

Greater Valley Forge Human Resources Association

## FLSA “POLE VAULT” REQUIRED: DOL INSTALLS HIGH HURDLE FOR OVERTIME EXEMPT STATUS

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# AGENDA

Basics

Changing  
Rules

How to  
Prepare



## BASICS: WHAT IS THE FLSA?

- Federal law establishing minimum wage and overtime requirements
- “Simple” Concept: all employees must receive MW and must be paid OT if work more than 40 hours in a week unless “exempt”
  - Sounds simple, right? NOT
  - Very complicated, convoluted at times, & nuanced
  - “White Collar Exemptions” (most popular)
- Remedies: back wages, liquidated damages, civil money penalties (DOL), atty fees



# 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 40 in a workweek.

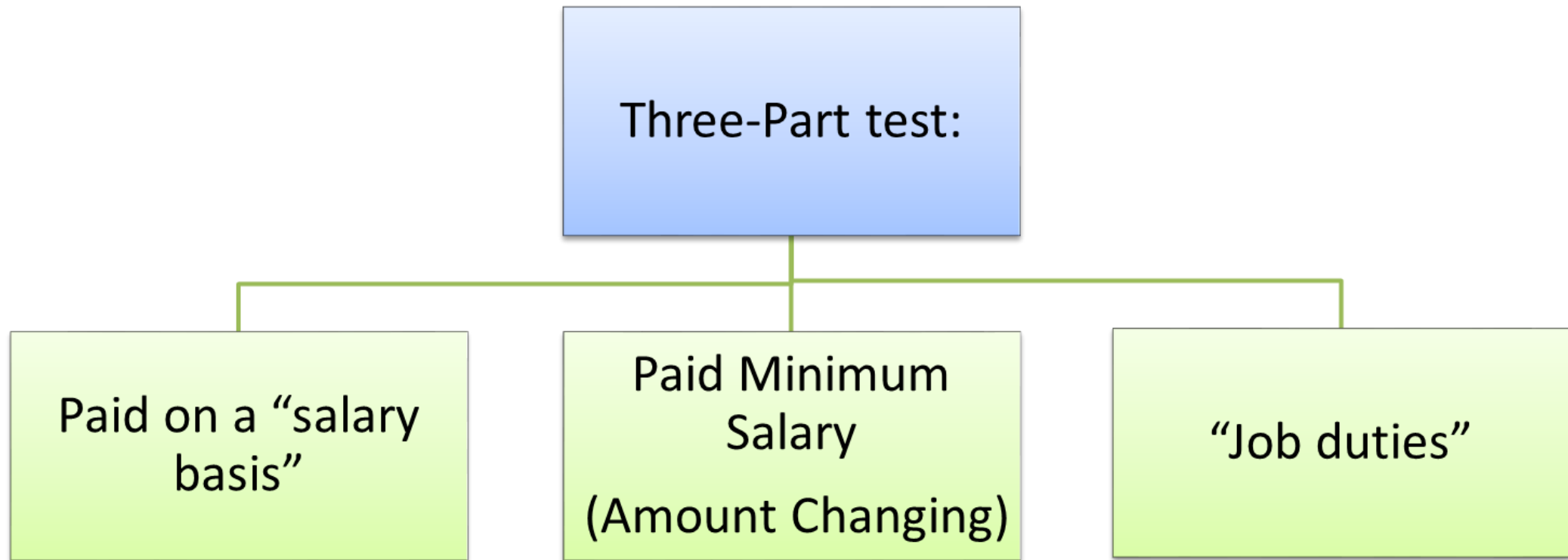
Recordkeeping requirements—track hours worked by employees each workweek.



# COMMON OVERTIME EXEMPTIONS

- “White Collar” Exemptions
  - Executive (supervise 2+ FTEs, hire/fire)
  - Administrative (“independent judgment & discretion”)
  - Professional (specialized degree)
  - Outside Sales (really, “outside”)
  - Computer? Highly compensated? (Not in PA)





**Must Satisfy All Parts**

Changes to the rules negate importance of job duties test.



# INCREASED ENFORCEMENT BY DOL

- Number of DOL investigators has **DOUBLED** since 2008
- In the last five years:
  - Initiating more investigations (up 23 percent)
  - 20 percent increase in number of establishments found in violation
  - 78 percent violation rate found in DOL-initiated investigations (was 65 percent)
  - \$1.3 billion in back wages recovered for 1.5 million individuals
- Investigations have a larger scope – looking for systemic problems
- Liquidated damages are the norm now



# FLSA LAWSUITS EVERYWHERE

- Cottage industry growth (FL, CA, NY)
- Lawsuit nightmare
  - Almost 9,000 FLSA federal case filings for FY 2015
  - Material increase over 2014; Quadrupled from trend start in 2000
  - These stats don't even include state law filings
  - \$400 million paid out in 2014 to settle FLSA claims
    - Average payment of \$5.3 million per employer
  - Since 2007, employers have paid more than \$3.6 billion to settle wage and hour lawsuits
- “Collective actions” are the “in” filing
  - What is that? “Class action”? (Not exactly)
  - “Similarly situated” = single policy, plan or decision
- Beware: individual execs are sued (like VP HR)—courts reluctant to dismiss if some policy-setting role





## SUMMARY OF THE CHANGES

1. “White Collar” salary minimums more than double to \$913/week or \$47,476/year
  2. “Highly Compensated” salary requirement increases to \$134,004 (be careful in PA)
  3. Some bonuses can be part of the salary minimum
  4. Automatic update every three years starting in 2020
    - “White Collar” would be limited to the 40<sup>th</sup> percentile of weekly earnings for full-time workers in lowest wage census region (currently the South)
    - “Highly Compensated” would be limited to the 90<sup>th</sup> percentile
- **Effective DECEMBER 1, 2016**



## AUTOMATIC “UPDATES” TO SALARY MINIMUM

- Auto-updates every 3 years, beginning 1/1/20 (40<sup>th</sup> %)
- Expected to exceed \$51,000 in 2020
- Will skew salary level because it includes EEs not subject to salary level test (e.g., drs, lawyers, teachers)
- Will cause upward shift because:
  - current exempt EEs may be given raises to avoid salary compression;
  - those re-classified to salary non-exempt may have increased earnings due to OT pay; and
  - those re-classified to hourly will be excluded from data.



## SOME NUMBERS TO CONSIDER

- 7.4 million establishments affected per DOL.
- DOL says 4.2 million employees instantly *eligible* for overtime
  - Industry groups say it will affect **10 million** (more than the populations of Maine, New Hampshire, Rhode Island, Montana, Delaware, South Dakota, Alaska, North Dakota, Vermont, Washington and Wyoming combined!)
- Cost to implement changes: \$592.7 million
  - One hour of compliance time—*really?*



# IMPACT OF CHANGES

- Many more employees eligible for overtime:
  - Anyone between \$23,660 and \$47,476
    - No longer exempt, no matter the duties
  - The Dilemma: “To raise or not to raise...”
  - Salary Increase vs. Reclassification
  - Giving raises = potentially significant financial impact
  - Reclassification means ...
    - Entire new group of workers exposed to “non-exempt world”
    - Psychological impact, often perceived as a stigma or demotion
    - Increased the administrative burden on employers
  - What policies need to be updated? Training?



## AREAS OF BIGGEST IMPACT

- Just ask the DOL – more than 4 million new workers eligible for OT
- Employers with exempt EEs earning less than \$47,500
- Geographic regions – South and Midwest
- Industries – Hospitality, Tourism, Retail, Restaurants, Healthcare, Higher Education, and Tech
- Job categories – store managers, bank branch managers (or assistant managers), finance departments, and admissions offices and other college staff



# WORKFORCE IMPACT

- On Exempt Employees:
  - longer hours,
  - more duties/responsibilities, and
  - salary compression.
- New Non-Exempt (Reclassified) Employees:
  - morale (feel like demoted);
  - lose perks and benefits of being “exempt” employee;
  - less training, mentoring, and education;
  - less flexibility and more restrictions; and
  - less full-time and more part-time.



## IS THERE ANY GOOD NEWS?

- Depends on how cynical you are ... .
- Bonus and incentive plans can be used to satisfy part of the salary basis test.
- Opportunity to fix long standing problems.



# BONUSES AND INCENTIVE PLANS

- Nondiscretionary bonuses can be used to satisfy up to 10 percent of the salary level
  - Must be paid on quarterly or more frequent basis (\$1,186.90 per quarter)
  - Permits “catch-up payment”
  - Capped at 10 percent (max \$4,747.60)
- Includes incentive compensation and commissions





# DO YOU HAVE TO CONVERT EVERYONE TO HOURLY?

No. Employers can pay non-exempt employees on a salary basis and pay overtime for hours worked over 40.

*But must keep track of all hours worked.*



# WHAT TO DO WITH EMPLOYEES MAKING LESS THAN \$47,476

Example: Judy is an HR manager earning a salary of \$40,000 per year (\$769.23 per week).

Options:

1. Increase Judy's salary to \$47,476 (knowing it will need to be raised again in 2020); OR
2. Reclassify and pay overtime
  - Calculate regular rate of pay
  - Overtime rate of pay



## HOW MUCH IS RECLASSIFICATION GOING TO COST?

- $\$40,000/\text{year} = \$769.23 \text{ week}$
- $\$769.23/40 = \$19.23 \text{ Regular Rate}$
- $\$19.23 \times 1.5 = \$28.85 \text{ Overtime Rate}$

If Judy works an average of 50 hours per week, her pay will increase by **\$15,000**

$$\begin{aligned} & \$769.23 + \$288.46 (10 \times \$28.85) = \$1057.70/\text{week} \\ & \quad \times 52 \text{ weeks} = \$54,999.94 \end{aligned}$$



# HOW TO RECLASSIFY AND KEEP JUDY AT \$40,000 PER YEAR

- 40,000/year = \$769.23 week
  - To maintain \$769.23 per week:
    - Reduce weekly salary to \$559.60
      - New Regular Rate \$13.99/hour (hours 1-40)
      - Overtime Rate \$20.99/hour (10 overtime hours per week)
- 40 x 13.99 = 559.60
- 10 x 20.99 = 209.90
- \$769.50



## ANOTHER SUGGESTION: SALARY BASED ON 50 HOUR WEEK

- \$40,000/year = \$769.23/week
- $\$769.23/50 = \$15.38$  regular rate
- Hours 1-50 paid at \$15.38
- Hours 40-50 add \$7.69 (1/2 OT) per hour
- Hours 50+ must be paid at \$23.07/hour OT rate

At 50 hours/week, total pay increased by \$76.90 per week or \$4,000 per year



## OTHER OPTIONS PERMITTED BY THE REGULATIONS

- Fluctuating Work Week (FWW)
- BELO Contracts

Both require advance agreement between employer and employee, but may be appropriate in certain circumstances.



# TIPS TO MINIMIZE RECLASSIFICATION IMPACT

- Develop a strategic communications plan (and follow it)
- Reduce scheduled hours of newly non-exempt employees
- Hire additional personnel to spread out hours (reduce OT)
- Reassign certain tasks up to exempt employees
- Consider effect on benefits eligibility
- Consider compensation required for training and mentoring new non-exempt employees



# RECLASSIFICATION – TRAINING & BIZ CONSIDERATIONS

- Train newly non-exempt and their managers (some managers may not be accustomed to supervising non-exempt)
- Timekeeping/record-keeping practices and policies
  - Understanding what are “hours worked”
- Restrictions on work outside normal work hours
- Mobile devices and remote access
- Update offer letters, handbooks, and job descriptions, including:
  - Making hours expectations clear
  - Documenting if salary is for all hours worked (FWW) or for how many





## RECLASSIFICATION – MORE TRAINING & ADMINISTRATION

- Compliance with meal and rest periods
- Telecommuting concerns
- Travel time pay
- Overtime restrictions – require supervisor approval
- Consider timing of implementation (pre-Dec. 1?)
- Consider timing of “annual” pay increases
- Monitor to ensure compliance – audit after test period



## NO CHANGES TO COMMON MYTHS

- Still not about being paid a salary – “salaried” does not mean exempt
- Still not about job title
- Still not about written job description
- Still not about how “everyone else” does it
- Still required to pay for OT even if not authorized
- Still cannot waive rights to OT (or MW)
- Still “no comp time” for private employers



## MUST KEEP TRACK OF HOURS WORKED

- Records must be accurate number of daily hours worked by the employee. Don't need to clock in/out, just track number of hours.
- **Fixed Schedules**: If employee works a fixed schedule, regulations do not require hours worked each day. Instead, agree on a default schedule that reflects daily and weekly hours and indicate (by check mark, or other method) that schedule was followed. On weeks when not followed, record actual hours. 29 C.F.R. 516.2(c).



# WHAT TO DO BETWEEN NOW AND DECEMBER 1

- Review job classifications/payroll
  - Who is in the “danger zone”?
  - Should he or she be reclassified?
  - Good opportunity to also look at contractor classification
- Determine how many hours employees are working
  - What is their regular rate of pay? What is their overtime rate?



# WHAT TO DO BETWEEN NOW AND DECEMBER 1 (CONT.)

- Raise awareness
  - Train employees on wage and hour policies.
  - Facilitate open communication.
- Review Policies
  - Does overtime need to be approved?
  - After hours work—how is it handled? What needs to be changed?
  - Beware of emails/calls to non-exempt employees
  - Take this opportunity to review and update your handbook
- Make sure you are keeping complete and accurate records of all hours worked.



## NEW REGULATIONS – LITIGATION TRIGGER?

- Beware: there will be an enormous number of vulnerable positions (i.e., under \$47,476)
- Reclassifications may be challenged
- With “new” non-exempt workers uneasy with “punching” a clock and managing their hours, off-the-clock claims will abound
- Remember: with the FLSA, almost everything is a class (“collective”) action
- P.S. – Don’t waste this opportunity! (Use the timing to address other issues – are other exempt EEs “actually” performing required duties?)



# QUESTIONS?

