

Navigating Changing Overtime Rules: What You Need to Know

Julie Kinkopf, Esquire

610-660-7786

julie@kinkopfllc.com



Kinkopf Law LLC

Agenda:



Navigating the Changing Conversation

- ▶ No longer “FLSA Compliance” or “Wage and Hour Violations”, now it’s “**Wage Theft.**”
- ▶ DOL/WHD Information Campaigns

DOL-Timesheet

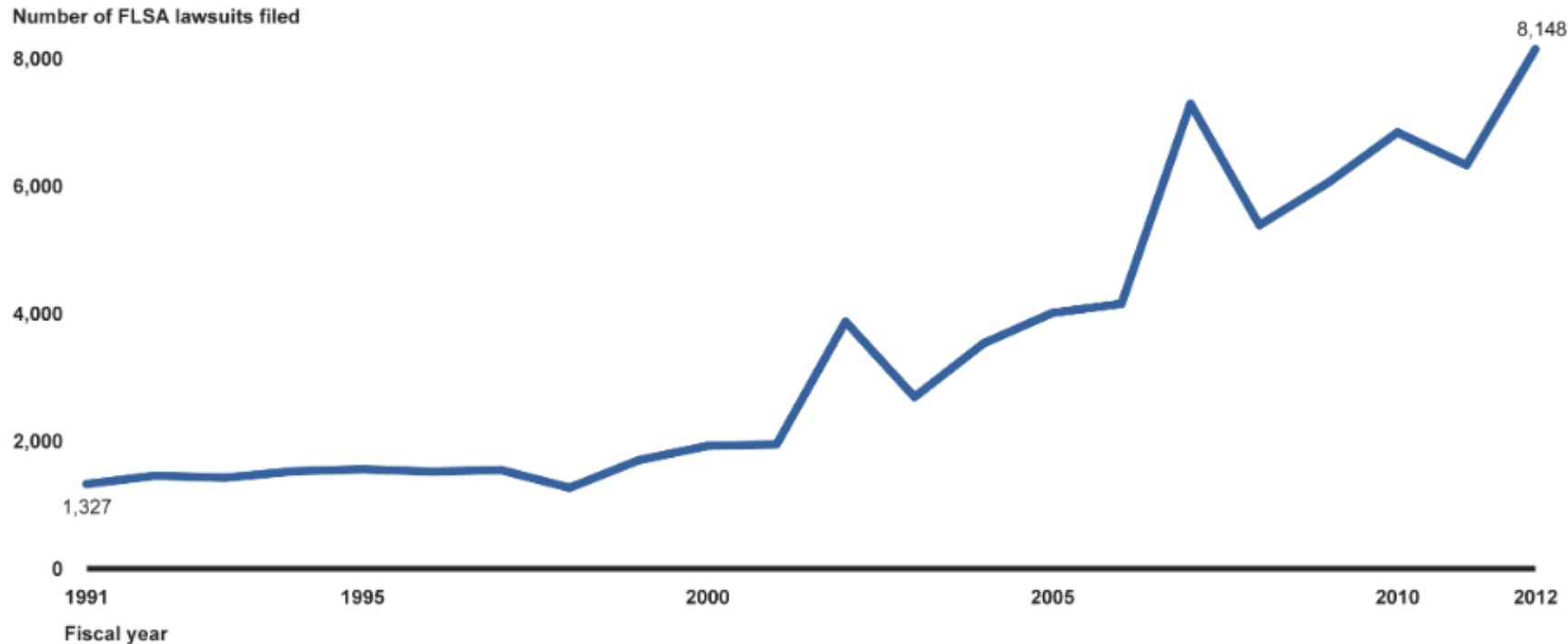
An app for employees to independently track the hours they work and determine the wages they are owed.



Navigating Increased Litigation Threats:

FLSA Litigation Up 514% from 1991-2012*

Figure 1: Number of FLSA Lawsuits Filed in Federal District Court, Fiscal Years 1991-2012



Source: GAO analysis of Federal Judicial Center data.

* Federal Court Litigation Only

Navigating Increased Enforcement and Changing Rules

- ▶ Number of DOL Investigators has **DOUBLED** since 2008
- ▶ Recent publications from IRS and DOL on employee/contractor classification signal increased scrutiny
- ▶ Changing overtime regulations--proposed changes to overtime regulations will impact **5 million workers** in year 1.



Fair Labor Standards Act Passed in 1938



1938 COST OF LIVING	
<u>LIVING</u>	
New House	\$3,900.00
Average Income	\$1,731.00 per year
New Car	\$860.00
Average Rent	\$27.00 per month
Tuition to Harvard University	\$420.00 per year
Movie Ticket	25¢ each
Gasoline	10¢ per gallon
United States Postage Stamp	3¢ each
<u>FOOD</u>	
Granulated Sugar	59¢ for 10 pounds
Vitamin D Milk	50¢ per gallon
Ground Coffee	39¢ per pound
Bacon	32¢ per pound
Eggs	18¢ per dozen



Fair Labor Standards Act: Who it Covers

Department of Labor says that more than **130 million** American workers are covered by the FLSA.



Industries Not Covered By FLSA:

- ▶ Certain Industries Specifically Excluded:
 - ▶ Transportation (Motor Carrier Exemption)
 - ▶ Seasonal and Recreational Establishments
 - ▶ Agricultural



- ▶ Workers performing specific types of work (i.e. commissioned retail salespersons, taxicab drivers, car salespeople)



Independent Contractors Not Covered by FLSA

According to the DOL, **MOST WORKERS ARE EMPLOYEES**, not contractors.

- ▶ Broad definition in the FLSA: “suffer or permitted to work”

- ▶ Six part “economic realities” test:
 1. Is the work an “integral part” of the employer’s business?
 2. Does the worker’s “managerial skill” affect the worker’s opportunity for profit or loss?
 3. How does the worker’s relative investment compare to the employer’s investment
 4. Does the work performed require special skill and initiative?
 5. Is the relationship between the work and the employer permanent or indefinite?
 6. What is the nature and degree of the employer’s control?

No one factor is determinative.



What the FLSA Requires

Employers must pay minimum wage (currently \$7.25)

Employers must pay non-exempt employees 1 ½ times the employee's regular rate of pay for all hours worked over forty in a workweek.

Record keeping requirements—track hours worked by employees each workweek.



Exemptions to Overtime

- ▶ Most common--“white collar” exemptions:
 - ▶ Executive
 - ▶ Administrative
 - ▶ Professional

- ▶ Other common exemptions:
 - ▶ Highly Compensated Employees
 - ▶ Outside Sales
 - ▶ Computer Employees

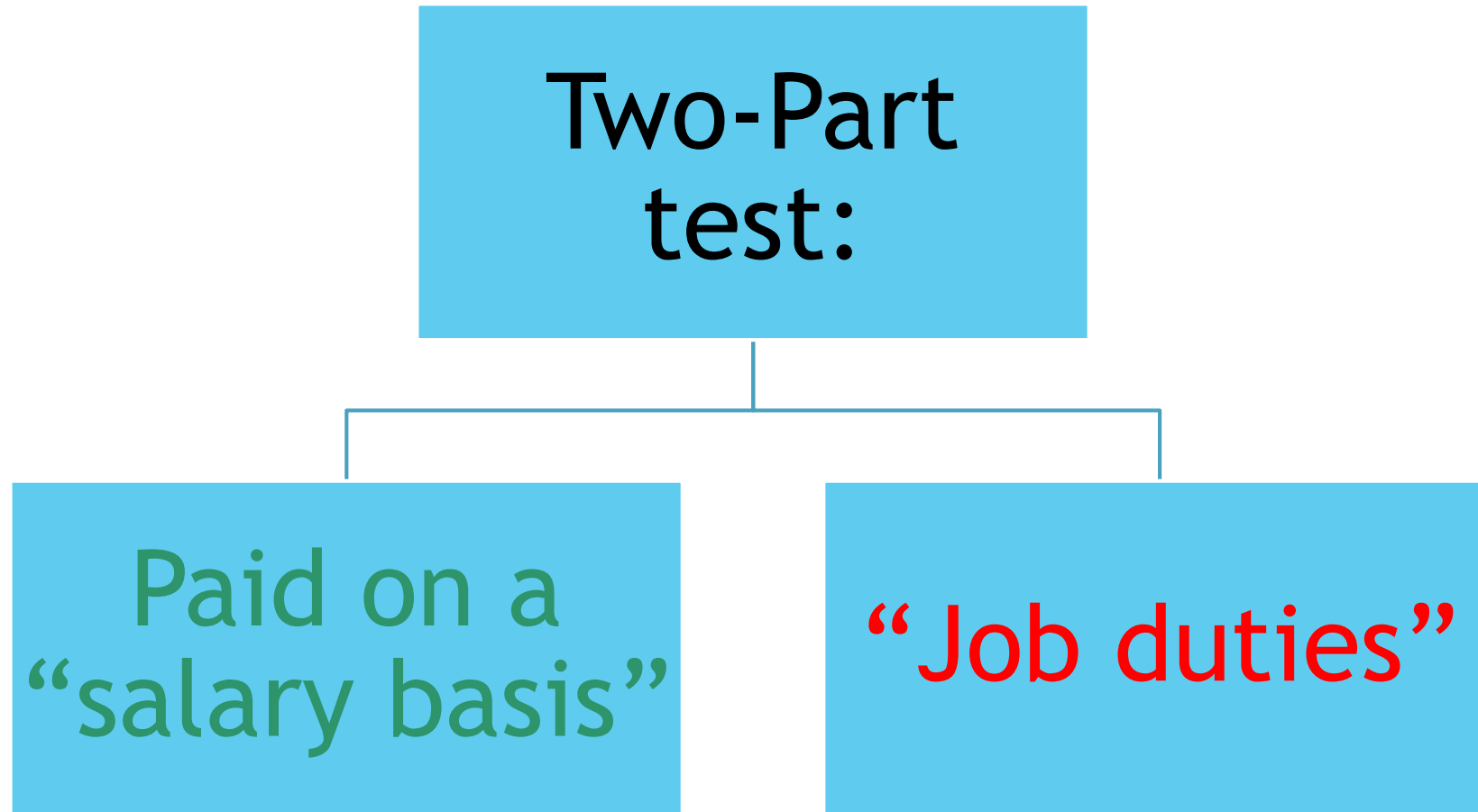


Quick Summary of the Proposed Changes

1. “White Collar” Salary Minimums more than double:
 - ▶ Currently \$455/week or \$23,660 per year
 - ▶ Proposed change put that to \$970/week or \$50,440/year in 2016
2. “Highly Compensated” salary requirement increases from \$100,000 to \$122,148
3. Automatic update mechanism:
 - ▶ “White Collar” would be limited to the 40th percentile of weekly earnings for full time workers
 - ▶ “Highly Compensated” would be limited to the 90th percentile



White Collar Exemptions



MUST SATISFY BOTH PARTS

PART ONE: Salary Basis Test

- ▶ Paid set amount on at least a weekly basis
- ▶ Must receive full salary for any week in which they perform work, regardless of number of hours or days worked
 - ▶ Any deductions from pay must be one of the permissible deductions set by the DOL
- ▶ Current Rules: Must be paid at least **\$455 per week / \$23,660 per year**
- ▶ Proposed Rules (2016): Must be paid at least **\$970 per week / \$50,440 per year**



Putting the Numbers in Perspective

- ▶ FLSA written in 1938
 - ▶ Number of employees exempt has increased greatly:
 - ▶ 1975 it was 35%
 - ▶ 2004 it was 82%
 - ▶ Now its 88%
 - ▶ Why?
 - ▶ Minimum salary has failed to keep up with inflation
 - ▶ Changes to interpretation of “primary duty” excluded many lower wage workers



Permissible Deductions

- ▶ Absent for one or more full days for personal reasons, such as illness
 - ▶ Not partial days, only full days
- ▶ Weeks employee is on unpaid leave under the FMLA
- ▶ Unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions

Employers who make improper deductions from salary risk losing the overtime exemption for employees in the same job classification.



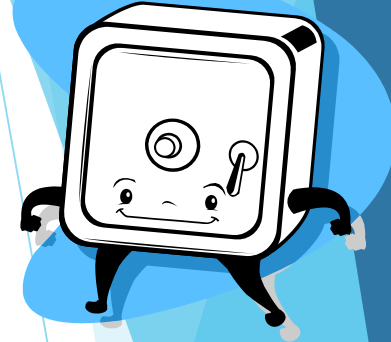
Safe Harbor Policies

All employers who have exempt employees need a “safe harbor” policy

Requirements:

1. Must be clearly communicated and include a complaint mechanism for employees who feel improper deductions have been taken;
2. Employer must reimburse employees for any improper deductions; and
3. Employer must make a good faith commitment to comply in the future.

Can protect the employer from errors, so long as the employer does not willfully violate the policy by continuing improper deductions after receiving employee complaints.



PART TWO: Job Duties Test

- ▶ Look at the **primary job duties**
 - ▶ “Primary duty” means the principal, main, major or most important duty that the employee performs.
 - ▶ Based on all facts, with major emphasis on the “character” of the employee’s job as a whole.
 - ▶ Amount of time spent on tasks can be a useful guide, but time alone is not the sole test



Time Spent On The Duties

50% or more?

- ▶ Generally satisfies
- ▶ Nothing requires employees to spend more than 50% of their time performing specific duty



Less than 50%?

- ▶ Can still be the “primary duty” if the essence of the job is supervisory
- ▶ Example: a manager who does much of the same work as others, but is responsible for management of the location, setting schedules, etc.

Executive



Primary duty of managing the enterprise or a recognized division or subdivision;



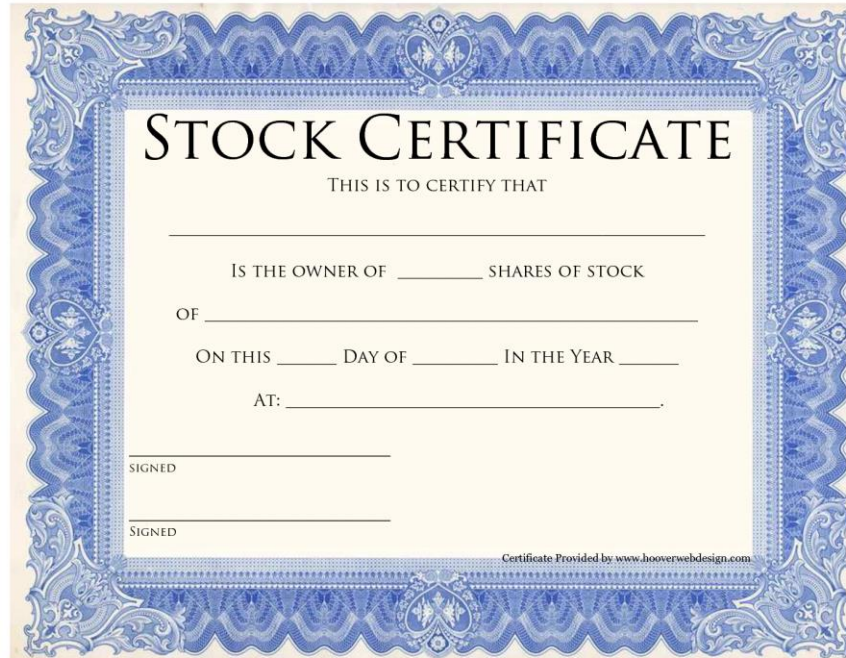
Customarily or regularly directs the work of at least two other full-time employees; and



Has hiring and firing authority or at a minimum influence in the hiring, firing, advancement, promotion, or other status change of other employees

Business Owners

- ▶ Employee who owns at least a bona fide **20% equity** interest in the enterprise and is **actively engaged in its management** is considered at bona fide exempt executive



Administrative



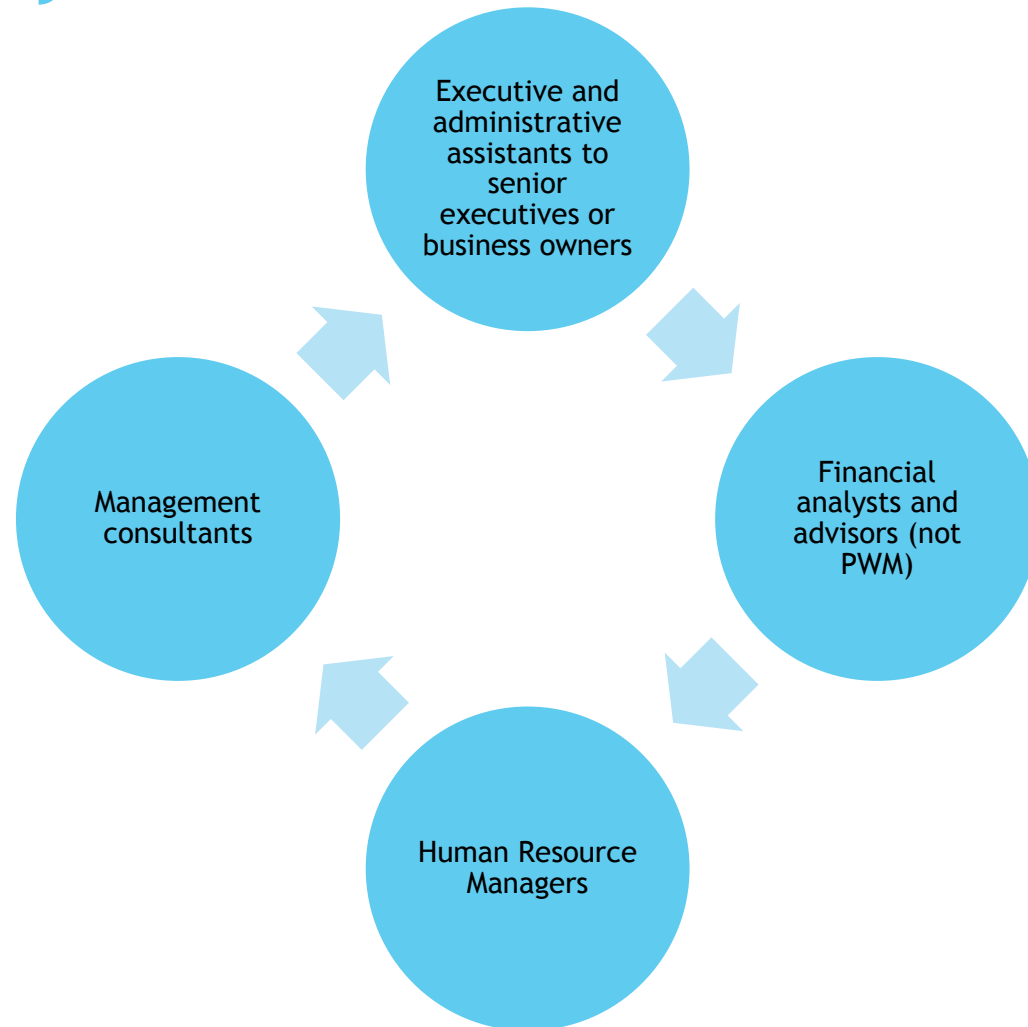
Perform primarily office or other non-manual work directly related to the management or general business operations of the employer or the employer's customers



Exercise discretion and independent judgment on significant matters



Examples of Administrative Exempt Employees



Professional/Creative



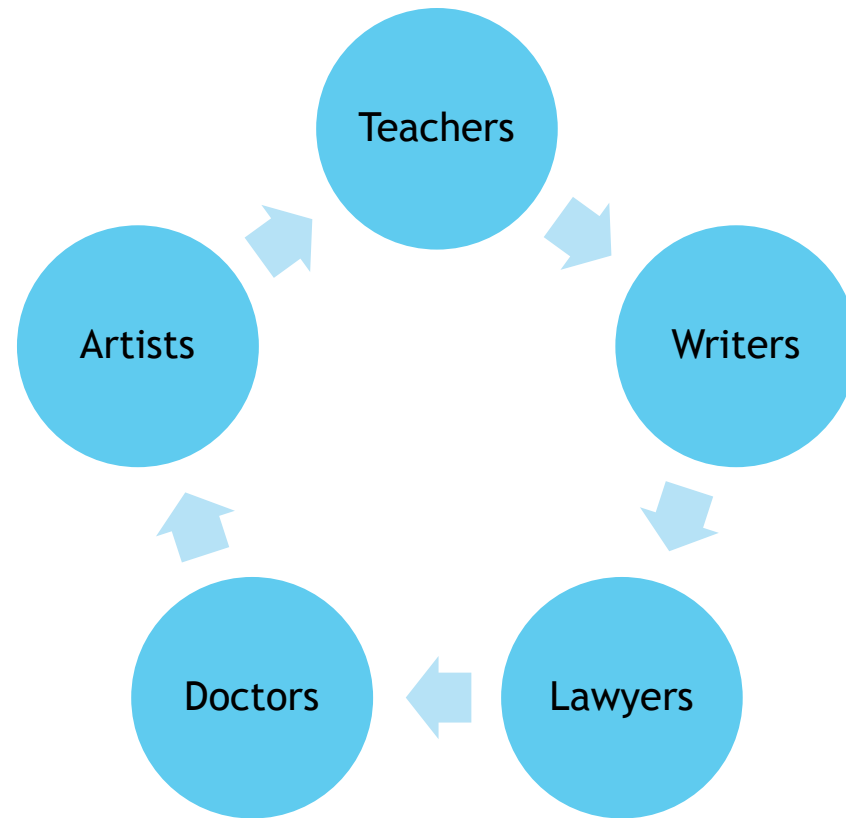
Advanced knowledge in a field of science or learning that generally is acquired by a prolonged course of specialized intellectual instruction or study; or



Originality, invention, imagination or talent in a recognized artistic or creative field, such as music, creative writing or theater



Examples of Professional/Creative



Other Common Exemptions with Different Tests

- ▶ Highly Compensated
- ▶ Outside Sales
- ▶ Computer Employees



Highly Compensated



Perform office or non-manual work and paid total compensation of \$100,000 (set to increase to \$122,148) or more are exempt if they customarily and regularly perform at **least one of the duties** of an exempt executive, administrative or professional employee



Outside Sales

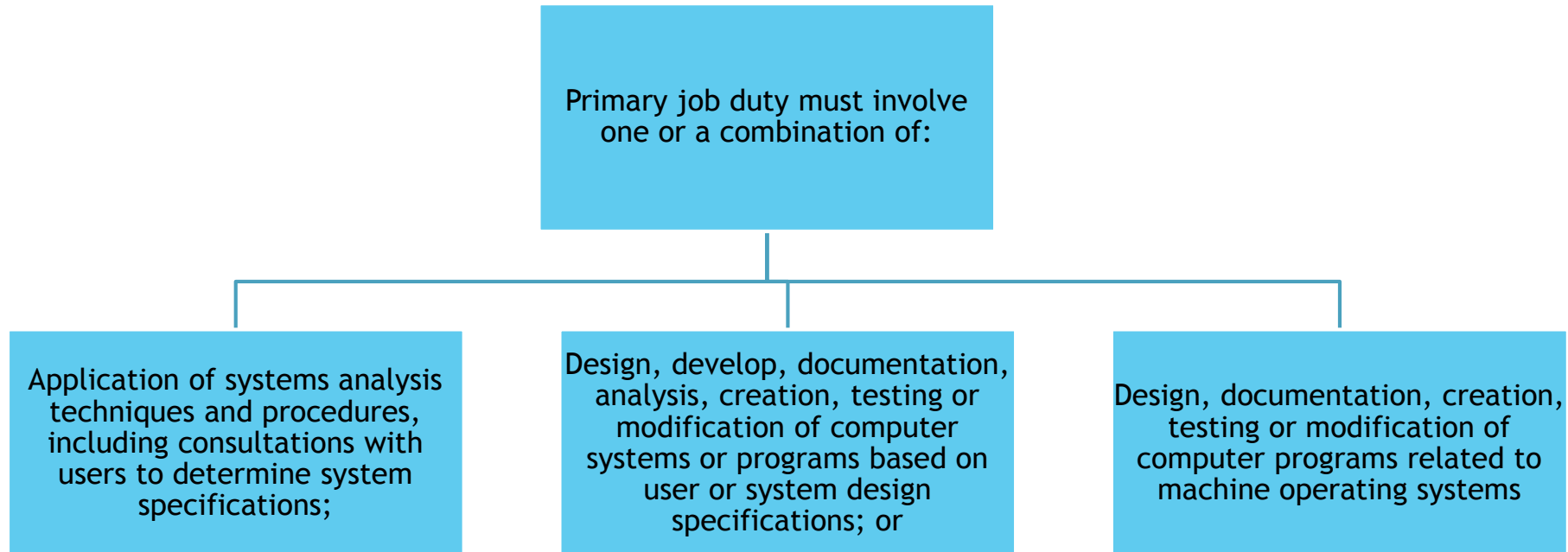
Make sales or obtain orders or contracts for which a consideration will be paid by the client or customer; **and**

Customarily or regularly engaged away from the employer's places of business

Does not include sales made by mail, phone or internet

Any fixed site, even a home office is considered employer's place of business

Computer Employees



Summary of the Changes to Overtime Rules

- ▶ White Collar Salary Minimums more than double:
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- ▶ Highly Compensated salary requirement increases from \$100,000 to \$122,148
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What Do The Changes Mean to You?

- ▶ Big hit to the bottom line.
 - ▶ Need to review budgets, schedules and staffing levels
- ▶ More workers will be hourly.
 - ▶ Need to track hours worked
 - ▶ Better policies for after hours work
 - ▶ BYOD policies
 - ▶ Better training of supervisors
- ▶ Many employees will go from salary to hourly
 - ▶ Need to educate them
 - ▶ Restructure compensation
 - ▶ Morale problems
- ▶ More scrutiny of pay practices and recordkeeping



Ways to Protect Your Organization

- ▶ Raise awareness
 - ▶ Train employees on wage and hour policies. Facilitate open communication.
- ▶ Review Worker Classification (contractor/employee *and* exempt/non-exempt)
- ▶ Have written job descriptions and review them regularly.
- ▶ Update your policies
 - ▶ Beware of emails/calls to non-exempt employees
- ▶ Make sure you are keeping complete and accurate records of all hours worked.
- ▶ Have a “Safe Harbor” policy

Audits: Your Best Line Of Defense

- ▶ Conduct regular audits of pay policies, deductions
- ▶ Audit job descriptions
- ▶ Review exempt/non-exempt classifications
- ▶ Audit record-keeping
- ▶ Get legal counsel involved
 - ▶ Opinion letters to support exempt classifications
 - ▶ Help with addressing executive team concerns
 - ▶ Attorney-client privilege



What To Expect If The DOL Comes Knocking

- ▶ 72 hours to prepare
- ▶ Review of all payroll information
- ▶ Will want to speak with employees
- ▶ Review of all your records, including I-9's, benefits etc...
- ▶ Highly disruptive to your business
- ▶ Expensive, little problems can become big problems quick

Penalties for FLSA violations

- ▶ Back wages
- ▶ Liquidated damages
- ▶ Attorney's fees and court costs
- ▶ Injunctions
- ▶ Penalties
 - ▶ Civil penalties of up to \$1,100 per violation
 - ▶ Willful violations may result in criminal prosecution
- ▶ “Hot Goods” provision—WHD can seek to restrain shipment of goods produced in violation of FLSA



Questions?

Julie Kinkopf
Kinkopf Law LLC

www.kinkopflawfirm.com

610-660-7786 (office) ♦ 215-704-0029 (cell)

LinkedIn www.linkedin.com/in/juliekinkopf

Facebook <https://www.facebook.com/kinkopflaw>

Blog: <http://youremploymentlawyer.wordpress.com/>

Twitter @yremploymentlaw



Kinkopf Law LLC