



# FLSA & DOL Final Overtime Rule Presentation

# **WHAT WE WILL COVER TODAY**

- **Exempt and non-exempt employees under the Fair Labor Standards Act (FLSA).**
- **The effect of the new Department of Labor (DOL) Final Rule.**
- **Implementing the new DOL Final Rule.**
- **Salaried non-exempt options and strategies.**
- **“Hours worked” by non-exempt employees.**
- **Employees vs. Volunteers.**
- **Employees who work at multiple locations.**

# **CLASSIFYING EXEMPT AND NON-EXEMPT EMPLOYEES**

- **The FLSA is a federal law that addresses how employers classify and pay employees.**
- **FLSA is enforced by the Department of Labor (DOL).**
- **The term “exempt” refers to the employee being exempt from FLSA minimum wage and overtime requirements.**
- **Whether an employee is exempt is based upon the job duties, not the job title.**
- **Executive, Administrative and Professional exemptions--“white collar” exemptions.**

# CURRENT “WHITE COLLAR” EXEMPTION REQUIREMENTS

1. Minimum Salary--\$455 minimum per week (\$23,660 annually) (minimum salary requirements do NOT apply to teachers, doctors, lawyers)

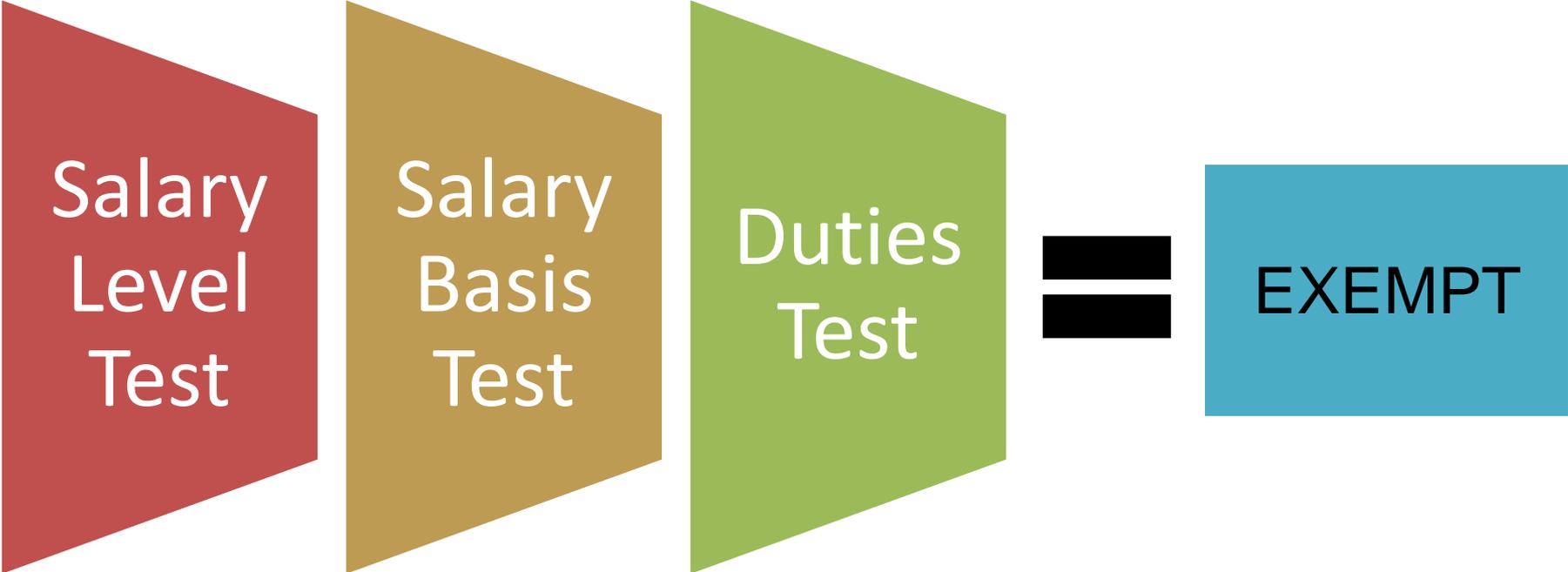
AND

2. Must be paid on a salary basis—not hourly

AND

3. Have *primary duties* that are categorized as executive, administrative, or professional.  
(rule of thumb for *primary duty* is spending greater than 50% of time performing exempt work)

# Requirements



Salary  
Level  
Test

Salary  
Basis  
Test

Duties  
Test

=

EXEMPT

# “WHITE COLLAR” EXEMPTION REQUIREMENTS

- **What is the downside to misclassifying a non-exempt employee as exempt?:**
  - Back overtime wages for a two-year period (or three-year period if willful violation)
  - No records of employee hours worked to refute employee evidence/testimony
  - Liquidated damages equal to double the amount owed in back overtime wages
  - Attorneys’ fees
  - Potential collective action (like a class action)

# “WHITE COLLAR” EXEMPTION REQUIREMENTS

- **EXECUTIVE EXEMPTION:**

- Management of the business or a department or subdivision thereof;
- Customarily and regularly directs the work of two or more full-time employees or their equivalents;
- Has authority to hire or fire other employees or whose suggestions or recommendations regarding an employee’s change in status are given particular weight.

# “WHITE COLLAR” EXEMPTION REQUIREMENTS

- **ADMINISTRATIVE EXEMPTION:**

- Performs office or non-manual work directly related to management or general business operations of employer or customers;
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance;
- Carries out major assignments in conducting operations of business;
- Performs work that directly affects business operations to a substantial degree.

# “WHITE COLLAR” EXEMPTION REQUIREMENTS

- **PROFESSIONAL EXEMPTION:**

- *Learned professionals* (work requiring advanced knowledge in a field of science or learning where the advanced knowledge is acquired by a prolonged course of specialized intellectual instruction) (e.g., accountants, registered nurses)
- *Creative professionals* (work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor) (e.g., actors, musicians, composers, novelists)

# MINISTERIAL EXEMPTION

- **The DOL recognizes a “ministerial exemption” to the FLSA that excludes a member of the clergy from being an “employee” within the FLSA.**
- **The notion of this exemption derived from a debate on the floor of Congress regarding the scope of “employee” coverage under the FLSA.**
- **The ministerial exemption was later delineated in guidelines issued by the DOL’s Wage and Hour Administrator in the form of a Field Operations Handbook.**

# MINISTERIAL EXEMPTION

- The relevant portion of the guidelines provides:
- *“Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be ‘employees.’”*
- Importantly, the DOL Final Rule neither expands nor restricts the scope of this exemption.
- Based on our research, including the opinion of our outside counsel, we are recommending no changes to current practice as it relates to this exemption.

# “WHITE COLLAR” EXEMPTION REQUIREMENTS—DUTIES TESTS

- **Jobs That Will Not Qualify For Exemption:**
  - Any job where primary duty involves manual labor
  - Teacher Aide/Classroom Helper
  - Secretary/Receptionist
  - Housekeeping/Office Maintenance
  - Help Desk Technician/Basic IT work
  - Accounts Payable/Accounts Receivable Clerk
  - Bookkeepers and some “staff” accountants

# “WHITE COLLAR” EXEMPTION REQUIREMENTS—DUTIES TESTS

- **Are These School/Parish Jobs Exempt?**
  - Teacher: YES
  - Principal: YES
  - School Secretary/Receptionist: NO
  - Office Helper: NO
  - Maintenance Worker: NO
  - Maintenance Supervisor: MAYBE
  - Teacher Aide: NO
  - Cafeteria Worker: NO
  - Cafeteria Supervisor: MAYBE

# **“WHITE COLLAR” EXEMPTION REQUIREMENTS—DUTIES TESTS**

- **Are These School/Parish Jobs Exempt?**
  - Business Manager: YES
  - Director of Religious Education: YES
  - Parish Secretary/Receptionist: NO
  - Music Director: YES
  - Organist: NO
  - Pastoral Associate: YES
  - Youth Ministry/Adult Faith Coordinator: YES
  - Bookkeeper: NO
  - Housekeeper/Cook: NO

# **DOL FINAL OVERTIME RULE**

- **The new rule takes effect on December 1, 2016.**
- **The annual salary threshold for exempt positions will jump from \$23,660 to \$47,476 (or from \$455 to \$913 per week).**
- **There will be no change in the duties tests for the white collar exemptions.**
- **There will be automatic salary threshold increases every 3 years (first update to take effect 1/1/2020).**
- **Efforts continue to be made to block or modify the new rule but we should plan for it to take effect.**

# DOL FINAL OVERTIME RULE

- **Employees currently classified as exempt who earn less than \$47,476 per year must be converted to non-exempt status.**
- **This is true regardless of whether the employee is full-time or part-time.**
- **Teachers are not subject to the salary threshold and thus the new rule does not apply to them.**
- **You can also exclude clergy and religious from the effects of the new rule as noted above.**



# CONVERTING AN EXEMPT EMPLOYEE TO NON-EXEMPT STATUS

- Analyze the employee's number of hours worked per week so that an accurate hourly rate can be established when the employee is converted to hourly, non-exempt status. 
- Pay close attention to any overtime hours that the employee works, as these hours (along with the overtime premium) will need to be factored into the hourly rate setting.
- Maintain compliance with the FLSA's recordkeeping requirements for non-exempt employees. See DOL Fact Sheet #21 (handout).

# CONVERSION EXAMPLE #1

- Jack earns an annual salary of \$41,600.
- Jack works 40 hours per week each week with little to no variation.
- To convert Jack's annual salary to an hourly rate:
  - $\$41,600 / 52 \text{ weeks} = \$800 \text{ pay per week}$
  - $\$800 / 40 \text{ hours} = \$20 \text{ per hour}$
- Minor variations in hours (over/under 40) will still produce the desired annual salary.

# CONVERSION EXAMPLE #2

- **Jill also earns an annual salary of \$41,600.**
- **Jill works 42 hours per week each week.**
- **To convert Jill's salary to an hourly rate:**
  - $\$41,600/52 \text{ weeks} = \$800 \text{ pay per week}$
  - $\$800/42 \text{ hours} = \$19.05 \text{ per hour}$
  - Will still need to add \$19.05 per week for the overtime premium ( $2 \times \$9.525 = \$19.05$ )
  - $\$19.05 \times 52 = \$990.60 \text{ additional salary}$
  - But, lower the hourly rate to \$18.60
  - $\$18.60 \times 40 = \$744 + (2 \times \$27.90) = \$799.80/\text{week}$

# **DOL FINAL OVERTIME RULE— ADDITIONAL CONSIDERATIONS**

- For those employees whose salary is already close to the \$47,476 salary threshold, you will want to consider increasing their salary above the threshold so they remain exempt.**
- Make sure that they are clearly exempt by job duties—if in doubt, non-exempt is safer!**
- This strategy can be particularly helpful for employees who work high OT hours (may save money) or have erratic work schedules.**

# **DOL FINAL OVERTIME RULE— ADDITIONAL CONSIDERATIONS**

- **Some additional thoughts/strategies:**
  - Reorganize workloads, adjust schedules or spread work hours to limit/avoid OT hours—this can include hiring new employees and job sharing
  - Implement a policy prohibiting overtime hours (either altogether or unless approved by management)—can be enforced through discipline if necessary
  - For those employees impacted by the new rule who do not work overtime, there is little change

Raise salaries to maintain exemption

Pay current salaries, with overtime after 40 hours

What are some options for responding to changes to the salary level?

Reorganize workloads, adjust schedules or spread work hours

Adjust wages

# **SALARIED NON-EXEMPT OPTIONS AND STRATEGIES**

- **Exempt employees must be paid on a salary basis, they cannot be paid hourly.**
- **By contrast, non-exempt employees are usually paid on an hourly basis.**
- **There are two methods for an employer to pay non-exempt employees on a salary basis.**
- **Employee must receive minimum wage for all hours worked and overtime for hours worked over 40 in a workweek, and recordkeeping requirements must be observed.**

# SALARIED NON-EXEMPT OPTIONS AND STRATEGIES

- **FIXED WEEKLY SALARY:**
  - Employee is paid a weekly salary that is intended to cover an agreed upon number of hours
  - Regular rate calculated by dividing the agreed number of hours into the fixed weekly salary (i.e., \$350 salary/35 hours=\$10 regular rate)
  - Overtime must be paid at one and one half times the regular rate for all hours worked over 40 (i.e., the overtime rate above would be \$15/hour)
  - Employer is NOT required to pay the full weekly salary if employee works less than agreed hours

# SALARIED NON-EXEMPT OPTIONS AND STRATEGIES

- **FIXED PAY FOR FLUCTUATING HOURS:**
  - Employee must have hours that fluctuate
  - Parties agree on a fixed salary for a fluctuating number of hours per workweek
  - Regular rate is calculated by dividing the agreed upon salary by the actual numbers of hours worked (regular rate will change each week)
  - Overtime is paid at **one half** of the regular rate
  - Employer IS required to pay the full salary even if employee works less than a full schedule of hours

# **WHAT ARE “HOURS WORKED” FOR NON-EXEMPT EMPLOYEES?**

- **Non-exempt employees are entitled to minimum wage for all hours worked and overtime pay for all hours worked over 40 in a workweek.**
- **Each workweek stands alone for purposes of overtime pay, regardless of the employer’s pay period (e.g., Employee who works 45 hours in week 1 and 35 hours in week 2 still gets 5 hours overtime for week 1).**
- **Overtime is only required to be paid for hours worked (not vacation, holiday, sick time, etc.).**
- **So, what are considered “hours worked”?**

# WHAT ARE “HOURS WORKED” FOR NON-EXEMPT EMPLOYEES?

- **Training /meeting time is compensable unless EACH of the following is met:**
  - Attendance is outside of the employee’s regular working hours
  - Attendance is, in fact, voluntary
  - The training/meeting is not directly related to the employee’s job
  - The employee does not perform any productive work during attendance

# WHAT ARE “HOURS WORKED” FOR NON-EXEMPT EMPLOYEES?

- **On-Call Time**

- Whether such time is compensable depends upon whether the employee can use the time effectively for his/her own purposes
- The courts and the Department of Labor will look at (1) the required response time, (2) the nature of the response (e.g., call in vs. report to facility), and (3) the number of times the employee is required to respond

# WHAT ARE “HOURS WORKED” FOR NON-EXEMPT EMPLOYEES?

- **Travel Time**

- Rule—Home to work and work to home commute is not compensable (**exception** if employee is working during commute?)
- Job site to job site is compensable
- All time spent in travel for an emergency call out after hours is compensable
- All time spent in travel for a special one day assignment in another city is compensable
- Overnight trip—all time during normal work hours

# **WHAT ARE “HOURS WORKED” FOR NON-EXEMPT EMPLOYEES?**

- Rest periods or “breaks” of 20 minutes or less are compensable.**
- Lunch periods of 30 minutes or more may be unpaid provided that the employee is completely relieved from duty.**
- The FLSA does not require an employer to offer breaks or lunch periods, whether paid or unpaid, unless child labor laws apply.**

# WHAT ARE “HOURS WORKED” FOR NON-EXEMPT EMPLOYEES?

- **Non-exempt employees must also be compensated for “off the clock” work:**
  - Starting work before clocking in
  - Clocking out but continuing to work
  - Unauthorized overtime “off the clock”
  - Working at home (responding to emails, etc.)
  - “Make-up” time
  - Working during (unpaid) meal periods
  - Automatic meal deductions

## **TIME OFF PLANS—PRIVATE SECTOR**

- **Although private employers cannot provide comp time, they can make arrangements with employees to offset overtime hours with proportionate time off hours.**
- **Under such a “time off plan,” the time off is not exchanged for overtime payments.**
- **Employee must work a fixed number of hours and must not be paid on a weekly basis.**
- **Example: Employee works 42 hours in week 1 and is limited to 37 hours in week 2.**

# **EMPLOYEES VS. VOLUNTEERS**

- **According to the DOL, a volunteer is an “individual who performs hours of service ... for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.”**
- **An employer must accurately distinguish paid “work” from volunteer duties, particularly as it relates to non-exempt employees.**
- **If a “volunteer” is later determined to be an “employee,” the liability can be substantial.**

# EMPLOYEES VS. VOLUNTEERS

- **The DOL considers a number of factors to determine if an individual is a volunteer:**
  - Is the entity a nonprofit organization?
  - Is the activity less than a full-time occupation?
  - Are the services offered freely and without pressure or coercion?
  - Are the services of a kind typically associated with volunteer work?
  - Have regular employees been displaced?
  - Does the worker receive (or expect) any benefit from the entity to which (s)he provides services?

# **EMPLOYEES VS. VOLUNTEERS**

- A volunteer position is likely to be regarded as “ordinary volunteerism” if the answer to the first four questions is “yes” and the answer to the last two questions is “no”.**
- With an existing employee, the DOL will also require that the services donated not be the same type of services as those that the employee performs for the organization.**
- Money given to a volunteer should be limited to reimbursement for documented expenses.**

# **MULTIPLE LOCATION EMPLOYEES**

- **In July 2016, we issued a Guidance document on properly compensating employees who work at multiple AOC locations.**
- **At issue is whether the hours of non-exempt employees who work at multiple AOC locations should be aggregated for purposes of determining overtime liability.**
- **Would the DOL find the multiple locations to be “joint employers” and thus require the employee’s hours to be added together?**

# **MULTIPLE LOCATION EMPLOYEES**

- We concluded that the DOL would likely find joint employment in both “vertical” and “horizontal” employment arrangements.**
- Based on this conclusion, we recommended that a multiple location employee’s weekly hours be aggregated for purposes of determining whether overtime is owed.**
- We then addressed both “shared employee” and “moonlighting employee” scenarios and provided a process for identifying, calculating and allocating overtime liability.**