

# Preparing for Change: DOL's Final Rule on Overtime

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Presented for the U.S. Chamber of Commerce

**Littler**<sup>®</sup>

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# Agenda

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A Quick Review

DOL's Final Rule

Preparing for Change



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## **A QUICK REVIEW**

# 29 U.S.C. § 213(a)(1)



- The “white collar” exemption is a complete minimum wage and overtime exemption for *bona fide* executive, administrative, professional and outside sales employees
- “as such terms are defined and delimited from time to time by regulations of the Secretary subject to the provisions of [the Administrative Procedure Act]”

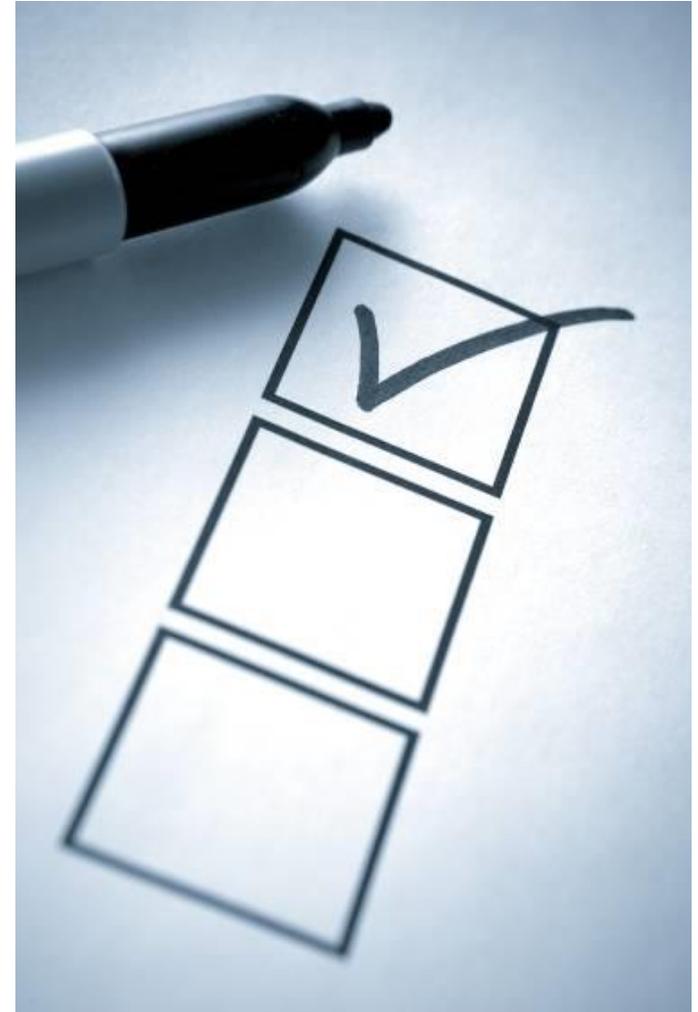
# 29 C.F.R. Part 541

- DOL has defined the “white collar” (or “EAP”) exemptions in regulations at 29 C.F.R. Part 541
  - Executive
  - Administrative
  - Learned Professional
  - Creative Professional
  - Computer
  - Outside Sales



# Three Tests for Exemption

- Salary Level
- Salary Basis
  - Salary level and basis tests do not apply to lawyers, doctors, teachers or outside sales
  - Computer employees can be paid by the hour (\$27.63)
- Duties



# The Rulemaking Process



- March 2014, Memorandum: President Obama directs Secretary of Labor Perez to revise the overtime regulations
- Summer 2014, Secretary Perez held “listening sessions” with stakeholders including U.S. Chamber members
- July 6, 2015, Wage & Hour Administrator Weil issues the NPRM, proposing changes to the Part 541 regulations.
- September 4, 2015, the comment period closed after nearly 300,000 comments were filed, a DOL record
- March 14, 2016, DOL sends Final Rule to White House Office of Management & Budget for review
- May 18, 2016, DOL publishes the Final Rule



# U.S. Chamber Public Comments

- Acknowledged that an increase in salary level is due, but said \$50,000 is too high
  - Suggested a 3 to 5 year phase-in period
- Supported counting bonuses towards salary level, but also stated:
  - Commissions should also count
  - Bonuses paid quarterly or annually should also count
  - Should not be limited to just 10%
- Strongly opposed annual increases
  - Not authorized by FLSA—would impose increases without input from employers, or any rulemaking process
- Objected to any changes in the duties tests because of DOL's failure to provide sufficient notice

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# **DOL FINAL RULE**

# What is NOT Changing

- No changes to the salary *basis* test
- No changes that impact outside sales, teachers, lawyers or doctors
- No changes to the duties tests
  - No changes in the definition of primary duty
  - No changes to the concurrent duties provision



# Minimum Salary Level

\$913 per week (\$47,476 annualized)

- Up from the current \$455 per week (\$23,660 annualized)
- Down from DOL's proposed \$50,440
- Set at the 40th percentile of full-time non-hourly paid employees in the lowest wage Census region (South)



# Bonuses and Commissions

Nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly, can satisfy up to 10% of the minimum salary requirement



# How Will This Work?

- Each workweek, the employer must pay the exempt employee a salary of at least 90% of the minimum salary level – \$821.70 (\$42,728.40 annualized)
- At the end of the quarter, if that salary plus all bonuses/commissions paid during the quarter do not equal \$11,869 (1/4 of \$47,467), to maintain the exemption, the employer has to make up the shortfall in the first pay period of the next quarter.
- **Question:** What if an employee leaves in the middle of a quarter?



# Highly Compensated Employees



\$134,004 total annual compensation

- Up from the current \$100,000
- Up from DOL's proposed \$122,000
- Set at the 90th percentile of full-time non-hourly paid employees nationwide

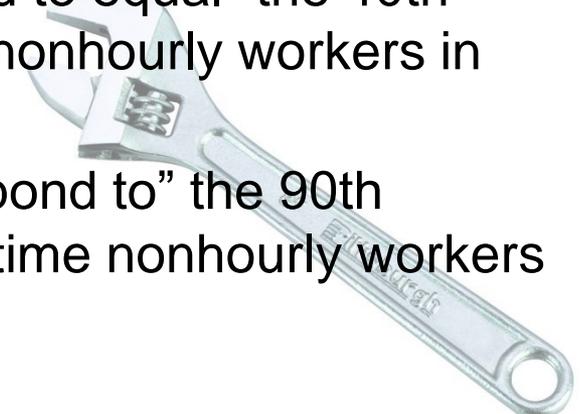
# Automatic, Annual Increases



The salary levels will automatically increase every 3 years, beginning January 1, 2020

# How Will This Work?

- DOL will provide notice of the new salary levels “not less than 150 days before the January 1<sup>st</sup> effective date” in the Federal Register and at [www.dol.gov/whd](http://www.dol.gov/whd)
- New levels will be based on BLS Current Population Survey data from the second quarter of the year preceding the update
  - The minimum salary level will be “updated to equal” the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region
  - The HCE level will be “updated to correspond to” the 90th percentile of weekly earnings data of full-time nonhourly workers nationally
- **Question:** Can the levels go down?



# Effective Date

- December 1, 2016
- But remember, some states require advance notice to employees of changes in pay
  - In some states only apply to reductions in pay
  - Most common is 7 days or one pay period
  - Longest is 30 days in Missouri for reductions in pay
- **WARNING**: Healthcare employers who provide Medicaid services also must comply by 12/1
  - DOL’s “non-enforcement” policy **does not** prevent employees from bringing private litigation

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# PREPARING FOR CHANGE

# Path to Stop or Modify the Rule?

- Protecting Workplace Advancement and Opportunity Act (S. 2707/H.R. 4773)
  - Introduced March 17, 2016 by Senate and House Republicans; even if passed, unlikely to withstand President Obama's veto
  - Would nullify final rule
  - Would require better economic analysis and prohibit automatic salary increases, and changes to duties test w/o notice and comment
- Congressional Review Act
  - Requires joint resolution of Congress within 60 *legislative* days of publication of the Final Rule
  - CRA will not be available for regulations published by May 16
  - President Obama would veto

# Path to Stop or Modify the Rule?

- **Litigation Challenge**
  - Challenges possible to both the very high salary level and the automatic salary increases
- **New Notice of Proposed Rule Making**
  - An incoming Republican administration could restart the regulatory process
  - Most likely also would be limited to automatic salary increases
  - Difficult to walk back from the salary level increase

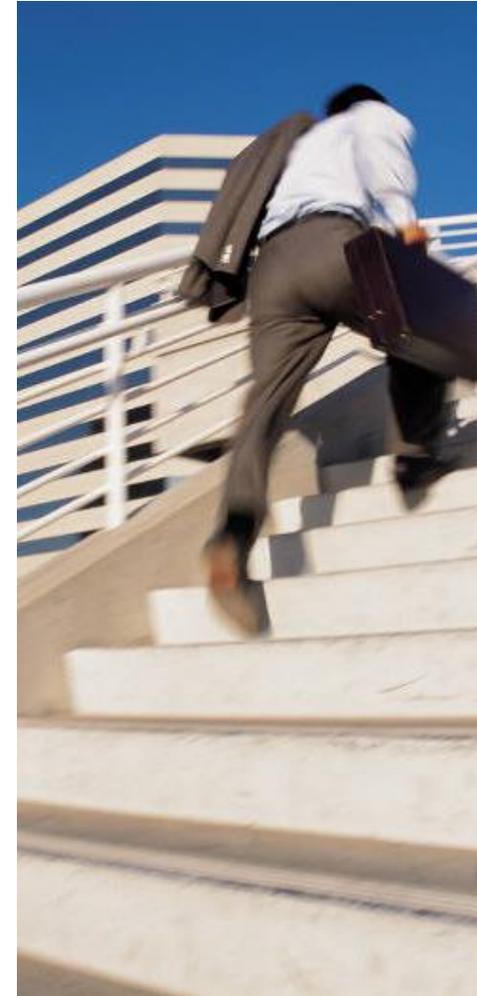
# Preparing for Change

- Bottom line: The new rules are ***not*** going to go away
- Determining who to reclassify and implementing reclassification can take up to ***six months***
- December 1<sup>st</sup> will be here before you know it
  - State laws notice of pay changes 7 to 14 days in advance (30 days in Missouri for reductions in pay)
- Don't wait! Start ***NOW!***



# Compliance, Step-By-Step

1. Identify employees who need to be reclassified
2. Develop new compensation plan for the reclassified employees
3. Review wage-hour policies and processes
4. Communicate the changes
5. Train the reclassified employees and their managers



# Identify Jobs for Review

- Jobs paid below \$47,476 annual salary
  - Or, below \$42,728.40 annual salary with at least \$4,747.60 in bonuses and commissions
- Also, consider a job duty review
  - Even if salary level is not an issue, you may have employees who do not meet the duties requirements for exemption under the current regulations
  - Rare opportunity to correct classification issues with reduced risk of triggering litigation



# Salary Increase or Overtime?

- Pull salary and incentive pay data
- Calculate the cost of increasing salary to \$47,476
  - Consider lowering incentive pay to offset salary increase
- Calculate the cost of overtime
  - How many hours are exempt employees are working?
  - $(\text{Weekly salary} / 40) \times 1.5 \times \text{expected overtime hours}$



# Cost-Neutral Solution

## **Weekly Salary / (40 + (OT Hours x 1.5))**

- With a good estimate of expected weekly work hours, applying this formula will provide an hourly rate which will result in the same weekly and annual compensation
- Yes, its legal – DOL gave us this formula in the preamble to the 2003 Notice of Proposed Rulemaking (68 F.R. 15576)

# We Have An App For That!

This application will help you decide how to treat exempt employees earning more than \$47,476 annually by calculating the estimated cost of:

- Raising the employee's salary to meet the new minimum requirement
- Reclassifying the employee as non-exempt and paying overtime at the level or hourly rate equivalent (salary/40 hours)
- Reclassifying the employee as non-exempt, but setting the additional labor costs

Please complete the following fields.

\*What is the employee's annual salary?

\$

\*Do you expect the employee to work more than 40 hours in a week?

Yes  No

\*Did the employee earn any of the following in the company's last year?

- Bonus Compensation
- Commissions
- Other Compensation
- None of the Above

## Overtime Cost Report

You have chosen to convert some or all of bonuses, commissions and/or other compensation into base wages in order to off-set increases in labor costs because of Department of Labor's new minimum salary requirement for overtime exemption. The employee's new total base pay will be **\$37,500.00**.

Under the final regulations, nondiscretionary bonuses and incentive payments (including commissions) paid at least a quarterly basis can satisfy up to 10 percent (**\$4,747.60**) of the salary test requirement. The calculation performed here assumes that any bonuses, commissions or other compensation entered are nondiscretionary (as defined in the regulations). To the extent allowed, any bonuses, commissions or other compensation will be taken into account in determining the whether or not the salary requirements were met.

Below are your options for compliance.

### Option 1: Maintain the exemption by increasing salary.

To maintain the exemption from the FLSA overtime requirements, you could increase the employee's salary to **\$7,476.00**.

### Option 2: Reclassify to non-exempt but maintain current salary and pay overtime.

If you reclassify the employee to non-exempt, converting the bonuses, commissions, and/or other compensation into base wages as you selected, but without any other changes in compensation, the additional overtime pay will add **\$7,572.12** in additional labor costs. If you did not choose to convert bonuses, commissions, and/or other compensation into base wages, you will owe additional overtime pay on such compensation.

### Option 3: Reclassify at Cost Neutral Hourly Rate

If you reclassify the employee to hourly non-exempt with an hourly rate of **\$15.00** and the employee works an expected 7 overtime hours per week for 40 weeks, the employee should have approximately the same cost.

This figure does not account for any state or local minimum wage requirement, which will increase cost if the applicable rate is higher.

# Job Review Process

- Conduct under the attorney-client privilege
- Review HRIS Data – salaries, bonuses, direct reports, educational degrees
- Review Documents – job descriptions, training materials, performance expectations
- Interview SME managers
- Legal analysis to determine if job duties qualify for an exemption



# ComplianceHR has an App for that

- A first-of-its-kind online and intelligent solution delivering expert level risk assessments on overtime exemptions at internet scale and speed
- Results after spending 10 to 15 minutes completing an on-line questionnaire about job duties
- Visit [compliancehr.com](http://compliancehr.com) for more information

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## Overtime Exempt Risk Report for Jane Doe



### EMPLOYEE

Jane Doe  
Engineering



### MANAGER

John Smith  
Accounting



### LOCATION

Illinois

What is the risk of classifying Jane Doe as an exempt employee?



Very Low

Jane Doe is very likely to meet the requirements for the following exemption: Administrative.

Jane Doe is likely to meet the requirements for the following exemption: Learned Professional.

Jane Doe is very unlikely to meet the requirements for the following exemption: Executive.

Jane Doe does not qualify for the following exemptions: Computer, Creative Professional and Outside Sales.

▶ [View All Individual Exemption Risks](#)

**FOR MORE INFORMATION ABOUT YOUR RESULTS PLEASE SEE THE RESOURCES BELOW:**

- ▶ [Understanding Your Risk](#)
- ▶ [Summary of Law](#)
- ▶ [Transcript of Your Questions and Answers](#)
- ▶ [Disclaimer](#)

# After the Reclassification Decision



**So many choices  
So little time!**

# Compensation Plan Redesign

- Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
- Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
- How will we calculate overtime for salaried non-exempt employees?
  - Divide salary by 40
  - Divide salary by actual hours worked
  - Fluctuating workweek
- Will we continue to provide incentive compensation?
- Do we need to make changes to any benefits?

# Review Policies and Processes

- Policies
  - Off-the-clock work
  - Meal and rest break
  - Travel time
  - Mobile device
- Processes
  - Timekeeping
  - Payroll changes
  - Controlling overtime hours



# Communicate the Changes

- Need to communicate with senior management, managers of reclassified employees and the employees themselves
- Key decisions
  - Who will communicate the changes?
  - What will be communicated?
  - How will changes be communicated?
  - When will the changes be communicated
- Prepare talking points and FAQs

# Training

- Train the reclassified employees and their managers
  - Wage & hour policies
  - Timekeeping procedures
  - Activities that are compensable work

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# Littler Can Help!

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All the tools you need to reclassify employees, with access to an SME wage and hour attorney, for one modest fixed-fee

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Xmpt  
Toolkit

Thank  
You!



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