The Impact of the New Overtime Regulations in Higher Education and How to Implement Balancing Cost and Cultural Considerations

AICUM Fall Symposium
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Presentation Overview

- Legislative Overview - Highlights of Revisions to the Fair Labor Standards Act (FLSA)
- Implications and Consequences
- FLSA Implementation Optimization

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Legislative Overview – Highlights of Revisions to the Fair Labor Standards Act
All Three Tests for Overtime Exemption

- Duties Tests Remain the Same:
  - Executive
  - Administrative
  - Professional
  - Outside Sales
  - Computer

- **Salary Test – Major Change**

- Salary Basis Test Remains the Same
Minimum Salary Test – Most Employees

- Applies to employees exempt under the executive, administrative and professional exemptions
- Nearly doubled, going from $23,660 to $47,476
- Based on the 40th percentile of full-time salaried workers in the lowest-wage census region, currently the Southern region
- The level will increase every three years going forward
Minimum Salary Test – Higher Education

As was the case prior to recent FLSA changes:
• Teachers/instructors/professors not subject to salary level test
• Academic administrators
  – Qualifying employees must be paid “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which [they are] employed.” §541.204(a)(1)
  – Academic administrative functions narrowly defined:
    • Operations directly in the field of education
    • Administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program
    • Department heads in institutions of higher education responsible for the various subject matter departments
    • Academic counselors and other employees with similar responsibilities
Higher Education Comp Time

- Public higher education institutions can continue to use comp time in lieu of overtime payments
Nondiscretionary Bonuses

• Employers will be able to include nondiscretionary bonuses to satisfy up to 10% of the new salary threshold, but:
  – The nondiscretionary bonuses must be paid on a minimum of quarterly basis
  – If employees do not meet the threshold in any given quarter through base and nondiscretionary incentive pay, the employer is required to provide a catch-up payment to meet the threshold
Highly Compensated Employee (HCE) Exemption

• Changed to $134,004, an increase from the former requirement of $100,000
• This amount is set to reflect the 90th percentile of full-time salaried workers nationally
• Will also increase every three years
Compliance Date

- Employers must comply with the changes by December 1, 2016.
- Applicability date for these rules in Puerto Rico unclear.
Additional Industry Considerations

• **Non-Profits**
  – Non-profit charitable organizations with less than $500,000 in commercial activities
  – Definition and calculation of “commercial activities” can be difficult and level of commercial activities can fluctuate
  – Individual FLSA coverage can still apply to many employees based upon job responsibilities (i.e. interstate travel, accepting/mailing packages across state lines, making phone calls to other states, etc.)

• **Small For-Profit Organizations**
  – “Employees of firms that have annual revenue of less than $500,000 and who are not engaged in interstate commerce are also not covered by the FLSA.”
  – Definition of “interstate commerce” tricky.
Additional Considerations

• White collar workers specified in FLSA as not subject to the salary level test:
  – Teachers
  – Physicians
  – Lawyers
  – Judges
  – Outside sales workers

• Separate salary level in effect for:
  – Workers in American Samoa (§ 541.600(a))
  – Motion picture industry employees (§ 541.709)
Implications and Consequences
DOL Responds to the Call to Act

• October 31, 2014 Blog post from Wage & Hour Administrator David Weil reflects the DOL’s enforcement mindset
• “…targeting investigations…in industries where workers are most likely to be mistakenly or deliberately cheated out of their wages…”
• “…taking strategic enforcement to the next level”
• “…make our investigation of one employer resonate throughout that particular sector and influence behaviors of employers across that entire industry…”
• “…increasing the cost of noncompliance… including civil monetary penalties, liquidated damages, and debarments”
• “Publicizing wage and hour violations is an effective way to educate other employers about their responsibilities …”
FLSA Litigation on the Rise

- Number of FLSA-related cases filed in federal court has dramatically increased

Record Year: 8,954 cases filed in 2015
DOL’s Use of Social Media
iPhone App

DOL-Timesheet
By U.S. Department of Labor
Open iTunes to buy and download apps.

Description
This is a timesheet to record the hours that you work and calculate the amount you may be owed by your employer. It also includes overtime pay calculations at a rate of one and one-half times (1.5) the regular rate of pay for all hours you work over 40 in a workweek.

What's New in Version 2.1
Bug fixes:
- Fixed date/time picker inconsistency when the device is set to 24-hour time
- Fixed break date/time picker to show proper break duration values (default 30 minutes)

iPhone Screenshot

Carrier  2:34 PM
Edit  Timesheet

Employer 1

Employer 2

Carrier  2:37 PM
Email Report

Options
Subject

Timesheet Report

Email
example@email.com

Dates

Employer

Send Email
How to File a Complaint

The U.S. Department of Labor’s Wage and Hour Division (WHD) is responsible for administering and enforcing some of the nation’s most important worker protection laws. WHD is committed to ensuring that workers in this country are paid properly and for all the hours they work, regardless of immigration status.

If you have questions or concerns, you can contact us at 1-866-487-9243 or visit www.wagehour.dol.gov. You will be directed to the nearest WHD office for assistance. There are WHD offices throughout the country with trained professionals to help you.

Information You Need

Handy Reference Cards

Flyer

Investigative Process

Frequently Asked Questions
DOL’s Mindset? Enforcement!

- Bridge to Justice
- Last DOL Opinion letter was January 16, 2009
- Secretary of Labor’s Blog

United States Department of Labor

You may have noticed a lot of discussion recently about whether certain workers are employees or independent contractors. Here at the Labor Department’s Wage and Hour Division, we’re tackling the employee misclassification issue head-on because so much depends upon the answer to that question.

We need to ensure the fundamental principal behind work in America — that a fair day’s work deserves a fair day’s pay. When employers misclassify their employees as independent contractors, often to cut their own costs, those workers are denied the protections of basic labor standards such as minimum wage and overtime, in addition to necessary safety and health protections. Competitors lose out, too, when they can’t compete with employers getting ahead by skirting the law.

Combating employee misclassification, particularly where vulnerable workers are at risk, continues to be a high priority for the Labor Department and this administration.

This is an ongoing conversation — and one where we want to hear from you!

Today at 5:00 p.m. ET Secretary Tom Perez is teaming up with Engadget on Facebook to answer your questions about misclassification and what it means for our 21st century economy.
DOL Projected Results

• Additional 4.2 million employees receiving overtime pay
  – Increased Earnings (Assuming OT)
  – Reduced hours with unchanged compensation
• Some employees receive pay increases to the 40th percentile to keep exemption
• Final rule will “transfer income” from employers to employees in the form of $1.2 billion in higher earnings
Realistic Consequences

- Reduced “hourly rate” to account for overtime
- Employers reclassifying employees as hourly employees
  - Timekeeping requirements
  - Reduced flexibility
    - Not paid for doctors appointments
    - Accessing e-mails from phone
    - No longer allowed to work from home
- Asking exempt employees to do more
- Inclusion of nondiscretionary bonuses to satisfy up to 10% of the new salary threshold effectively doesn’t matter
- Increased use of “labor replacements” such as kiosks
Flaws of the Revised FLSA Rules

• Assumption that exempt employees want to be nonexempt
• Allowing incentives to account for up to 10% of minimum salary test – but requiring payment up to minimum if not earned
• Keeping the non-profit organizational exemption – far too risky for widespread use
• Creating an incentive in higher education to hire a single teacher at the lowest rate possible to establish a low salary threshold
Flaws of the Revised FLSA Rules

- Tying salary test to 40\textsuperscript{th} percentile salary will erode the number of exempt employees quickly as employees below the threshold are made non-exempt:
Flaws of the Revised FLSA Rules

Minimum Salary Test

- **DOL**
- **Worst Case Scenario**

Year:
- 2017
- 2020
- 2023
- 2026
- 2029

Salary:
- 45,000
- 50,000
- 55,000
- 60,000
- 65,000
- 70,000
- 75,000
- 80,000
- 85,000
- 90,000
- 95,000
- 100,000
- 105,000
- 110,000
- 115,000
- 120,000
- 125,000
- 130,000
- 135,000
- 140,000
- 145,000
- 150,000
- 155,000
- 160,000
- 165,000
Steps to Implementation Optimization
Optimizing Implementation

- Identify Affected Employees
- Develop Strategy
- Develop Strategies
- Communicate Changes
- Zero Cost Implementation
- Cost Mitigation
- Cost Absorption
- Long-Term Implications
1. Identify Affected Employees
   – Employees previously considered exempt paid below $47,476 annually ($913 weekly)
   – Key decision: evaluate based on employee or entire jobs
Optimizing Implementation

2. Analyze Alternatives
   – Zero-cost implementation strategy
   – Increase all employees to the new minimum
   – What-if analysis
   – Job modeling
   – Compression Analysis
   – Productivity loss
   – Long-term projections
Optimizing Implementation

- CBIZ created the FLSA Optimizer Tool\textsuperscript{SM} to provide the in-depth and tailored analysis that CFOs and Human Resources need to effectively evaluate all options.
Understand Long-Term Implications

- Identify Affected Employees
- Develop Strategy
- Develop Strategies
- Communicate Changes
- Zero Cost Implementation
- Cost Mitigation
- Cost Absorption
- Long-Term Implications

Exempt
Non Exempt

Year

2016
2017
2020
2023
2026
2029

Exempt
Non Exempt
Optimizing Implementation

3. Determine Current Misclassifications

4. Develop Strategies

5. Communicate Changes
Questions?

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