 40; 1.5 x regular rate of pay for hours worked over 40**
 - **Option B: Salary plus overtime - salary for hours worked up to 40; 1.5 x regular rate of pay for hours worked over 40**
 - **Option C: Fluctuating workweek – agreement with employee to pay salary for all straight-time hours; $\frac{1}{2}$ x salary divided by hours worked for OT**

Option A(1)

- **Pay employees an hourly rate equal to their salary before reclassification**
 - This will increase labor costs
 - May incentivize off-the-clock work
 - But, employees would feel they were treated fairly
- **Example: Exempt EE earns \$37,000/year. This is \$711.54/week. A straight conversion for 40 hours a week = hourly rate of \$17.79**
 - O/T hours by this employee would be paid at a rate of 1.5 x \$17.79 (or \$26.69)

Option A(2)

- **Adjust salary to reallocate it between the regular wages and overtime; hourly rate cannot fall below the highest applicable minimum wage**
 - **EE earns back their former salary through anticipated overtime**
 - **Minimizes financial impact**
 - **Could harm EE morale**

Option A(2)

- **Example: Same EE earns \$37,000/year. Investigation shows EE works 45 hours/week. You choose to pay \$15 per hour**

\$600.00/week at regular rate (40 hours x \$15/hr

+ \$122.50/week OT (5 hours of OT x \$15/1.5)

= \$712.50/week total earnings

Option B

- **Salaried Non-Exempt**
 - **Reclassify EEs and continue to pay a salary plus overtime for hours worked in excess of 40**
 - **Law does not require non-exempt employees to be paid on an hourly basis**
 - **In some situations, salary continuation for non-exempt employees is preferable (e.g.) if a position generally does not work overtime**

Option B

- **Example:** EE currently earns a fixed salary of \$41,600/year (or \$800/week). She generally works only 40 hour workweeks
 - EE could continue to be paid the same fixed salary, but any hours over 40 would be compensated at \$30/hour ($\$800/40 = \20 regular rate $\times 1.5 = \$30$ OT rate)
 - REMINDER – hour tracking and record keeping

Option C

- **Fluctuating Workweek**
 - Permits Employers to pay non-exempt EEs a fixed salary when the EE's hours fluctuate week to week
 - Benefit – only need to pay an additional .5 multiplier rather than standard 1.5
 - Important – (a) must tell EE that the fixed salary is comp for all hours worked each week, whatever their number; and (b) pay a salary large enough to ensure EEs earn more than minimum wage

Reclassification – Big Picture

- **Even if EEs makes more money, many will consider it demeaning or a demotion**
- **Consider creating new pay grades/job titles**
- **Improve job descriptions**
- **Consider how changes will impact entitlement to benefit program**
- **Determine whether and how you will impose limits on hours worked**

Restructuring

- **Restructuring or eliminating jobs**
 - May discover that certain positions do not satisfy duties prong
 - May determine that the added cost from potential overtime does not warrant continuation of jobs as is
- **Options include:**
 - Hiring new part-time EEs
 - Outsourcing
 - Redistributing workloads
 - Convert PT to FT with capped hours



Step 4: Pick Options and Get Buy-In

- Make recommendations for increases, reclassification or restructuring
- Make sure you have stakeholder buy-in on changes
- With legal, draft opinion letters if appropriate or necessary



Step 5: Implement, Communicate and Train

- **Communicate**
 - A clear communication plan is the most important component
- **Train and train (and document!)**
 - Any EE being converted to non-exempt is subject to the same wage & hour rules as other non-exempt employees
 - Accurate timekeeping
 - Meal and rest breaks
 - Remote access

Communication

- **Timing**
 - **Do not wait until November 30**
- **Rolling notice**
 - **Regular communications**
 - **Consider communicating changes by department, business unit, location**
 - **Hold question and answer sessions**
- **Consistent, unified message**
- **Emphasize the positive**

Communication

- You and EE should sign any document communicating pay or structural changes
- Comply with state specific rules about communications concerning the timing of a pay change
- Consider who should issue the communication



Handling Common Concerns

- **Benefits**
 - **Some benefits or plans are tied to a salary or classification**
- **Merit and performance increases**
- **Back pay for reclassified positions**
- **Payroll errors**

HR TAMPA PRESENTATION

Questions?

LABOR & EMPLOYMENT
LAW

FROM A DIFFERENT
ANGLE

Ogletree
Deakins

May 18, 2015