

# **Managing Changes in the Department of Labor's Overtime Rules**

**July 12, 2016**

**Littler®**

# *Presented By:*



**Andrew Voss**  
Minneapolis, MN  
AVoss@littler.com  
612.313.7605

**Tammy McCutchen**  
Washington, DC  
TMcCutchen@littler.com  
202.414.6857



# Agenda

---

A Quick Review

DOL's Final Rule

Preparing for Change



Managing Changes in the  
Department of Labor's Overtime Rules

# A QUICK REVIEW

# The Fair Labor Standards Act



- Requires employers to pay employees at least the minimum wage and overtime pay for work over 40 hours in a week
- Since enacted in 1938, the FLSA has included exemptions from the minimum wage and overtime requirements for 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]”

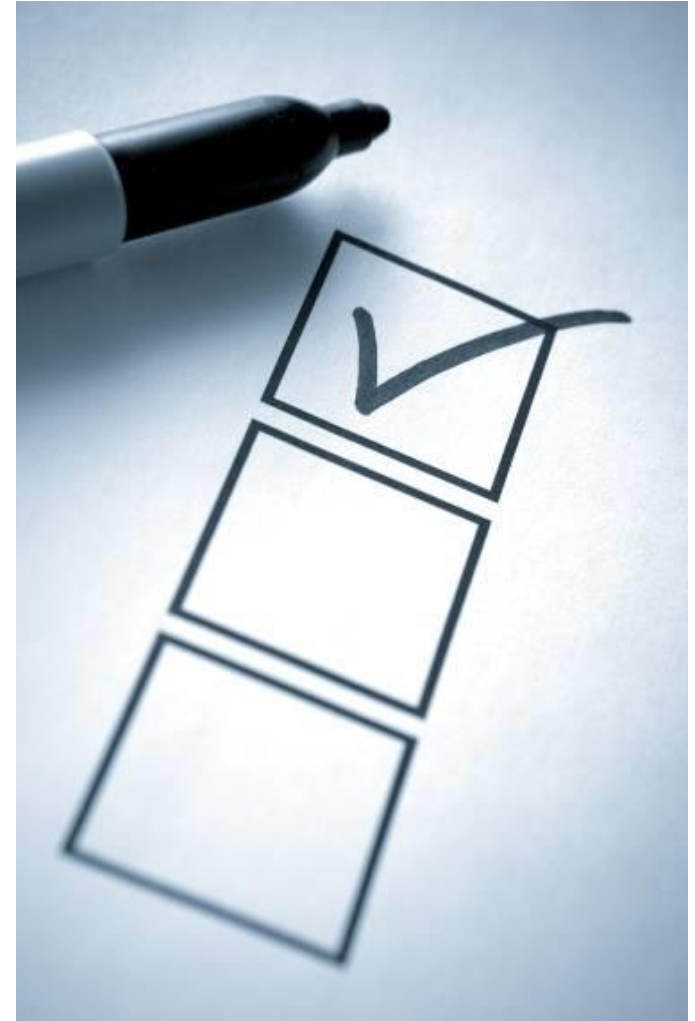
# 29 C.F.R. Part 541

- 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
  - Exempt employees must be paid their full salary for any week in which they perform any work
  - 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
- 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





# The Proposed Rule

- Salary Level
  - Set the minimum salary required for exemption at the 40th percentile of weekly earnings for full-time salaried employees – \$970 per week (\$50,440 annualized)
  - Allow nondiscretionary bonuses paid monthly or more frequently to satisfy up to 10% of the minimum salary level
  - Automatically increase the minimum salary levels annually based either on the 40<sup>th</sup> percentile or inflation (CPI-U).
- Duties Tests (Anticipated)
  - Limiting the amount of time exempt employees can spend performing non-exempt work
  - Adopt California primary duty 50% rule



# Public Comments

- Some employers and employer organizations, including NAA, acknowledged that an increase in salary level is due, but most said \$50,000 is too high
  - Some employers suggested a 3 to 5 year phase-in period
- Employers 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%
- Near universal opposition to annual increases
  - Some commenters suggested an alternative of automatic increases every 5 years
- Employers objected to any changes in the duties tests because of DOL's failure to provide sufficient notice and disruptive impact

Managing Changes in the  
Department of Labor's Overtime Rules

# 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



# Duties Analysis Remains the Same

## **For Newspaper Employers:**

- *Creative Professionals*: Regulation describing exempt-level work by journalists (29 C.F.R. 541.302(d)) remains unchanged; work that requires invention, imagination, originality or talent may qualify as exempt.
- *Newspaper Delivery*: FLSA continues to exempt employees who are engaged in the delivery of newspapers to consumers (29 U.S.C. 213(d)).

# 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 is the lowest wage Census region (South)



# Bonuses and Commissions

Nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly, can satisfy up to 10 percent 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 (13 weeks), if that salary plus all bonuses/commissions paid during the quarter do not equal \$11,869 ( $\$47,476 \div 4$ ), 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 Salary Level Increases



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

# Effective Date

- December 1, 2016
  - Typical DOL: yes, that is on a Thursday!
- But remember, some states require advance notice to employees of changes in pay
  - In some states only applies to reductions in pay
  - Most common is one pay period
  - Longest is 30 days in Missouri for reductions in pay



# What About State Law?

- 18 States have duties requirements that differ from the federal regulations
  - 4 states have a minimum salary level higher than the current \$455
    - Alaska
    - California
    - Connecticut
    - New York
- Employees must be paid overtime unless exempt under both the federal FLSA and State Law
    - The higher FLSA salary level, and
    - The more difficult State duties tests

Managing Changes in the  
Department of Labor's Overtime Rules

# PREPARING FOR CHANGE

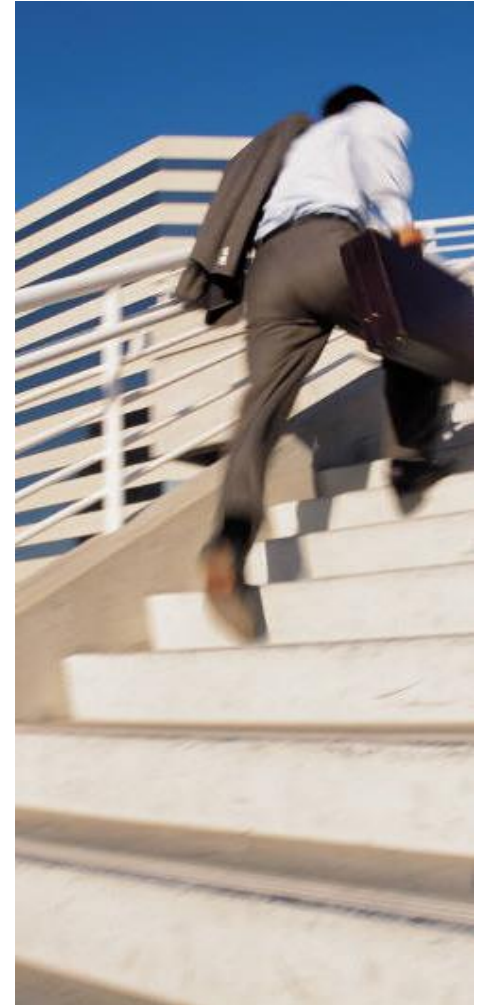
# Preparing for Change

- 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
- Don't wait! Start ***NOW!***



# Compliance, Step-By-Step

1. Identify employees who need a salary increase or 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





# Salary Increase or Overtime?

- Pull salary and incentive pay data for all employees earning below \$47,476 annual salary
  - Or, below \$42,728.40 annual salary with at least \$4,747.60 in bonuses and commissions
- Calculate the cost of increasing salary to \$47,476
  - Consider a “re-mix” – lowering incentive pay to offset salary increase
- Calculate the cost of overtime
  - How many hours are exempt employees are working?
  - $(\text{Weekly salary} / 40) * 1.5 * \text{expected overtime hours}$





# 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)

# ComplianceHR Has an App for That!

Compliance**HR** OT Cost Estimator

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

☒ Yes ☐ No



\*How many hours over 40 in a workweek do you expect the employee to work?

3

\*How many weeks do you expect the employee to work the overtime hours?

50

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

☒ Non-Discretionary Bonus

☐ Commissions

☐ Other Incentive Pay

☐ None of the Above

**Important:** Under the 2016 regulations, [nondiscretionary bonuses](#) and incentive payments (including commissions) that are paid on at least a quarterly basis can satisfy up to 10 percent (\$4,747.60) of the salary test requirement.

Accordingly, you can choose either to (1) convert all or part of an employee's bonuses, commissions or other incentive pay to base pay in order to meet the minimum salary requirement for exemption, and/or (2) maintain all or part of an employee's bonuses, commissions or other incentive pay and, if paid quarterly or less frequently, use 10% of such compensation to count towards the minimum salary level.



\*What was the total amount of the employee's nondiscretionary bonus in the last fiscal year?

\$

2700.00

\*What percentage of the bonus would you like to convert to base pay (in order to reduce increased labor costs)?

50

%

Answer a few questions  
regarding salary, bonuses  
and hours worked.

Show My Report >

# The Overtime Cost Estimator FREE @ [www.ComplianceHR.com](http://www.ComplianceHR.com)

Compliance **HR** OT Cost Estimator

## 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 requirements for exemption. The employee's new total base pay will be **\$28,350.00**.

Under the final regulations, nondiscretionary bonuses and incentive payments (including commissions) paid on 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 were 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 by **\$17,776.00**.

**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 **\$3,066.71** 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 **\$12.30** and the employee works the expected 3 overtime hours per week for 50 weeks, the employee should have approximately the same earnings.

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

**IMPORTANT:** If you reclassify an employee to non-exempt but continue to pay bonuses, commissions or other compensation, you must pay additional overtime on such compensation.

And with one click,  
compare:

- The cost of a salary increase
- The cost of paying overtime
- The cost-neutral hourly rate

Recalculate

# 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
- With other employees being reclassified because of the salary issue, reclassifications because of job duties should fly under the radar



# 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 Too: Navigator OT

- 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](https://compliancehr.com) for more information

Compliance **HR** Navigator OT

Save & Logout

## 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?

Low



High

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

**Littler Learning Group**  
Compliance Training Solutions Worldwide

**NAVEX** GLOBAL™  
The Ethics and Compliance Experts



# Reclassification Help

The logo for Littler, featuring the word "Littler" in a green, sans-serif font. A vertical line is positioned to the right of the text.The logo for the Xmpt Toolkit, featuring the text "Xmpt" in a large, dark grey font and "Toolkit" in a smaller, green font below it.

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

<b>Reclassification Work Plan</b>	The reclassification process, explained step-by-step.
<b>Communications Plan Template and Materials</b>	A guide to communicating the changes to employees and their managers, including talking points and FAQs.
<b>Training Webinars and Presentations</b>	Learn all you need to know on exemption requirements, hours worked, overtime pay calculations, timekeeping and payroll best practices.
<b>Template Policies and Agreements</b>	National and state-specific policies on off-the-clock work, meal and rest breaks, travel time and flexible workweek agreements.
<b>Wage and Hour Field Guides</b>	Comprehensive state-by-state guides to wage and hour laws to help answer everyday questions and identify critical areas of compliance.
<b>Littler Wage and Hour GPS</b>	A library of state-by-state surveys on a variety of wage-hour topics and substantive analysis of new legislation and regulations.
<b>Wage and Hour Counseling</b>	Four hours of attorney time with a wage and hour subject matter expert.

Thank  
You!



**Littler**<sup>®</sup>

## Managing Changes in the Department of Labor's Overtime Rules

**Andrew Voss**

Minneapolis, MN

AVoss@littler.com

612.313.7605

**Tammy McCutchen**

Washington, DC

TMcCutchen@littler.com

202.414.6857