

REG TIME

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DOL's New Rule Expanding Overtime Eligibility

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Today's Agenda

1. Introduction to the FLSA

2. Application of the FLSA to the Non-Profit Sector

3. White Collar Exemption Overview

4. What Has Changed?

5. Implementing the DOL's New Regulations

FLSA: Minimum Wage and Overtime

Employers must pay non-exempt employees:

At least minimum wage for all hours worked (the current federal rate is \$7.25 per hour).

Overtime compensation for all hours worked over 40 hours in one workweek.

Overtime compensation must be at least 1.5 times the employee's "regular rate" of pay.



FLSA: Compensable Time

Under the DOL's "continuous workday" principle, all activities that occur between the beginning and end of a workday are compensable.

When a workday begins and ends can be more complicated than simply clocking in and out.

FLSA: Compensable Time

Common compensable time issues include:

- Donning and doffing.
- Preliminary and postliminary activities
- Travel time to and from work
- Travel for work
- Walking time
- Waiting or on-call time
- Training, onboarding, and seminars
- Testing
- Volunteer work

Application of the FLSA to the Non-Profit Sector

Application to the Non-Profit Sector

Enterprise coverage: Must engage in ordinary commercial activities that result in sales made or business done of \$500,000

Ordinary Commercial Activities (Covered):

- Operating a business
- Engaging in revenue producing activity

Charitable Activities (Not Covered):

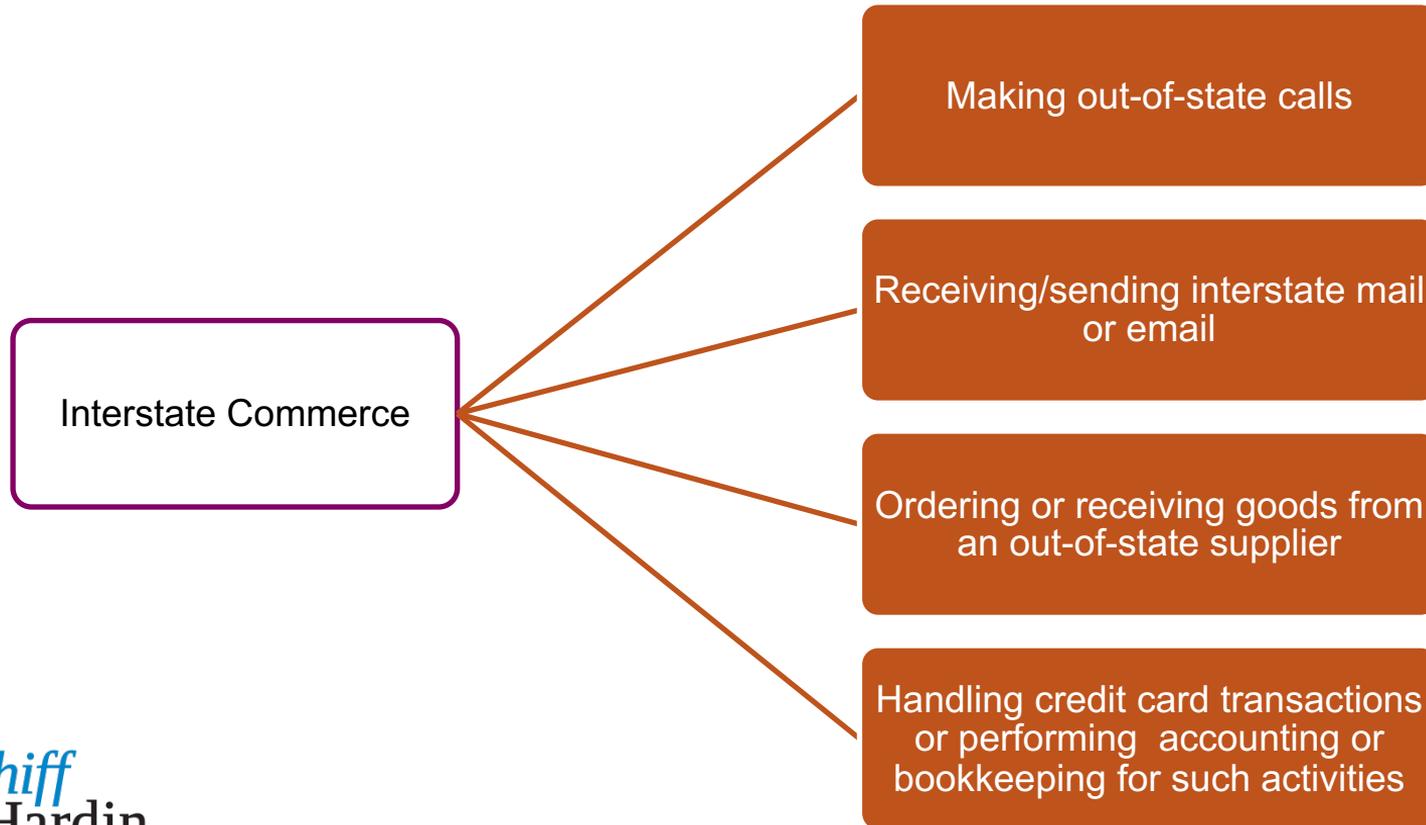
- Providing temporary shelter
- Providing clothing or food to homeless persons
- Providing sexual assault, domestic violence, or other hotline counseling services
- Providing disaster relief provisions

Application to the Non-Profit Sector

Individual Coverage is based on an employee's involvement in one of the following areas:

- Interstate commerce;
- The production of goods for interstate commerce; or
- The movement of persons or things across state lines.

Application to the Non-Profit Sector



Illinois Minimum Wage Law

State law minimum wage and overtime protections for Illinois employees

Employers must comply with both federal and state law

Be mindful of minor differences between the two statutes!

White Collar Exemptions

Exempt v. Non-Exempt Employees

The Fair Labor Standards Act (FLSA)

Application

- All covered, non-exempt employees must be paid no less than the federal minimum wage and receive 1.5x their regular rate of pay for all hours worked in excess of 40 in a workweek

Exemptions

- Executive, Administrative, Professional, Highly Compensated Employee & Others



White Collar Exemptions:

Duties Test



Salary Basis
Test



Salary Level
Test



Duties Tests - EAP

Executive Exemption

- Salary Basis
- Primary Duty: Manages the enterprise or a department or subdivision of the enterprise
- Directs 2 or more full-time employees
- Has authority to hire/fire or such suggestions are given particular weight

Administrative Exemption

- Salary or Fee Basis
- Primary Duty: Performs office or non-manual work directly related to the management or general business operations of the employer or employer's customers
- Primary duty includes exercise of discretion and independent judgment with respect to matters of significance

Duties Tests - EAP

Professional Exemption

- Salary or Fee Basis
- Primary Duty: Performs work requiring advanced knowledge—work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and independent judgment
- Advanced knowledge must be in a field of science or learning
- Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

Duties Tests: Computer Employees

The employee must be compensated either on a salary or fee basis or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;

The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

The employee's primary duty must consist of:

- 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The employee's primary duty includes work that consistently requires the exercise of discretion and independent judgment. (Illinois requirement)

Salary Basis and Salary Level Tests

Employee paid a predetermined and fixed salary that is not subject to reduction based on quality or quantity of work

Do apply to computer employee exemption if the employee is paid on a salary basis

Deductions from weekly salary permissible in only limited circumstances

No deductions based on quality or quantity of work

Minimum salary threshold applies

\$455 per week
(\$23,660 per year)
under the old rule

Clarifying Common Misconceptions

- Salaried status and exempt status are separate concepts: non-exempt employees can still be paid a salary
- Job title/job description not determinative
- Employers are required to pay overtime worked even if it is not authorized
- Employees cannot waive their entitlement to overtime
- Required minimum salary not prorated for part-time employees

What Has Changed?

Timeline re: Development of The Final Rule

March 2014:
President directs Secretary to “modernize and streamline” the white collar exemption regulations.

July 6, 2015:
DOL publishes the proposed rule. Comment period closes September 4, 2015.

May 18, 2016:
President and Secretary announce the publication of the final rule.

September 28, 2016: House passes a bill in effort to delay implementation until June 1, 2017.

December 1, 2016: The final rule takes effect.

New Salary Level Test

Minimum Salary Threshold

- **\$913 per week (\$47,476 per year)**
- Minimum threshold set at amount equal to the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region (currently the South)
- Effective December 1, 2016

New Salary Level Test

Additional Compensation May Be Included in Meeting Salary Threshold

- Up to 10 percent of the salary threshold may be met by **non-discretionary** bonuses, incentive pay, or commissions
- Such payments must be made on a quarterly or more frequent basis
- Employers can establish their own quarterly (13 week) period
- Employers can make a “catch up” payment no later than the next pay period after the end of the quarter (will only apply to the previous quarter’s salary)

New Salary Level Test

Automatic Updates

Salary threshold updates every three years, commencing January 1, 2020

Each update raises standard threshold to the 40th percentile of full-time salaried workers in lowest-wage Census region

Estimated threshold will be \$51,168 in 2020

New salary levels posted 150 days in advance of their effective date, beginning August 1, 2019

Volunteers and Interns

What is a Volunteer Under the FLSA?

- An individual who volunteers freely for public service, religious, or humanitarian objectives without contemplation or receipt of compensation

What is an Intern Under the FLSA?

- The program is similar to training that would be given in an academic or vocational environment.
- The internship or training is for the benefit of the intern or trainee.
- Regular employees are not displaced by interns or trainees.
- The employer derives no immediate advantage from interns or trainees.
- No job entitlement.
- No compensation

The final rule does not impact volunteers but could impact interns.

Implementing the DOL's New Regulations

Taking Action: Options for Employees Who No Longer Qualify For Exempt Status

Increase salary of employees who meet the duties tests but not the new thresholds to meet the new minimum salary threshold and maintain exempt status.

Reclassify employees to non-exempt status and pay required OT.

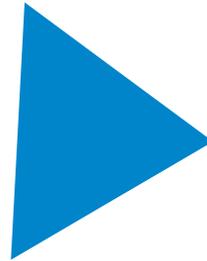
Reclassify employees to non-exempt status and reduce or eliminate OT hours.

Reclassify employees to non-exempt status and adjust pay so that total earnings (regular pay plus any overtime) remains the same, provided the employee still receives at least the applicable minimum wage.

Considerations: Raising Salaries or Reclassification

Consider:

- How close to the threshold is the employee
- Is the employee eligible for non-discretionary bonuses
- How much overtime does the employee work
- How consistent or predictable is the overtime worked



Consider:
Involving legal
counsel for any
audit for purposes
of the privilege

Reclassifying Exempt Employees as Non-Exempt

Non-exempt employees may be paid a salary or hourly

Workload and schedules can be modified to reduce overtime

New employees can be hired

Earnings can be adjusted to reallocate between regular and overtime wages

Prepare communication plan to employees who will be reclassified

Reclassifying Exempt Employees as Non-Exempt

- ➔ Additional timekeeping and recordkeeping requirements will apply
- ➔ Employees must be paid for all hours worked
- ➔ Address restrictions on work outside normal working hours
- ➔ Address smart phones and remote access for previously exempt employees
- ➔ Be aware of state notice requirements
- ➔ Offer letters, job descriptions, other documentation
- ➔ Train supervisors or managers
- ➔ Train newly exempt employees

Other Reclassifications?

Some employers may have positions that come “close to the line’ in qualifying for exempt status from the standpoint of the “duties test.”

These employers may engage in other reclassifications, in addition to those mandated by the new DOL minimum salary thresholds.

Helpful Links:

U.S. Department of Labor FAQs on New Rules:

<https://www.dol.gov/whd/overtime/final2016/faq.htm>

U.S. Department of Labor Overtime Final Rule and the Non-Profit Sector

<https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf>

U.S. Department of Labor Guidance for Non-Profit Organizations on Paying Overtime under the FLS

<https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>

Illinois Department of Labor Minimum Wage / Overtime FAQs:

<https://www.illinois.gov/idol/FAQs/Pages/minimum-wage-overtime-faq.aspx>

Questions?

Thank you!