



Implementing the new *Fair Labor Standards Act* Regulations

June 16, 2015

Today's Presenters

Dave Horvath, Director
Crowe Horwath LLP

Steve Greene, Managing Member
Helms & Greene, LLC

Pat Cole, Senior Manager
Crowe Horwath LLP

Webinar Outline

- Background information on the changing FLSA regulations regarding overtime pay exemptions
- The Salary Test: Expected new minimum pay level to qualify for exempt status consideration
- The Duties Test: The more demanding second requirement to qualify for exempt status
- Specific application to your organization and comparison of alternative actions going forward

New FLSA Exemption Revisions To Be Issued Soon

- **May 6, 2015:** U.S. Secretary of Labor, Tom Perez, has [announced](#) that proposed new definitions for the federal Fair Labor Standards Act Section 13(a)(1) executive, administrative, professional, outside-sales, and derivative exemptions have been submitted to the federal Office of Management and Budget to seek its approval for their release for public comment.
- **UPDATED May 8, 2015:** Speaking at the Associated General Contractors of America Labor Law Symposium in Washington, D.C., U.S. Labor Solicitor, M. Patricia Smith, has said that the proposed regulations will be published no later than June 18, 2015.
- If OMB approves the submission, then presumably USDOL will release it for public comment with little delay. This comment period is unlikely be shorter than 60 days, and it might be longer (the period was about 90 days in 2003, the last time revisions were proposed).

Risks to Financial Institutions

- U.S. Supreme Court announced a unanimous decision on March 9, 2015, that DOL has final say on whether mortgage loan officers are entitled to overtime pay under the FLSA administrative exemption requirements. This ended a nearly five year appeal process.
- The original 2010 judgment was critiqued by the ABA who expressed the following concerns:
 - Other positions would also need to be reclassified as nonexempt (for example, loan underwriters and credit analysts)
 - Officer status within a bank has no bearing on exemption status
 - Volunteer activities would be viewed as hours worked
 - Restricting overtime hours would become a greater challenge
 - Overtime pay and incentive pay calculations would be impacted

Risks to All Organizations

- The *Fair Labor Standards Act of 1938* (FLSA) applies to employment within any state of the United States, the District of Columbia, or any territory or possession of the United States.
- Current federal requirements are:
 - Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek
 - Unless a position incumbent qualifies for exempt status by meeting both a salary test and a duties test
- Positions of greatest risk for losing exempt status are first line supervisors or managers and entry-level professionals who do not spend the majority of their time on exempt activities.

Coordination with Salary and Duties Test

- It is important to note that satisfying the salary test alone is not a “safe-harbor” to automatically classify an employee as exempt.
- Rather, the salary test is considered in conjunction with the duties test in determining an employee’s exempt status.
- Employers choosing to increase certain employee’s salaries over the new salary test threshold need to also consider the duties test before classifying the employees as exempt.

Key Changes Salary Test

- Current regulations set minimum salary level at \$455 per week (\$23,660 annually)
- New regulations will set minimum salary level in the \$50,000 range
- Debate Range – \$45,000 to \$68,000
- Any employee paid less than this standard, cannot qualify for “white collar” exemption, regardless of their duties

Salary Test Logic:
Weekly/Annual Salary Level – Adjusted For Inflation

<u>Year</u>	<u>Weekly Pay</u>	<u>Annual Pay</u>
1950 --	\$844	\$43,888
1959 --	\$874	\$45,448
1963 --	\$998	\$51,896
1970 --	\$1,071	\$55,692
1975 --	\$984	\$51,168

Polling Question #1: Which statement best describes your organization's current documentation regarding exempt employees?

- a) We have well developed job descriptions for our exempt positions and overtime pay exemption worksheets for our exempt employees.
- b) We have some written job descriptions and overtime pay exemption worksheets but probably need to develop more.
- c) We have spent little time considering the classification of our employees as exempt or non-exempt from overtime pay requirements.

Key Changes: “Duties” Test

- Current standard – “Primary Duty”
- Principal – Main – Major – Most Important
- Consider character of the job as a whole
- Specific time performing tasks not determinative
- Qualitative standard since 1949

New Duties Test: California Rule

- “Primarily Engaged”
- 51 percent of actual work time each week
- Distinguish between exempt categorized duties and non-exempt categorized duties.
- Purely quantitative
- What’s the problem?

New Standard: California Rule

- Consider manager – four direct reports
- Currently exempt under Executive Test – primary duty management
- With four direct reports:
 - 30 percent +/- supervisory tasks
 - 70 percent +/- nonsupervisory tasks
- Nonexempt under new 51 percent rule

New Standard: California Rule (continued)

- Consider entry-level accountant
- Consider an auditor
- Consider an HR generalist
- Consider any small department manager

New Standard: California Rule (continued)

- “First and foremost” – “How the employee actually spends his or her time”
- “Actual tasks performed by employees”
- During time in exempt classified position (not each day, each week, or each month)

Concurrent Performance of Exempt and Non-Exempt Duties

- California Agency – “impossible” to perform nonexempt and management work at the same time (1993 opinion letter)
- What is the “type of work the individual is actually doing”?
- Why is the person doing the work?
- Why isn’t another employee doing the work?

Closely Associated Nonexempt Duties

- Nonexempt work is activity of “the same nature as that performed by nonexempt subordinates”
- Nonexempt work not performed by subordinates requires careful study to identify how the activity assists in the completion of specific exempt tasks (that is, keeping performance records)
- Why is the individual performing the nonexempt tasks? Is the reason to support completion of exempt duties? Is there another reason?

Realistic Requirements of the Job

- What about an employee who fails 50 percent rule due to “substandard performance”?
- What are the “realistic” requirements of the job?
- Consider:
 - How does the employee actually spends his or her time?
 - Does the employee’s practice diverge from employer expectations?
 - Are there any concrete expressions of dissatisfaction from employer?
 - Are employer expectations realistic and documented in job descriptions or performance appraisals?

What Tasks are “Exempt”?

- What tasks are recognized as exempt?
- What tasks are recognized as nonexempt?
- Regulations
- Opinion letters
- Court decisions
- Interpretive bulletins
- Field operation handbook

Polling Question #2: The prospect of our organization being required to determine which exempt employees should be reclassified as nonexempt is:

- a) Relatively easy for us, as we have good documentation and can apply new criteria when it is finalized.
- b) Very concerning and presents a significant risk to our organization and looks difficult.
- c) Just now thinking about this and am currently unsure.

Specific Application to Your Organization

Key Questions:

1. Which positions currently have incumbents paid below the expected new minimum salary threshold?
2. Which major option do you select?
 - Automatically raise the exempt incumbents' salaries to the new minimum (option 1)
 - Reclassify employees to non-exempt (option 2)
3. What are the consequences for each option?
 - Which option would cost more?
 - Which option has greater risk?
 - How best do we make and implement this decision?

How might these options play out?

Let's use a theoretical branch manager who currently:

- Receives a base salary of \$43,000 annually
 - Works an average work week of 45 hours
 - Has been a branch manager for three years with your bank
1. Do you increase her base salary by \$7,000 to reach the new salary threshold (for example, from \$43,000 to \$50,000)?
 2. Or, do you reclassify her as nonexempt and pay her \$7,286.18 in additional overtime pay?
 - $\$43,000 / 2080 \text{ hours} = \$20.67/\text{hour}$
 - Multiply hours greater than 40 by 1.5 (that is, time and a one half pay – 5 hours worked = 7.5 hours pay)
 - Multiply weekly overtime by 47 weeks (52 less paid time off – holidays/vacation)
 - $\$20.67 \times 7.5 \text{ hours} \times 47 \text{ weeks} = \$7,286.18$

Unfortunately, it's not this easy.

If Option 1: Consider Possible Pay Compression

- Pay differentials may become too small to be considered equitable. The pay compression term can apply to differences between:
 - Pay of experienced and newly hired personnel doing the same job
 - If you raise a less experienced branch manager's pay to a new minimum do you also raise the pay of coworkers who used to make more money due to their greater experience or higher performance level?
 - Pay range midpoints in successive job grades or related grades across your pay structures
 - If you raise the branch manager's pay to a new minimum, do you assign them a higher grade or adjust their assigned pay range to reflect this change? If so, how does this affect other positions, classifications, and grade levels?
 - Pay of supervisors and their direct reports
 - If you raise the branch manager's pay to a new minimum, do you have to also raise their supervisor's pay to maintain a reasonable difference in pay between the two levels?

If Option 2: Consider Three Possible Consequences

If you reclassify to nonexempt, what about... ?

1. Projecting overtime pay if former exempt employees continue current workweek hours (for example, 45/50/55 hours per week)
2. Restricting overtime worked and eliminate, reassign, or delegate tasks and potentially add staff to accomplish this
3. Addressing back-pay requests for previous years worked
4. Considering how nonexempt status will impact incentive pay, policy administration, productivity, retention...

Available resources to assist you

- DOL website and forms
- Professional association website (for example, ABA) and their published guides and toolkits
- Employment law guidance from your attorney
- Labor cost and job position studies from your accounting/consulting firm

Polling Question #3: Expected guidance from the Department of Labor will likely be followed by what first?

- a) A comment period
- b) Proposed guidance
- c) Congressional hearings

Polling Question #4: The final rule will likely involve satisfying:

- a) A new salary test
- b) A new duties test
- c) Both a and b

Questions

Have more questions?

Dave Horvath, Director

Crowe Horwath LLP

630.586.5117

david.horvath@crowehorwath.com

Steve Greene, Managing Member

Helms & Greene, LLC

770.206.3371

sgreene@helmsgreene.com

Pat Cole, Senior Manager

Crowe Horwath LLP

630.586.5194

patrick.cole@crowehorwath.com

The information provided herein is educational in nature and is based on authorities that are subject to change. You should contact your tax adviser regarding application of the information provided to your specific facts and circumstances.

Crowe Horwath LLP is an independent member of Crowe Horwath International, a Swiss verein. Each member firm of Crowe Horwath International is a separate and independent legal entity. Crowe Horwath LLP and its affiliates are not responsible or liable for any acts or omissions of Crowe Horwath International or any other member of Crowe Horwath International and specifically disclaim any and all responsibility or liability for acts or omissions of Crowe Horwath International or any other Crowe Horwath International member. Accountancy services in Kansas and North Carolina are rendered by Crowe Chizek LLP, which is not a member of Crowe Horwath International. © 2015 Crowe Horwath LLP