



# Winning in Overtime

HOW TO SAVE MONEY AND PROTECT YOUR BUSINESS BY  
ENSURING COMPLIANCE WITH THE WAGE AND HOUR LAWS



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LONG

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# Presenters



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# Topics of Today's Presentation

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- The Final Overtime Rule: an overview, the impact of the Nov. 22 injunction, and what this means for employers.
- Exempt versus non-exempt status and deductions from wages.
- Special rules under FLSA: The Motor Carrier Exemption, commissions, Fluctuation Work Week.
- Frequently Asked Questions.

# The Fair Labor Standards Act: Demystifying Exempt and Non-Exempt Employees

- Nonexempt employees – earn minimum wage and overtime.
- Exempt employees – “exempt” from requirements to pay overtime and minimum wage if they meet several tests:
  1. Salary Level Test
  2. Salary Basis Test
  3. Duties Test



# Salary Level Test

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- Employees who are paid less than \$23,600 per year (\$455 per week) and meet the duties test are **nonexempt**.
- Over \$100,000 generally exempt for office and non-manual work.

# Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs *any* work
- Need not be paid for any workweek when no work is performed

# No Salary Requirements

- The salary level and salary basis tests do not apply to:
  - Outside Sales Employees
  - Doctors
  - Lawyers
  - Teachers
  - Certain computer-related occupations paid \$23,600 per year (\$455 per week) on a salary basis, or on an hourly basis at a rate not less than \$27.63 per hour

# DOL's New FLSA Overtime Rule

- Workers who do not earn at least \$47,476 a year (\$913 a week) will have to be paid overtime, even if they're classified as a manager or professional.
- This would have doubled the Fair Labor Standard Act's (FLSA's) salary threshold for exemption from overtime pay.
- The Department of Labor planned to increase the salary threshold **every three years**. Based on current projections, the salary threshold is expected to rise to more than \$51,000 with its first update on January 1, 2020.



# DOL's New FLSA Overtime Rule

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- Employers were expected to be compliance with the new regulations by December 1, 2016.
- ***However, implementation and compliance has been delayed by court order.***

# New Regulations Recently Enjoined

- On November 22, 2016, federal Judge Amos Mazzant of the federal district court for the Eastern District of Texas issued a preliminary injunction enjoining the Final Overtime Rule on a nationwide basis.
- The judge's preliminary injunction effectively halts the implementation of the new rule by enjoining the DOL from implementing and enforcing the Final Overtime Rule.
- Decision is on appeal.

# Practical Effect of this Injunction

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- Many employees were told they would receive an increase in pay – either a raise in pay to meet new threshold of \$47,476.00, or additional monies because they would now be entitled to overtime.
- Employers now worry that if they rescind those promises their companies could face a decrease in morale.

# What does this mean for employers?

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- As of now, employers are essentially left with three options:
  1. Put their compliance plans on hold;
  2. Roll back Final Rule compliance steps already taken; or
  3. Leave Final Rule compliance steps that are already in effect.

# What does this mean for employers?

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- It is important to recognize that this is only a *temporary* injunction, preserving the status quo until a final decision on the merits is made.
- While many believed President-Elect Trump's victory was too late to affect the Final Rule, this preliminary injunction may provide the new administration an opportunity to act.

# Deductions From Salary

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- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available



# Permitted Salary Deductions

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- Seven exceptions from the “no pay-docking” rule:
  1. Absence from work for one or more full days for personal reasons, other than sickness or disability
  2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
  3. To offset any amounts received as payment for jury fees, witness fees, or military pay

# Permitted Salary Deductions

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4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act

# The Duties Test

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- The Administrative Exemption (29 C.F.R. § 541.200 *et. seq.*)
- Executive Exemption (29 C.F.R. § 541.100, *et. seq.*)
- The Professional Exemption (29 C.F.R. § 541.300 *et seq.*)

# The Administrative Exemption

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- office or nonmanual work, which is
- directly related to management or general business operations of the employer or the employer's customers, and
- a primary component of which involves the exercise of independent judgment and discretion about
- matters of significance.

# Administrative Exemption Hints

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- Usually high-level employees whose main job is to "keep the business running."
- Rule of thumb: distinguish administrative employees from "operational" or "production" employees.
  - Can employee formulate or interpret policies?
  - Authority to commit company financially?
  - Authority to deviate from policy?

# Management or General Business Operations

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality Control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and Health
- Human Resources
- Employee Benefits
- Labor Relations
- Public and Government Relations
- Legal and Regulatory Compliance
- Computer Network, Internet and Database Administration



# Executive Exemption

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- regularly supervises two or more other employees, and also
- has management as the primary duty of the position, and also,
- has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

# Executive Exemption Tips

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- Rule of thumb: determine if the employee is "in charge" of a department or subdivision of the enterprise (such as a shift).
- Hint: consider to whom a telephone inquiry would be directed if someone called and asked for "the boss."

# Learned Professional

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- The employee's primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction

# Examples

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- Social worker
  - Masters degree in social work with at least two years of experience;
  - independent decisions about the course of therapy best suited to the needs of individuals;
  - Diagnose problems, create treatment plans, engage in therapy

# Examples

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- Case worker
  - Bachelor's degree in social science;
  - Train volunteers and run classes for patients;
  - Refer patients to other community services;
  - Provide in home assessments; and
  - Provide therapy and counseling

# Other Exempt Professionals

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- Lawyers
- Teachers
- Accountants
- Pharmacists
- Engineers
- Actuaries
- Chefs
- Athletic trainers
- Licensed funeral directors or embalmers



# Other Nonexempt Professionals

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- Accounting clerks and bookkeepers who normally perform a great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians

# Motor Carrier Exemption

- Section 13(b)(1) of the FLSA provides an overtime exemption employees who are:
  1. Employed by a motor carrier or motor private carrier, as defined in 49 U.S.C. § 13102;
  2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce; and
  3. Not covered by the small vehicle exception

# Commissions

- Employees employed by “retail establishments” who receive 75% of annual dollar volume from sales or services.
- Examples of non-retail: common or contract carriers, transportation companies, burglar alarm installation. 29 C.F.R. 779.317.
- The regular rate of pay of such employee must be more than one and a half times the minimum hourly rate; and
- More than half of his compensation or a representative (not less than one month) must represent commissions on goods or services.

# Fluctuating Work Week

- Agreed upon “salary” for non-exempt workers for all hours in a workweek and time over 40 hours per week paid at  $\frac{1}{2}$  rather than 1.5.
- Rules: (1) Employee must agree, (2) must be paid the guaranteed salary regardless of hours worked, (3) hours must fluctuate, (4) must be more than minimum wage.

# Highly Tipped Employees

- Allows “tip credit” toward minimum wage in certain instances.
- Tips belong to employees but tip pooling allowed.
- To use tip credit, employers must provide information on:  
(1) Amount of wage the employer will pay; (2) Amount the employer will credit against tips; (3) Notification that the tip credit will not exceed the value of tips received, (4) Notification that the tip credit can be used only if the employee has been informed of the FLSA's tip credit rules; (5) Notification that all tips received must be retained by the employee, except when collected for a valid tip pool.
- Overtime paid based on minimum wage and NOT the lower amount that would not consider the tip credit.

# FLSA Lawsuit Statistics

- **2014:** 8066 FLSA filings in federal courts.
- **2015:** 8954 FLSA filings in federal courts.
- This year-to-year increase has **persisted since 2000** going up by more than 450%.
- Given this trend, it has been predicted that employers can expect record breaking FLSA filings in 2016.
- The factors causing this increase include:
  - Minimum wage increases in many states and municipalities;
  - Focus on independent contractor classification; and
  - Higher scrutiny of who actually constitutes a worker's employer, particularly in the context of whether a franchisor or franchisee is liable.



# Wage and Hour FAQ

**Q. Can a part-time employee be paid on a salary basis and qualify for exempt status?**

A. YES, as long as the position also meets the salary test and the duties test.

**Q. Can we dock the pay of an exempt employee who only worked a partial day last week but has exhausted their accrued leave?**

A. NO. Disciplinary action may be taken against a salaried, exempt employee who fails to meet your performance requirements, but you may not dock their pay on any day where they performed any work because you have to dock their pay in whole-day increments.

# Wage and Hour FAQ

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**Q: Can I deduct a half hour from nonexempt employees for lunch and do away with the requirement that they punch out for lunch?**

A: Not recommended. Without punch records you could not defend a claim that the employee was in fact working during lunch.

# Wage and Hour FAQ

**Q. We no longer employ secretaries. All of our secretaries are now called Administrative Assistants. Doesn't this mean the administrative exemption applies and they are no longer eligible for overtime pay?**

A. NOT NECESSARILY. The position description must be scrutinized carefully to determine whether the position of administrative assistant is eligible for the administrative exemption. In most cases AAs should be classified as non-exempt.

**Q. We cannot afford to pay overtime, so we ask incoming employees to voluntarily agree to "exempt" status. As long as they volunteer, is this ok?**

A. NO. An employee may not opt out of the wage and hour laws.

# Wage and Hour FAQ

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**Q. Can you deduct pay from a non-exempt employee's paycheck for damaging client's property (e.g. a mover for a moving company damages a table in a move)?**

A. It depends. In Michigan it is very difficult. You cannot dock pay without consent. In other states, you can dock pay, but not below minimum wage.

# Audience Questions?

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