Overtime Overhaul

Unpacking Changes to the Federal Wage Law

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Seyfarth Shaw LLP

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Introduction

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Overview for Today

01 Refresher on FLSA Overtime Exemptions

02 Examining the Final Rule

03 Challenges Ahead for the Final Rule

04 Next Steps for Employers
The FLSA and its Exemptions

a look at status quo
The FLSA is a Shield and a Sword

• The FLSA is:
  - Landmark legislation from height of the Great Depression
  - The source of federal minimum wage, overtime pay, and child labor protections
  - ...as well as exemptions, including for employees working in an executive, administrative, or professional (“EAP”) capacity
  - A model for various state OT and MW laws, some stricter than the FLSA

• The FLSA is also:
  - Notoriously difficult to interpret for employers and judges
  - The source of over 6,000 lawsuits in federal court per year
  - An avenue for lawyers to win certified classes, double damages, and fees
  - A driver of costly litigation, with routine multi-million-dollar class settlements
The DOL Defines EAP “Capacity” Through Duties and Pay

<table>
<thead>
<tr>
<th></th>
<th>Custodian</th>
<th>CEO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hourly rate of</td>
<td>Not Exempt</td>
<td>Not Exempt</td>
</tr>
<tr>
<td>$150/hour</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Salary of $500,000/year</td>
<td>Not Exempt</td>
<td>Exempt</td>
</tr>
</tbody>
</table>
The EAP Exemption Rules as of Today

Primary duty of exempt executive, admin., or prof'l

Salary level at least $684/week

Paid on a salary basis

Also an exemption for “highly compensated” employees (“HCE”)

1. Total comp of $107,432, inclusive of min. salary
2. A relaxed duties test (essentially at least one EAP duty)
Other FLSA Exemptions That May Apply to News Media

<table>
<thead>
<tr>
<th>Outside sales</th>
<th>Generally for employees who (i) make sales and (ii) are regularly engaged away from employer’s place of business</th>
<th>Any basis</th>
<th>Overtime and minimum wage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Creative professional</td>
<td>Primary duty requires invention, imagination, originality, or talent in recognized field of artistic or creative endeavor (e.g., writing, graphic arts)</td>
<td>Salary or fee basis (level changing)</td>
<td>Overtime and minimum wage</td>
</tr>
<tr>
<td>207(i) (“7(i)” exception)</td>
<td>(i) Employees of retail or service establishments, who (ii) earn at least 1.5x minimum wage, and (iii) receive at least half of total earnings via commissions</td>
<td>At least 50% of total earnings via commission</td>
<td>Overtime only</td>
</tr>
</tbody>
</table>
**Other FLSA Exemptions (cont.)**

<table>
<thead>
<tr>
<th>General Description</th>
<th>Pay Requirement</th>
<th>Exempt From</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Small circulation papers</strong></td>
<td>Any basis</td>
<td>Overtime and minimum wage</td>
</tr>
<tr>
<td>Employees of weekly, semiweekly, or daily newspaper with <strong>circulation of less than</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4,000 primarily in county of publication or contiguous counties</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Small town radio/TV announcers, editors, chief engineers</strong></td>
<td>Any basis</td>
<td>Overtime only</td>
</tr>
<tr>
<td>Announcers, editors, or chief engineers of a radio or TV station, the major studio of which is in certain small cities or towns</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Newspaper delivery</strong></td>
<td>Any basis</td>
<td>Overtime, minimum wage, child labor</td>
</tr>
<tr>
<td>Employees delivering newspapers to consumers</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Some States Define Exemption More Narrowly

• Some states have their own overtime laws with their own exemptions

• **Salary level is higher in some states**, including (but not limited to):
  - California: $66,560 annually
  - Colorado: $55,000 annually
  - New York: $58,458.40 to $62,400 annually, depending on location
  - Washington: $67,724.80 annually

• **Duties tests differ in some states**, including (but not limited to):
  - California: quantitative duties test (50%)
  - Colorado: quantitative duties test for executives

• And **plenty of states don’t recognize all exemptions**, such as HCE and numerous other exemptions
Unpacking the New Rule

the DOL’s push to $58,656
The New Rule Focuses on Salary Level

• No changes to the duties test

“While...[the] duties test is not universally popular, it is well known to employers, employees, and the courts, making it easier and more efficient for employers to implement and for workers to understand.”

• Focus is on higher salary level, as well as new auto increases

• DOL believes:

  - More than 4 million workers newly entitled to OT pay in year 1
  - $1.5 billion in costs to employers and “income transfer” to employees
  - Increased worker productivity, reduced turnover, better balance
### Changes to the EAP Salary Levels

<table>
<thead>
<tr>
<th>Salary Level</th>
<th>2004 (R)</th>
<th>2016 (D) (enjoined)</th>
<th>2019 (R) (current)</th>
<th>2024 (D) (July 2024)</th>
<th>2025 (?) (Jan. 2025)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Salary Level</strong></td>
<td>$455/week ($23,660/year)</td>
<td>$913/week ($47,476/year)</td>
<td>$684/week ($35,568/year)</td>
<td>$844/week ($43,888/year)</td>
<td>$1,128/ week ($58,656/ year)</td>
</tr>
<tr>
<td><strong>Percentile</strong></td>
<td>20th in lowest-paid region</td>
<td>40th in lowest-paid region</td>
<td>20th in lowest-paid region</td>
<td>20th in lowest-paid region</td>
<td>35th in lowest-paid region</td>
</tr>
<tr>
<td><strong>Auto-Increases</strong></td>
<td>No</td>
<td>Yes, every 3 years</td>
<td>No</td>
<td>Auto increase in Jan. 2025</td>
<td>Yes, every 3 years, starting July 1, 2027</td>
</tr>
</tbody>
</table>
Potential Ratcheting Caused By Auto-Increases Tied to Wages Paid to Full-Time Salaried Workers

Universe of Salaried Full-Time Workers in 2024
- $35,000
- $55,068
- $100,000
- $150,000

Universe of Salaried Workers in 2027
- $55,068
- $100,000
- $150,000

Universe of Salaried Workers in 2030
- $100,000
- $150,000

Note: The graphs and projected thresholds reflected on these graphics are neither precise nor to scale; they are intended for illustrative purposes.
# Changes to the HCE Compensation Levels

<table>
<thead>
<tr>
<th></th>
<th>2004 (R)</th>
<th>2016 (D) (enjoined)</th>
<th>2019 (R) (current)</th>
<th>2024 (D) (July 2024)</th>
<th>2025 (?) (Jan. 2025)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Annual Comp</strong></td>
<td>$100,000</td>
<td>$134,004</td>
<td>$107,432</td>
<td>$132,964</td>
<td>$151,164</td>
</tr>
<tr>
<td><strong>Percentile</strong></td>
<td>-</td>
<td>90&lt;sup&gt;th&lt;/sup&gt; nationally</td>
<td>80&lt;sup&gt;th&lt;/sup&gt; nationally</td>
<td>80&lt;sup&gt;th&lt;/sup&gt; nationally</td>
<td>85&lt;sup&gt;th&lt;/sup&gt; nationally</td>
</tr>
<tr>
<td><strong>Auto-Increases</strong></td>
<td>No</td>
<td>Yes, every 3 years</td>
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Additional Points

• U.S. territories

  – Unlike the proposed rule, the DOL stated that the salary changes will not apply to Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Marina Islands.

• Motion picture industry

  – Unlike the proposed rule, the DOL did not carve out a special change for the motion picture industry.
Challenges Ahead

2016 all over again?
The Rule Will Face Challenges

• Challenge to salary rules as exceeding DOL’s authorization to define EAP “capacity”

• Challenge to salary level as too high

• Challenge to auto-increasing as exceeding regulatory charge

• Challenge to DOL’s authority to publish new rules with no confirmed secretary

• Political uncertainty around Nov. election
Challenge to **Salary Amount** and **Auto-Increasing Feature**

- In 2016, a judge in Texas enjoined Obama DOL’s rule, which increased salary level and added automatic updates.

- The court’s main concern: rule would exclude too many workers who perform exempt duties.

- Similar challenges here:
  - Salary level: Obama DOL went to 40\textsuperscript{th}, Biden DOL goes to 35\textsuperscript{th}
  - Auto updates: Both rules include
Challenge Concerning Gaps in DOL Permanent Leadership

- DOL does not have Senate-confirmed Secretary in place (led by Acting Secretary Julie Su)

- Issuance of rule without a permanent Secretary in place has drawn heat from some industry groups
Next Steps for Employers

opportunities and imperatives
What Should Employers Be Doing?

• The DOL will not stall the effective date due to threatened or actual litigation

• Waiting for legal challenges to start planning, even if not messaging out, means high risk of waiting too long

• Many states already have salary thresholds at or above where the federal level is going
What Should Employers Be Doing? (cont.)

• Critical to partner with counsel to prepare for potential changes to impacted jobs
  - Any roles earning less than new thresholds?
  - For roles that straddle both sides of the line, what is tolerance for (a) raises; (b) split-classification roles; or (c) reclassification of entire role
  - For roles being reclassified, need to assess budget impact, new comp approaches, and effects on impacted employees

• Opportunity to assess other exemption-related issues
How Can Counsel Help?

• **Triage** exempt jobs to focus time and resources in a sensible way
• Understand what **drives risk**
• Work backwards from “go live” to ensure organized, well-communicated changes
• Help **protect privilege** or, if desired, bolster **good faith defense**
questions?

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