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# Understanding the New Overtime Rule

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# Agenda:

- Update on efforts to delay and/or overturn the rule
- Overview of the FLSA
- Key provisions in new rule
- Compliance steps and advice

# Legal and Legislative Update

# Legal and Legislative Update

- On September 28, 2016, the U.S. House of Representatives passed H.R. 6094
  - Delays the implementation of the Rule for Six Months
  - Sent to Senate, but no further action took place.
- Two phase-in bills introduced: H.R. 5813 and S. 3464

# Legal and Legislative Update

- H.R. 5813 (introduced by Rep. Schrader)
  - Phases-in OT increase over three year period, with full rate going to \$47,476 for January 1, 2020

Year	Previous Level	New Level	Percent Increase
2016	\$23,660.00	\$35,984.00	52%
2017	\$35,984.00	\$39,780.00	11%
2018	\$39,780.00	\$43,628.00	10%
2019	\$43,628.00	\$47,476.00	9%

- Removes auto-indexing provision of law

# Legal and Legislative Update

- S. 3464 (introduced by Sen. Alexander)
  - Gradually increases Overtime threshold over five years, and includes a pause year in 2017
  - Federal government will be required to evaluate the rule's initial impact on businesses during the pause year

Year	Previous Level	New Level	Percent Increase
2016	\$23,660.00	\$35,984.00	52%
2017			NO INCREASE
2018	\$35,984.00	\$39,780.00	11%
2019	\$39,780.00	\$43,628.00	10%
2020	\$43,628.00	\$47,476.00	9%

- Removes auto-indexing provision in DOL Rule

# Legal and Legislative Update

- End of Year Legislative Scenarios:
  - Rule goes into effect December 1, 2016
  - Rule delayed for six months
  - Phase-in legislation, or something substantially similar, included in a “must-pass” bill that is signed into law



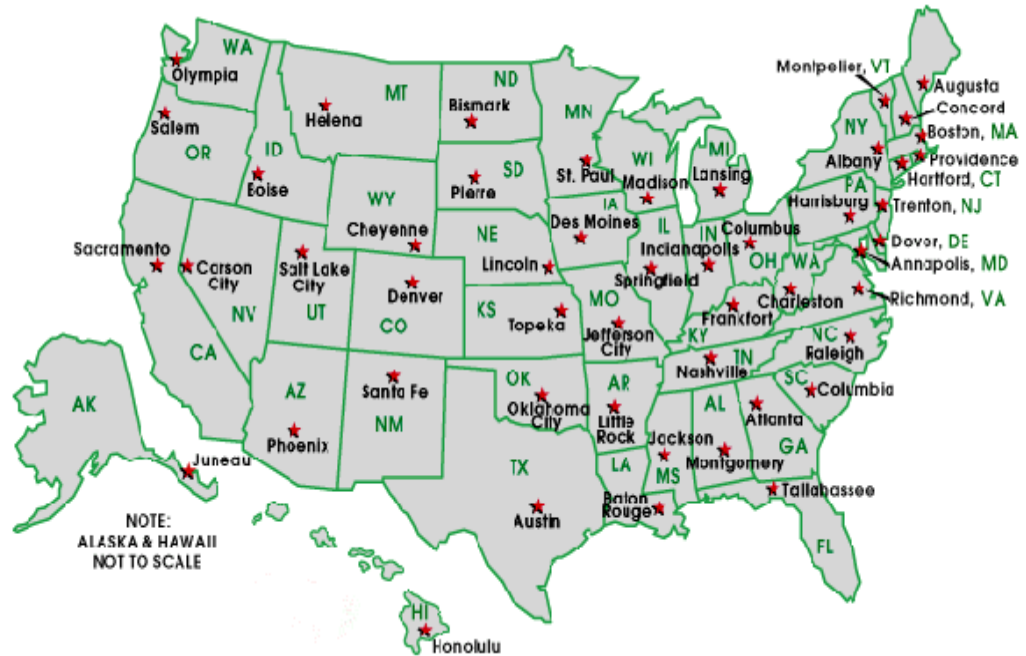
# Legal and Legislative Update

- On September 13, 2016, NFIB petitioned the U.S. Department of Labor for a six month delay of the rule's implementation.
- Lawsuit Filed:
  - 21 states & 55 business groups, including NFIB, filed a lawsuit in Texas
  - Hearing on preliminary injunction November 16, 2016 – *NFIB will update members and website as case proceeds.*

# Overview of the FLSA

# Overview of the FLSA

- Follow the law (federal, state or local) that provides for the higher rate of pay.



# Overview of the FLSA

- Enacted in 1938
- Enforced by the U.S. Department of Labor
- Requires minimum wage
- Requires overtime compensation for hours worked over 40 in a 7-day work week
- Enforces restrictions on child labor



*Roosevelt*

# Overview of the FLSA

## Who is covered by the FLSA?

- ***Employees*** who are engaged in interstate commerce, or work in activities closely related to such work (includes use of e-mail, phones, credit cards and U.S. mail)
- ***Employers*** who are engaged in interstate commerce and have annual gross income of \$500,000



# Overview of the FLSA

## Non-exempt employees

- Paid for actual hours worked
- Must keep records of time worked, *e.g., timesheets or timecards*
- Must earn at least minimum wage for all hours worked
- Entitled to overtime for any hours worked over 40 in 7-day work week at rate of 1½ times regular rate of pay



# Overview of the FLSA

## Exempt employees

- Paid regardless of quantity or quality of work
- No limit on the number of hours an employee may work or be required to work
- No minimum wage requirement
- No overtime requirement



# Overview of the FLSA

- There are numerous exemptions from the minimum wage and overtime requirements.
- Common Exemptions:
  - Administrative
  - Executive
  - Professional
  - Highly Compensated
  - Outside Sales
  - Computer Professional
  - Agricultural
  - Equity Owner





# Overview of the FLSA

New Overtime Rule primarily affects following exemptions:

1. Administrative,
2. Executive,
3. Professional, and
4. Highly Compensated.



# Overview of the FLSA

- Executive, Administrative, Professional – 3 part test:
  1. Salary Basis: Employee must be paid a predetermined and fixed minimum salary that is not subject to reduction because of quality or quantity of work performed
  2. Salary Level: Starting December 1, 2016, must be paid \$913/week or \$47,476/annual.
  3. Duties Test: employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations.

# Overview of the FLSA

## Highly Compensated – 3 part test:

1. Salary: The employee earns total annual compensation of \$134,004 or more, including \$913/week, paid on a salary basis;
2. Non-manual work: The employee's primary duty includes performing office or non-manual work; and
3. One exempt EAP duty: The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

# Key Provisions in New Rule

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## Background of 2016 Changes:

- In March 2014, President Obama issued a memorandum directing DOL to “modernize and simplify” the FLSA’s overtime and minimum wage requirements.
- DOL engaged in a rulemaking process and received over 270,000 comments in response to its proposed rule.

# Key Provisions in New Rule

## Final Rule:

- On May 23, 2016, the new overtime rule was published in the Federal Register.
- **Changes go into effect on December 1, 2016.**
- Changes affect the salary test. No changes to duties test.

# Key Provisions in New Rule

**\$47,476**

The previous threshold of \$455 per week/\$23,660 annually has been increased to \$913 per week/\$47,476

**\$134,004**

The salary threshold for qualifying as an exempt "highly compensated employee" will raise from \$100,000 to \$134,004.

# Key Provisions in New Rule

## Salary Increases:

- Raises the salary level requirement for executive, administrative and professional exempt employees from the current rate of \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year).
- Represents the 40<sup>th</sup> percentile of weekly earnings of full-time salaried workers in the U.S. lowest wage census region.



# Key Provisions in New Rule

## Inclusion of Bonuses & Commissions:

- Permits nondiscretionary bonuses and incentive payments (including commissions) to count toward the salary level requirement for EAP & Highly Compensated:
- Examples:
  - Retention bonuses
  - Commission payments based on fixed formula

# Key Provisions in New Rule

## Inclusion of Bonuses & Commissions (cont.):

- Can only count toward 10% of the standard weekly salary
- Must be paid at least quarterly
- Allows for a quarterly “catch-up” payment within one pay period of the end of a quarter
- This does not allow discretionary bonuses to count toward the salary level requirement

# Key Provisions in New Rule

## Inclusion of Bonuses & Commissions (cont.):

### – Example:

- Helen is an exempt professional employee who is paid on a weekly basis and receives a quarterly nondiscretionary bonus
- Helen must receive a minimum of \$821.70 per week in salary (90% of \$913)
- Helen must receive a nondiscretionary bonus of \$1,186.90 per quarter (\$91.30/week x 13 weeks) within one pay period after the close of a quarter

# Key Provisions in New Rule

## Inclusion of Bonuses & Commissions (cont.):

### – Example:

- Helen earns a quarterly nondiscretionary bonus of \$2000
- Her employer still may only count \$1186.90/quarter (\$91.30/week) toward her salary level
- Her employer still must pay, at a minimum, \$821.70 per week in salary (90% of \$913)

# Key Provisions in New Rule

## Automatic Updates:

- Salary and compensation thresholds will automatically update every 3 years
  - 40<sup>th</sup> percentile for executive, administrative and professional employees
- DOL will publish updated rates at least 150 days in advance
- January 1, 2020, first automatic update
  - Currently estimated to set the salary level requirement at \$984 per week (\$51,168 per year)

# Key Provisions in New Rule

## Impact of New Rule:

- Currently, DOL estimate 8% of the workforce is overtime-eligible.
- If the rules took effect tomorrow as proposed, leaving employers no time to adjust their pay practices, DOL says the number would jump to 40%.
- That means that 4.6 million more people would become overtime eligible.

# Compliance Steps and Advice

# Act Now



- The rule becomes effective December 1, 2016
- Employers need to analyze classifications and communicate changes to employees



# Compliance Steps

## Recognize Your Options:

– Either:

1. Increase pay for exempt workers to meet the new salary level requirement; OR
2. Reclassify employees as nonexempt

# Compliance Steps

## Steps:

- Identify which employees the new rule will affect:
  1. Review exempt employees' salaries;
  2. Identify all exempt employees paid below \$913 per week.

# Compliance Steps

## Steps:

- Will you increase salaries to meet the new threshold?
- Will you convert to hourly?
  - If so, what will be estimated overtime for those employees?
    - Will you hire additional employees to reduce overtime?
    - Will you adjust employee workloads and/or transfer duties?
    - Will you reduce equivalent hourly pay so employees' hourly wages plus overtime still equals current salaries?

# Compliance Steps

## Steps:

- Consider whether employees will be subject to different benefits as nonexempt employees



# Compliance Steps

## Steps:

- Consider communication strategy
  - “This is required by law”
  - “This is not a demotion”
  - “This is the company’s effort to maintain your job and pay”



# Compliance Steps

## Steps:

- Review and communicate your overtime policy
  - Advance authorization required
  - Off-the-clock work
  - Meal and rest breaks
  - Travel time
  - Mobile devices
  - Pre-post-shift activities



# Compliance Steps

## Example One

- Evelyn is an exempt administrator who is paid an annual salary of \$30,000 per year (\$576.92 per week)
- On average, Evelyn works 45 hours per week
- Evelyn's calculation: If her salary is raised to meet the minimum salary threshold of \$913 per week (\$47,476/year) the employer will have an additional cost of \$336.08/week, \$17,476/year.

# Compliance Steps

## Example One (cont.)

- If Evelyn is converted to hourly:
  - Evelyn's employer will be required to pay 260 OT hours
  - If Evelyn is converted to hourly at a rate of \$13.00/hour, her employer will pay:
    - \$5,070 in overtime wages per year (5 hours x \$19.50 x 52 weeks)
    - \$27,040 in regular wages (40 hours x \$13.00 x 52 weeks)
    - Total wages = \$32,110/year (\$617.50/week)
    - Additional cost to employer \$2,110/year (\$40.589/week).



# Compliance Steps

## Example Two

- Jacob is an exempt administrator who is paid an annual salary of \$45,000 per year (\$865.38 per week)
- On average, Jacob works 50 hours per week
- Jacob's calculation: If his salary is raised to meet the minimum salary threshold of \$913 per week (\$47,476/year) the employer will have an additional cost of \$47.62/week, \$2,476/year.

# Compliance Steps

## Example Two (cont.)

- If Jacob is converted to hourly:
  - If Jacob is converted to hourly at a rate of \$17.00/hour, his employer will pay:
    - \$13,260 in overtime wages per year (10 hours x \$25.50 x 52 weeks)
    - \$35,360 in regular wages (40 hours x \$17.00 x 52 weeks)
    - Total wages = \$48,620/year (\$935/week)
    - Additional cost to employer \$3,620/year (\$69.62/week).

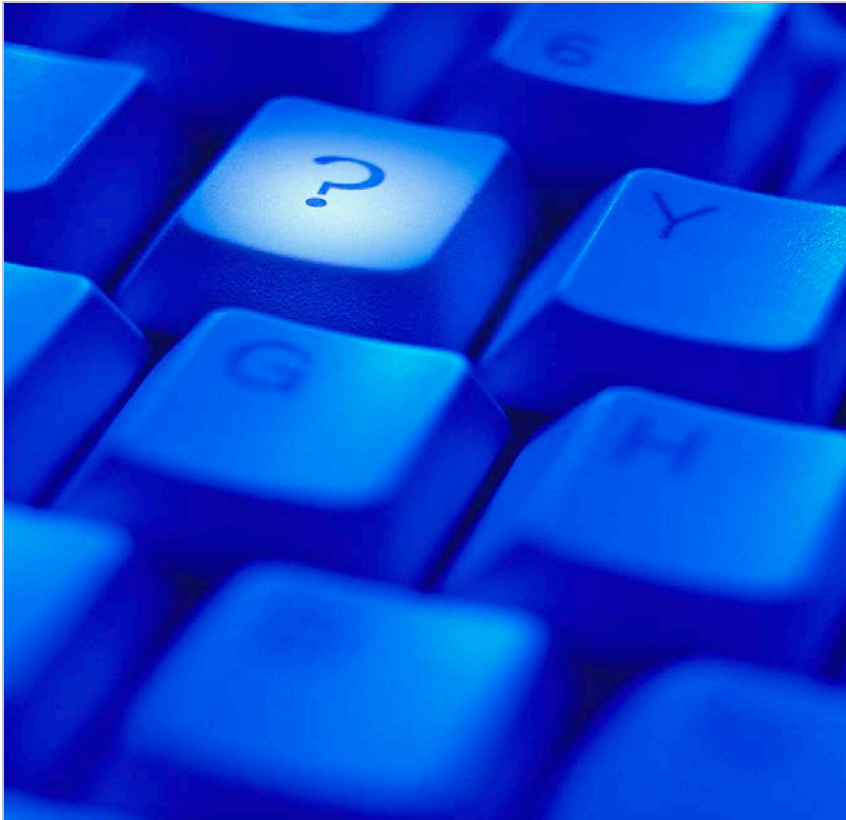
# Compliance Steps

## 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)

# Compliance Steps



- Visit the WHD homepage at: [www.wagehour.dol.gov](http://www.wagehour.dol.gov)
- Call the WHD toll-free information and helpline at 1-866-4US-WAGE (1-866-487-9243)
- Use the DOL interactive advisor system - *ELAWS*: [www.dol.gov/elaws](http://www.dol.gov/elaws)
- Contact NFIB: (202) 406-4443 or [elizabeth.milito@nfib.org](mailto:elizabeth.milito@nfib.org).





Thank you...