

## DOL EXEMPTION RULE

Preparing for Implementation of the New Rule

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## History

- The Fair Labor Standards Act (FLSA) was enacted in 1938 during the depression years
- Requires employers to pay covered employees (those not otherwise exempt) minimum wage
- As well as time and a half the worker's "regular rate" for hours worked over 40

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## Exempt/Non-Exempt

- Not determined by hourly v salary pay status!
  - Exempt – must be paid on a "salary basis"
  - BUT payment of salary does not mean exempt
  - Non-exempt employees may be paid a salary rather than hourly, but they also must be paid overtime if they work over 40 hours in a week

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### Benefit of Exemptions

- Employees may work as many hours as necessary for set salary
- Don't have to pay overtime, do not have to compensate per hour worked

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### Salary Basis

- Employee paid a predetermined amount
- Not subject to deductions (with limited exceptions)
- Paid full salary for each week in which any work is performed

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### Salary Basis con.

- Deductions may be allowed under specific circumstances including:
  - Employee absences of one or more full days for personal reasons
  - Employee absences of one or more full days for sickness or disability if you have a plan, policy or practice of providing compensation for loss of salary due to sickness/disability
  - Penalties for major safety rule infractions

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**Salary Basis con.**

- Allowable deductions con.
  - Good faith unpaid disciplinary suspensions of one or more full days for infractions of certain workplace conduct rules
  - FMLA leave
  - The employee is absent the entire workweek or performs no work during an entire workweek

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**Salary Basis con.**

- Deductions are not permitted for absences for:
  - Employer shutdown
  - Operating requirements of the business
  - Jury duty
  - Witness testimony
  - Temporary military leave

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**Salary Basis con.**

- Deductions not permitted for:
  - Cash shortages
  - Damage to equipment

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### Actual Salary – New Rule

- Currently the minimum predetermined salary amount is \$455 a week which equals \$23,660 a year
- The new rule jumps the minimum predetermined salary amount to **\$913 per week**, which equals an **annual salary of \$47,476**.

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### New Rule

- As of December 1, 2016, any employee who makes less than \$913 (with a few special exceptions) per week, must be classified as non-exempt regardless of whether they are paid on a salary basis or whether they meet the duties test

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### New Rule Salary Basis

- Salary threshold will be adjusted automatically every three years to remain at the 40<sup>th</sup> percentile of weekly earnings as measured in the lowest wage census region (currently the south)
- Estimated to jump to \$51,000 on January 1, 2020

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### **New Rule Salary Basis**

- Allows bonuses and incentive payments to court toward up to 10% of the new salary level

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### **New Rule Highly Compensated**

- Employees who are "highly compensated" do not have to pass the duties test to be classified as exempt.
- "highly compensated" under the FLSA is currently \$100,000 per year
- Under the new rule, a "highly compensated" employee must be paid at least \$134,004 per year to be classified as exempt

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### **Duties Test**

- The new rule did not make any changes to the duties test
- For each employee who meets the salary basis requirement, you must then analyze each one to see if they meet the duties test
- If so, they can be classified as exempt, if not, they can't be classified as exempt

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## Available Exemptions

- Executive
- Administrative
- Professional
- Certain Computer professionals
- Outside Sales employees

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## White Collar Exemptions

- To qualify, generally must:
  - 1. be paid pursuant to the salary basis rule
  - 2. be paid the threshold salary \$913
  - 3. primarily perform executive, administrative, or professional duties as provided in the DOL's regulations (the duties test)

Doctors, teachers and lawyers are not subject to either the salary basis or salary level tests

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## Duties Tests

- [Dol.gov/whd/overtime/fs17a](http://Dol.gov/whd/overtime/fs17a)
- Or look for DOL, Wage and Hour, Fact Sheet #17A which is interactive and will link you to all the different sites with additional information.

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### Duties Test

- An employee must be evaluated on the duties they actually perform, not necessarily what their job description says
- They must meet each prong of the test to qualify for the exemption
- The DOL has its own definitions of "primary duties," "customarily and regularly," "exercise of discretion and independent judgment," "matters of significance"

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### Prepare Now

- Look at each employee you are currently classifying as exempt
  - Ask:
    - Are they paid on a "salary basis"
    - Are they paid at least \$913 a week
      - If no, what are they paid
      - Do they receive bonuses or incentives, if so what is the value

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### Prepare Now con.

- How many hours do they work in a 7 day workweek? **TRACK ALL HOURS**
- What would be the cost if you had to pay that employee overtime for all hours worked over 40?
- What would be the cost to bump the employee's salary up to \$913 per week?
- If it makes sense to bump the employee up to \$913, move on to assess their duties

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### Prepare Now con.

- If it doesn't make economic sense to increase their compensation, or they aren't paid on salary basis, they must be re-classified as "Non-Exempt"
  - Pay them hourly or salary, but must pay overtime for all hours worked over 40 in a workweek

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### Prepare Now con.

- If they meet the salary basis and threshold salary, move on to the duties test
  - Assess each employee's actual duties, then compare them with the white collar exemption duties tests to determine if they meet the duties test
  - If so, they can be classified as exempt
  - If not, they must be classified as non-exempt

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### Problems in re-classifying

- Exempt employees generally consider it a demotion
- Will now have to punch in and out
- Can't be as flexible with their time
- Will have to be told they may not work from home including emailing, texting, etc. Otherwise employer will be liable for overtime pay
- Accurate Time tracking is and will be very important from an employer standpoint

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**Problems con.**

- May affect employee benefits where exempt employees have more favorable time off or insurance offerings such as life insurance

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**Penalties Under FLSA**

- Amount of unpaid overtime for
  - The past two years
  - the past three years if wilful violation
- Fines, interest and possible criminal sanctions
- Attorney fees for prevailing employees' attorney's.

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**Consider**

- Changing job duties
- Schedule changes
- Hiring more employees
- Adjusting wages
- Reassigning job duties
- Limiting overtime

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## Positives

- Employers can and should use this opportunity to re-classify those employees who for whatever reason have been mis-classified
- It's the perfect opportunity to correct past mistakes while all employees are under scrutiny and you can explain the re-classification is due to the change in laws (rather than your prior mistakes!)

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## Be Proactive

- Do your assessments
- Consult your CPA's and attorneys
- When you know how you will handle each employee, sit down with them and explain the change in the law and what is happening with respect to their job, duties, pay and benefits
- Be sympathetic, blame the DOL

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## DON'T

- Ignore the changes
- They will affect 4.5 billion employees
- The DOL will be enforcing
- The penalties are financially severe

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