



Welcome!

THE NEW OVERTIME RULE:

Yes, It Really Is Happening – Are You Ready?

Presented by Susan M. Parrott and Kerry A. Shad





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Ms. Shad's practice focuses on representing employers in connection with all aspects of employment-related litigation and counseling. She has represented clients in state and federal courts throughout the country, including North Carolina, Arizona, California, Florida, Georgia, Illinois, New York, Pennsylvania, South Carolina, and Tennessee. Her experience includes defending individual, class and collective action claims of discrimination, harassment, wrongful discharge, retaliation, and wage and hour violations; representing clients in investigations by state and federal Department of Labor and The Equal Employment Opportunity Commission and similar agencies; serving as "in-house" employment litigation counsel to large company managing employment litigation across the country; and representing clients in disputes involving alleged violations of non-competition agreements.




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Ms. Parrott regularly assists clients in complying with state and federal employment-related laws and preventing employee lawsuits. Her experience includes identifying and managing employment-related issues in mergers, acquisitions, reorganizations, and plant closings, and developing and interpreting employment, non-competition, confidentiality, and severance agreements. Her appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. Prior to attending law school, Ms. Parrott worked for the United States Environmental Protection Agency and obtained a Masters Degree from the University of North Carolina, School of Public Health.

Topics for Discussion

- FLSA – The Basics
- Steps Toward the Final Rule
- What the New Rule Does
- What the New Rule Doesn't Do
- What Employers Should Do Now

FLSA – The Basics

- Federal Fair Labor Standards Act and Regulations
 - Minimum Wage and Overtime
 - Exemptions
- White Collar Exemptions
 - Executive
 - Administrative
 - Professional

“EAP” – focus of the New Rule

- Highly Compensated Employees – **focus of the New Rule**
- Outside Sales – **No effect**
- Computer-Related Occupations – **No effect**
- Three Part Test for Exemption (salary basis, salary level, duties) – **must satisfy all 3; salaried ≠ exempt**

Steps Toward the Final Rule

- March 2014 – President Obama’s directive
- July 2015 – Proposed Rule; comment period
- May 2016 – Final Rule issued
- December 1, 2016 – Effective Date for Final Rule

What the Final Rule Does

Key Provisions:

- Salary level
 - Sets the standard salary level at \$913/week or \$47,476/year (the 40th percentile of earnings of full-time salaried workers in the lowest wage Census Region)
 - Up from \$455 per week (\$23,660 per year)

What the Final Rule Does

Key Provisions:

- Highly Compensated Employees
 - Sets the total annual compensation requirement for HCE at \$134,004 (the 90th percentile of full-time salaried workers nationally)
 - Up from \$100,000 per year

What the Final Rule Does

Key Provisions:

Bonuses, Incentive Payments and Commissions

- Permits the use of non-discretionary bonuses, incentive payments and commissions to satisfy up to 10% of the standard salary level (other fringe benefits do not count)
 - Must be paid at least quarterly
 - At least 90% of minimum salary level paid each week - \$821.70
 - At end of quarter, to keep the exemption the employer must pay any shortfall if the salary paid plus bonuses / commissions do not equal $\frac{1}{4}$ of the annual minimum salary level of \$11,869 ($\$47,476 \div 4$)
 - HCEs must receive at least full salary level each pay period without regard to bonuses and incentive pay; bonuses and incentive pay can count towards total annual compensation

What the Final Rule Does

Key Provisions:

- Includes a mechanism for automatic updates to the salary level every three years starting January 1, 2020
 - Expected to exceed \$50,000 by 2020
 - HCE threshold likely to exceed \$147,000 by 2020
 - DOL will give notice of new level at least 150 days before January 1 effective date

What the Final Rule Does

- Becomes Effective December 1, 2016
 - That's a Thursday
 - Implement changes to apply to that workweek
- Check state law for advance notice requirements regarding change in pay

What the New Rule Doesn't Do

- No change in Salary Basis Test
 - Employee receives predetermined amount of compensation each pay period
 - No reduction because of variation in quantity or quality of the work performed
 - Generally, must receive full salary for any week in which employee performs any work
 - No docking of salary except for reasons delineated in the regulations (full personal days; full sick days; penalty for violation of safety rule; etc.)

What the New Rule Doesn't Do

- No change in the Duties Test
 - Each exemption must satisfy the primary duty tests delineated in the regulations
 - No set percentage of time for exempt duties (but be aware of different state laws that might impose a percentage)

What Employers Should Do Now

- Review pay/incentive compensation data to identify all exempt employees earning salary of less than \$47,476 annually (\$42,728.40 if have at least \$4,740.60 in bonuses/commissions)
 - Calculate cost of increasing the salary and/or using non-discretionary bonuses to hit the new level
 - Calculate the cost of OT
 - Estimate the OT if reclassified
 - Decide whether to increase salary or pay OT

What Employers Should Do Now

- Review job duties for all exempt employees
 - Remember, salaried does not mean exempt
 - If job duties test not met, must reclassify
 - Review under Attorney-Client Privilege
 - Job descriptions
 - Performance appraisals/expectations
 - Training materials
 - Direct reports
 - Level of education required
 - Talk to managers/supervisors who understand the duties of the position

What Employers Should Do Now

After review, will have 3 lists:

1. Employees who are already paid on a salary basis at or above the new level AND who pass the job duties test – NO CHANGES NEEDED
2. Employees whose salary/incentive comp will need to increase to retain exemption (assuming they pass the job duties test)
3. Employees who must be reclassified (either employer doesn't want/or can't afford to increase salary or employee doesn't pass the job duties test)

What Employers Should Do Now

- If Reclassification is Necessary, What are the Options?
 - Convert to hourly
 - Reduce hourly rate to neutralize effect of OT
 - Formula: $\text{Weekly salary} / (40 + (\text{OT Hours} \times 1.5))$
 - COMPLIANT NATIONALLY
 - Convert to salaried non-exempt and pay overtime for hours over 40
 - OT rate is 1.5 times salary \div 40
 - Most expensive
 - Can reduce salary to neutralize the effect of OT
 - COMPLIANT NATIONALLY

What Employers Should Do Now

- Fixed salary for fixed hours
 - Must be an agreement
 - OT rate can change each week
 - NOT LEGAL IN ALL STATES
- Fluctuating workweek
 - Must have agreement
 - Straight time for all hours in workweek (at least MW)
 - Hours must fluctuate
 - NOT LEGAL IN ALL STATES

What Employers Should Do Now

- Bonuses/Incentive Compensation/Commissions
 - Decide whether to continue to pay to non-exempt employees
 - If do pay, OT calculation must include these payments
 - Pay OT in same check as bonus is paid

What Employers Should Do Now

- Consider Effect on Benefits
 - Does reclassification to non-exempt affect entitlement to or reduce level of certain benefits?
 - Ensure treatment is consistent with plan documents
 - If want to allow reclassified employee to retain prior level of benefits, may need to change plan documents

What Employers Should Do Now

- What if Exempt and Non-Exempt Employees are in same job?
 - Only difference is salary
 - Permissible, but not a best practice
 - Create different levels

What Employers Should Do Now

- Review policies and procedures
 - Off the clock work
 - Travel time
 - Mobile devices
 - Meal and rest breaks
 - Timekeeping
 - Change in payroll
 - Limits on overtime hours

What Employers Should Do Now

- Develop communication plan
 - All levels of management and the affected employees
 - Explain the changes
 - DOL requirement
 - OT eligibility
 - Timekeeping
 - Pay changes if any (e.g. converting to hourly or reducing salary)
 - Don't forget about state required notice
 - Whether any benefits are affected
 - Restrictions on work outside of normal work hours
 - Prepare FAQs/talking points

What Employers Should Do Now

- Train Managers and Employees
 - What counts as “work”
 - Timekeeping
 - Avoid off the clock work
 - Wage and hour policies generally