



The DOL's New Overtime Rule: More Than Just a Compliance Decision

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The presentation will begin shortly.

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Housekeeping Notes for Audience

- The webinar will be recorded.
 - The recording and slides will be sent to all participants after the webinar.
- If you are calling in through your computer, please be sure to turn up the computer's volume.
- Questions will be answered at the end of the presentation.
 - Use the Q&A application to submit a question.
- The code required for CLE credit will be announced later in the presentation.

Speaker Introduction

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Agenda

Topic 1

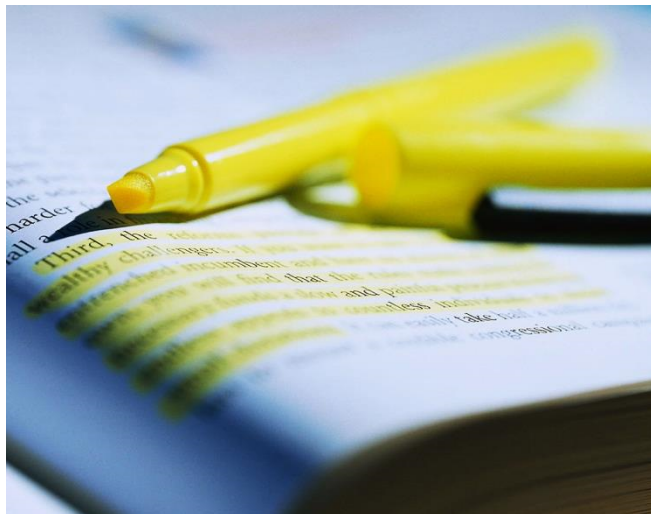
Summary of the New Overtime Rule

Topic 2

Employer Considerations When Making Classification Decisions

Topic 3

Planning for the Future



Summary of the New Overtime Rule

Summary of Final Overtime Rule

- Minimum Salary Basis Threshold Raised From \$455 to \$913 per week
 - \$913 per week = 40th Percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region
 - \$913 per week = \$47,476 annually (increase from \$23,660 annually)
- Minimum Salary Thresholds Automatically Updated Every Three Years
- Minimum Annual Salary Basis Threshold for Highly Compensated Employees Raised from \$100,000 to \$134,004

Summary of Final Overtime Rule

- Employers May Use a Portion of Nondiscretionary Incentive Compensation to Meet the New Salary Threshold
 - 10% limit (although does not apply to HCEs)
 - Must be paid at least quarterly
 - Catch up payment permitted
- No Changes to the Duties Test
- Effective Date of December 1, 2016

Don't Forget About State and Local (!) Wage and Hour Laws

- Many states have different and sometimes more stringent overtime laws
- Example:



California

- Different salary threshold for white-collar exempt employees:
 - Increased Federal (\$47,476) vs. California (\$41,600)
 - But as CA's minimum wage increases, so will its minimum salary threshold
 - Employers must pay attention to federal and state salary threshold raises to make sure exempt employees are paid, at a minimum, the higher salary threshold of the two
- Different requirements to qualify as exempt – "primary duty" test
- No exemption for "highly compensated" employees
- Cannot include non-discretionary bonuses and commissions to satisfy salary threshold
- Not just time and half for over 40 hours worked

Don't Forget About State and Local (!) Wage and Hour Laws

- **Example: New York**

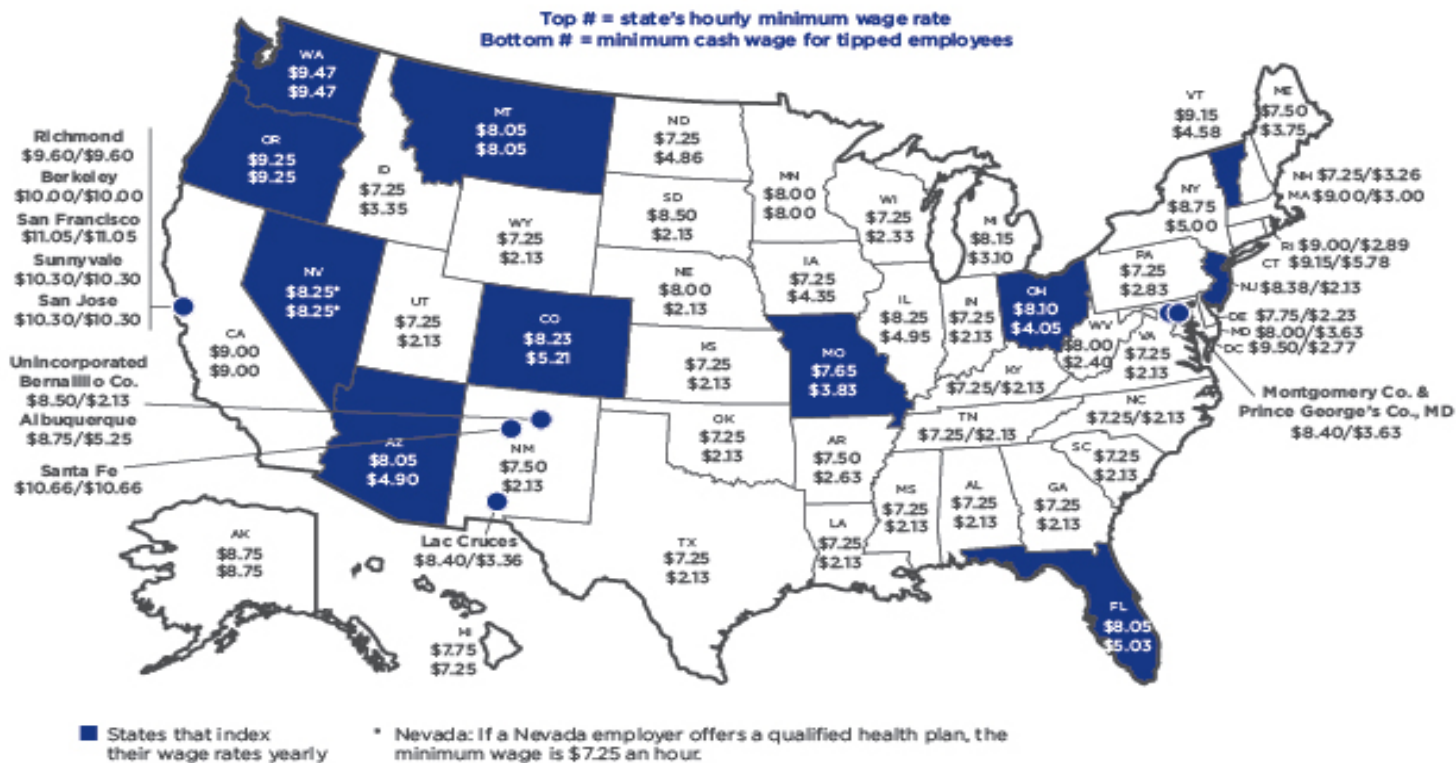
- Some positions may qualify as exempt under the FLSA but not the NYLL, and therefore are still overtime eligible under NY law
 - Entitled to overtime pay at a rate of 1.5 times the NY minimum wage rate (not 1.5 times the employee's *regular* rate of pay)

- **Local Wage and Hour Laws**

- Increasing trend toward localized employment regulation
 - San Diego: \$10.50 min. wage starting mid-July
 - Los Angeles:
 - July 1, 2016: \$10.50 min. wage for companies with 26+ employees
 - January 1, 2017: \$10.50 min. wage for companies with less than 26 employees
 - Washington, DC: \$11.50 min. wage starting July 1, 2016
 - San Francisco: \$13.00 min. wage starting July 1, 2016
- Must use the higher minimum wage to calculate overtime pay
- Generally, it is the law of the locality where the employee performs work that applies

Don't Forget About State and Local (!) Wage and Hour Laws

State and Local Minimum Wage Rates: 2015





Employer Considerations When Making Classification Decisions

Employer Options

- What are your options for employees affected by the new Rule?
 1. Raise salaries +
 - Increase base salary to the new threshold
 - Review and revise incentive comp and bonus plans
 - Goal: ensure that incentive comp and bonus plans will, together with the base salary, get employees to the new threshold
 2. Make overtime eligible and pay OT where required
 3. Modify schedules where necessary and add headcount

N.B . Current HCEs who will be below the new threshold, may be able to retain their exempt status IF they meet *all* of the duties tests for exemption.

Potential Impact and Unintended Consequences

- More than just a compliance decision
- Run a cost-benefit analysis that accounts for the overall impact of your classification decision
- More than just accounting for direct wage costs
- Consider other cost factors

Classification Analysis Considerations

- How can I control or offset overtime costs?
 - Can the job be done well in under 40 hours?
 - Should I adjust incentive compensation?
 - Should I reduce or eliminate other benefits (e.g., PTO)?
 - Should I reengineer job duties?

Classification Analysis Considerations



- Other Considerations
 - Will the change affect other positions in a job family in same salary band?
 - Will the change affect those senior to impacted employees?
 - Will I be able to reach the same decision in three years?
 - Will employees lose flexibility?
 - What are my competitors doing in response to the rule?

Classification Analysis Considerations

- These questions are also aimed at helping employers understand the costs related to lost productivity, lower morale and increased turnover in connection with the classification decision.
- Also consider:
 - What are my managerial-related costs, including on training?
 - What are my other operational costs, including to IT systems?

Compensation Structuring

- Incentive compensation as a tool to meet salary basis threshold
 - Non-discretionary incentive comp and formulaic bonuses
 - Does it fit with your business model and strategy?
 - At least quarterly
 - Catch up payments required/but are they desirable?
 - Triennial Increases Beginning January 1, 2020
 - Keep your eye on the rising salary basis threshold

Compensation Structuring

- **Typical pay methods for calculating overtime owed to non-exempt employees:**
 - The **Hourly** method is the most straightforward and well-known method
 - Example: If you are converting \$40,000 exempt employee to non-exempt hourly employee working 50 hours in a workweek:
 - Regular hourly rate: $\$40,000 / 52 \text{ weeks} / 40 \text{ hours} = \$19.23/\text{hour}$
 - Overtime rate: $\$19.23 \times 1.5 = \$28.85/\text{hour}$
 - Overtime due: $\$28.85 \times 10 = \288.50
 - Total weekly wages: $(\$19.23 \times 40 \text{ hours}) + \$288.50 = \$1057.70$



Compensation Structuring

- **Typical pay methods for calculating overtime owed to non-exempt employees:**
 - The **Salary** method is similar to the Hourly Method, but may have better optics
 - If employee works OT, follow same steps used in hourly method to determine regular hourly rate and overtime rate
 - Weekly Salary: $\$40,000/52 \text{ weeks} = \769.23
 - Regular hourly rate: $\$769.23/40 \text{ hours} = \$19.23/\text{hour}$
 - Overtime rate: $\$19.23 \times 1.5 = \$28.85/\text{hour}$
 - Overtime due: $\$28.85 \times 10 = \288.50
 - Total weekly wages: $\$769.23 + \$288.50 = \mathbf{\$1057.70}$

Cost Saving Solutions for Implementation

- Consider alternative pay methods for calculating overtime owed to non-exempt employees:
 - There are several alternative pay methods that use a smaller "overtime premium" rate to calculate overtime - the most common method is the **Fluctuating Workweek** method which pays the employee at a halftime rate rather than time and a half.

Cost Saving Solutions for Implementation

- Fluctuating Workweek conditions:

1. Employees hours must typically vary from week to week

2. Employee is paid a fixed weekly salary representing straight time pay for *whatever* hours he/she is required to work (e.g. 51, 38, 21, 45)

3. The salary divided by the total number of hours worked exceeds the minimum wage for each hour worked

4. There exists a clear mutual understanding that the employee will receive a fixed salary regardless of the number of hours the employee works that week

Cost Saving Solutions for Implementation

- **FWW Example:** convert \$40,000 exempt employee to non-exempt:
 - Employee works 50 hours in a week:
 - Weekly Salary: $\$40,000/52 \text{ weeks} = \769.23
 - Regular hourly rate: $\$769.23/50 \text{ hours} = \$15.38/\text{hour}$
 - Halftime rate: $\$15.38 \times 0.5 = \$7.69/\text{hour}$
 - Overtime due: $\$7.69 \times 10 = \76.90
 - Total weekly wages: $\$769.23 + \$76.90 = \$846.13$

Pay Method	Hours worked	Weekly Salary	Regular Hourly Rate	OT Rate/ OT Premium	Total Pay
Hourly	50	\$769.23	\$19.23	\$28.85	\$1057.70
FWW	50	\$769.23	\$16.03	\$8.02	\$ 846.13

– **TOTAL COST SAVINGS: \$211.57**

Effects on Employee Benefits



When making employee classification and compensation changes, effects on employee benefits must be considered

Benefit Plan Terms

Changing the composition of "exempt" and "non-exempt" employee classes or changing employees' hours or compensation may result in unintended shifts in eligibility and benefits

Employers should review all employee benefits

- Identify plans and benefits that vary eligibility and/or benefits based on "exempt" or "non-exempt" status or hours worked
- Consider the trickle-down effects of any policy changes

Benefit Plan Terms

401(k) Plan Concerns:

- For purposes of calculating employee elective deferrals and matching contributions, some plans count overtime and bonuses as "compensation" and others do not
- If plans do count overtime and/or bonuses, and overtime/bonuses increase, the employer's matching contribution will increase
- If plans do not count overtime, and overtime pay increases, the amount of elective deferrals and matching contributions may be skewed towards exempt (higher paid) employees, resulting in nondiscrimination testing problems

Health and welfare plan examples:

- Employer's short term disability plan imposes a 5-day waiting period on non-exempt employees, but allows exempt employees to receive benefits on day one of disability
- Employees may participate in certain plans only if they work at least 40 hours per week
- Medical plan premium contributions may vary based on compensation

Benefit Reductions

- Employers have limited ability to increase costs of goods and services
- But the dollars to fund compensation increases must come from *somewhere*
- Reducing benefits to save costs is one option that employers will consider

Benefit Reductions

- Medical benefits are more likely to remain static:
 - Under the Affordable Care Act employers that do not offer affordable, minimum value coverage to "full-time" employees are at risk for a substantial tax penalty
 - "Full-time" is a pure 30-hour standard; categorical exclusions (such as exempt vs. non-exempt or salaried vs. hourly) are meaningless
 - Employers who are already offering the minimum contribution have no room for further reductions; more generous employers may have some cost saving options (e.g. reduce employer premium contribution, change plan designs)

Benefit Reductions

- But other benefits are in play. Some options:
 - Reduce employer premium contributions towards other plans (such as dental or vision)
 - Consider less expensive plan designs (e.g. increase cost-sharing, implement high deductible plans)
 - Offer "voluntary" (employee-pay-all) benefits (popular voluntary benefits include dental, vision, disability, hospital indemnity, and individual disease policies)
 - Reduce or eliminate employer 401(k) match
 - Reduce PTO and other perks (e.g. subsidized child care, fitness subsidy, fancy dinners, parties)

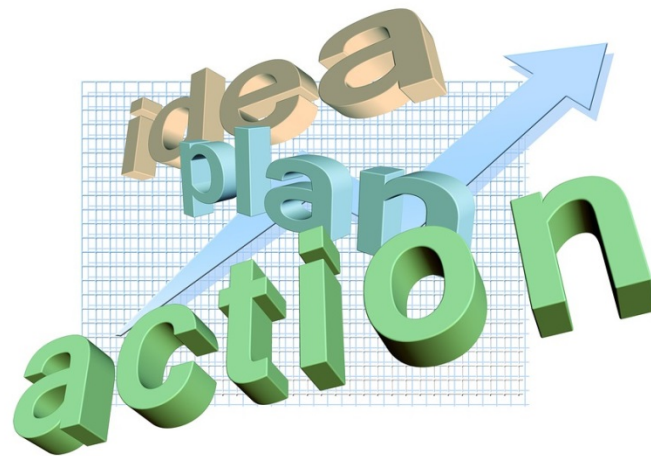
Beware ERISA 510?



- "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."
- What if hours are reduced and benefits eligibility lost?

Documenting and Communicating Benefits Changes

- Amend plan documents
- ERISA summary plan description (SPD):
 - General: a revised SPD (or summary of material modifications or SMM) must be distributed within 210 days following the close of the plan year in which the change was made
 - But in the event of a material reduction in benefits, a revised SPD or SMM must be issued within 60 days after the date of adoption of the modification or change
- Summary of Benefits and Coverage (SBC) - If there is a material modification made outside of open enrollment, then a notice of the modification (or new SBC) must be provided 60 days in advance of the effective date of the change
- Update handbook and other employee communications
- Inform employees of changes as far in advance as possible



Planning for the Future

Steps to Take to Meet the December 1st Deadline

- 1. Identify Internal Personnel to Manage Process; Alert Management; Obtain Necessary Buy-in**
- 2. Identify Impacted Positions and Run Classification Analysis**
- 3. Determine Pay Method for Reclassified Employees**
 - Determine average number hours/week non-exempt employees work
 - Decide which non-exempt pay method is appropriate for each position
- 4. Legal Exposure Analysis**
 - Consider if this is your first time analyzing whether the impacted employee is properly classified under not just the salary test, but also duties test
 - Consider updating employee handbooks to ensure appropriate mandatory language (safe harbor provisions)
- 5. Timekeeping Systems/Policies Review and Development**
- 6. Training/Notice Development**

Steps to Take to Meet the December 1st Deadline

7. On or before December 1st:

- Determine effective date of reclassification (i.e., first day of future pay period)
- Meet with executive-level employees
- Train department heads and exempt managers and supervisors
- Train non-exempt employees
- Distribute individual pay notices
- Schedule "open office hours" for employees to speak with HR regarding questions/concerns
- Start on effective date and remind employees

Effectively Communicating Changes to Employees



- "Different Strokes for Different Folks" – tailor the messaging
 1. Don't wait. Plan now
 - Who, How, What, When
 - Messaging varies depending on approach
 - » E.g., Employees whose hours will be cut back to avoid OT vs. Employees whose base salary will be cut back to reduce regular rate of pay and keep overall comp the same
 - » "The government made me do it."
 2. Alert and train managers

Effectively Communicating Changes to Employees

3. Employees who will remain exempt but are currently below the new salary basis threshold
 - Review job descriptions and re-confirm they meet the duties tests
 - Focus on salary increases and changes in commissions and bonus plans
4. Employees moving from exempt to non-exempt
 - Group and/or individual meetings
 - » Group meeting: high level and general
 - » Individual meetings: regular rate of pay, OT expectations, timekeeping

Analyze Your Workforce Generally for Compliance

- Opportunity to reclassify where appropriate, and roll-out as part of messaging around other changes and messaging prompted by the new rule.
- Review all exempt positions
 - Confirm each meets the duties tests for at least one of the exemptions
 - Consider updating job descriptions
 - Beware of "mission creep"
 - Where duties don't meet the duties test, take this opportunity to reclassify
 - Assess risks for close calls

Cybersecurity Webinar – Join Us Tomorrow!

- This webinar, presented by Mintz Levin attorneys Cynthia J. Larose, Dianne Bourque and Kirsten Liston, SVP of Product & Market Strategy at ThreatReady Resources, focuses on how to boost efforts and counter malicious and negligent employee handling of personal and confidential data.
- Contact NMSheehan@mintz.com to register.



Cybersecurity Risk: Addressing the Human Factor

June 22 | 1:00 pm EDT

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- Follow our **Employment Matters blog** (www.employmentmattersblog.com), ranked as the #1 employment law blog among Am Law 200 firms, for up to date reports on employment, labor, and benefits law that affect your business.
- For additional information on the overtime rule, view the posts below:
 - May 18, 2016 – [The DOL Releases its Final Rule Updating the FLSA White-Collar Overtime Regulations](#)
 - May 19, 2016 – [Where do the DOL's New FLSA White-Collar Overtime Regulations Leave Non-Profits and Educational Institutions?](#)
 - May 25, 2016 – [The DOL's New Overtime Rule: Considerations for California Employers](#)
 - May 26, 2016 – [Handling Nondiscretionary Incentive Payments Under the New FLSA Overtime Rule](#)



Questions?

Thank you for joining us!