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ATTORNEYS & COUNSELORS AT LAW

## FLSA: Navigating the New Regulations

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*2016 School Law Conference in Charleston, SC*

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### Overview of Presentation

- Review of the Fair Labor Standards Act (FLSA)
- Introduce new regulations from Department of Labor (DOL)
- Impact of Changes and Implementation Toward Compliance
- Q&A

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### Review of the FLSA



**FLSA OVERTIME RULES**  
WHAT'S GOING ON & HOW SHOULD YOU PREPARE?



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### Review of the FLSA: What is it?

- The Fair Labor Standards Act (FLSA) requires that (most) employees be paid at least the federal minimum wage of \$7.25/hour.
- The FLSA also provides that any hourly employee who works over 40 hours in a **work week** must be paid additional compensation for those **overtime hours** at a rate of 1.5 times the employee's **regular hourly rate** of pay (or if comp time, 1.5 times the amount of hours worked).




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### "Work week" and "Overtime"

• Work week:

- Each work week stands on its own;
- A regular work week may begin at any hour and day, but must be 7 consecutive 24 hour periods; and
- A different work week can be established for different groups of employees but should remain constant.



• Overtime:

- Any hour over 40 worked in the work week = overtime;
- Only hours worked count to determine 40 hours; and
- Hours paid but not worked do not count toward 40 hours (i.e. holidays, vacation, sick days, jury service, inclement weather, funerals, voting).




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### How do we determine an employee's "regular rate" for FLSA purposes?



- The regular rate is determined by dividing the total earnings in the work week by the total number of hours worked in the work week.
- May not be less than minimum wage.
- Ex: Molly works 40 hours per week. At the end of the week, she earns \$723.00. What is Molly's regular rate?
  - $\$723.00 \text{ (total earnings)} / 40 \text{ hours (total number of hours worked)} = \$18.08 \text{ (Molly's regular rate)}$ .




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### What is an "exemption" under FLSA?

- The FLSA provides exemptions for certain categories of employees (white collar exemptions) such that employers are not required to pay these employees a federal minimum wage or overtime pay. (29 U.S.C. § 213(a)(1)).




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### Exemption Cheat Sheet

- **Exempt Employee = NO** overtime.
  - Employees must meet two broad requirements:
    - (1) actually perform qualifying exempt job duties and
    - (2) maintain required **salary basis** and level → this is the change.
      - This does not apply to lawyers, doctors, **teachers**, or outside sales;
      - **Computer employees** can be paid by the hour (\$27.63/hour).
- **Non-Exempt Employee = MUST** be paid overtime.
  - Employees who do not meet **both** criteria outlined above.




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### Exempt Employee Test

- Remember, an **Exempt** Employee = **NO** overtime.
- Salary basis – is the employee paid a regular, predetermined amount and that amount is not subject to a reduction because of variations in the quality or quantity of the work performed?
- Salary level - \$47,476/year or \$913/week → this is the change.
- Duty – what is the employee's primary duty?
  - Most important part of the job;
  - Job title is not determinative of whether employee is actually exempt; and
  - Determinations must be made on a case by case basis.




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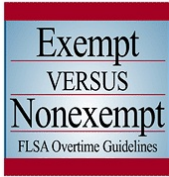
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## Who is Exempt – “White Collar” Exemptions



- Executive Employees
- **Administrative Employees**
- Professional Employees
- **Teachers**
- Certain Computer Employees
- Highly Compensated Employees




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## Exempt: Executive Employees

- Remember, look at salary basis and salary level.
- Primary duties:
  - Managing the enterprise, department, or subdivision;
  - Employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalents; and
  - Have authority to hire or fire other employees (or opinion is given significant weight).




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## Exempt: Administrative Employees



- Remember, look at salary basis and salary level.
- Primary duty:
  - Performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - Includes the exercise of discretion and independent judgment with respect to matters of significance.




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### Exempt: Administrative Employees (Some Examples)

- Business Managers
- Human Resources and Employee Benefits Managers
  - Note: generally not a personnel clerk who "screens" applicants for minimum qualifications and fitness for employment
- Public Relations/Communications Directors




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### Exempt: Academic Employees

- Remember, look at salary basis and salary level (or use exception – salary which is at least equal to the entrance salary for teachers in the same educational establishment).
- Primary duty:
  - Performing administrative functions directly related to academic instruction or training in an educational establishment.




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### Exempt: Academic Administrative Employees – Special Exception

- There is a limited exception for academic administrative employees who are paid at least either the new salary level or a weekly salary equal to the entrance salary level for teachers in the same educational establishment.
- Exempt academic administrative employees must have the primary duty of performing administrative functions directly related to academic instruction or training.
- Employees, such as a cafeteria supervisor, who work in education but whose work does not relate to the educational field are not performing academic administrative work, and must be paid the standard salary level of \$913 per week and meet the required duties test to be exempt.




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### Exempt: Academic Employees (Some Examples)

- Superintendent
- Assistant Superintendents
  - Curriculum
  - Quality and Methods of Instruction
  - Testing/Achievement
  - Academic and Grading Standards
  - Other Aspects of Teaching Programs
- Principals and Vice Principals (responsible for the operation of an elementary or secondary school)
- Academic counselors




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### Exempt: Professional Employees

- Remember, look at salary basis and salary level.
- Primary duty:
  - Must be the performance of work requiring advanced knowledge in a field of science or learning, which is customarily acquired by a prolonged course of specialized intellectual instruction.




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### Exempt: Professional Employees (Some Examples)

- Nurses (RNs)
  - Not LPNs
- Accountants (CPAs)
  - Not accounting clerks or bookkeepers who do routine work
- Lawyers
  - Not paralegals
- Athletic Trainers
  - Must have completed four years of pre-professional study in an accredited program and are certified by the Board of Certification of the National Athletic Trainers Association




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### Exempt: Teachers

- Teachers are excluded from salary basis and salary level tests.
- Primary duty:
  - Teachers are specifically exempt from minimum wage and overtime requirements // the teacher "has the primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed." (29 C.F.R. § 541.303(a)).




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### Exempt: Computer Professionals

- Remember, look at salary basis and salary level.
- Primary duty:
  - The application of systems analysis, techniques, and procedures; and
  - The design; development; documentation; analysis; creation; testing; or modification of computer systems, programs, or computer programs related to machine operating systems.




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### Exempt: Highly Compensated Employees

- Paid total annual compensation of \$134,004 → **this is the change:**
- Customarily performing office or non-manual work; and
- Regularly perform at least one of the duties of an exempt executive, administrative, or professional employee.




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### New Regulations from DOL



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### Changes in the Rules – Salary Test

- New salary level threshold is effective on **December 1, 2016**.
- Old threshold was \$23,660/year (\$455/week).
- Compare with new threshold of \$47,476/year (\$913/week).
- New threshold for highly compensated employees.
- **Automatic** updates to salary threshold **every three years**.

OLD Overtime Rule	NEW Overtime Rule
<b>\$23,660</b>	<b>\$47,476</b>
<small>Previously, full-time, salaried workers who earned up to this amount annually (\$455 a week) were not eligible for FLSA overtime protections.</small>	<small>The DOL more than doubled the salary threshold, requiring employers to pay workers who make up to this amount annually (\$913 a week) overtime pay.</small>



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### Changes in the Rules – HCE

- The minimum salary amount for a highly compensated employee (HCE) will increase to \$134,004 annually.
- Formerly \$100,000 annually.



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### Changes in the Rules – Effective Date

- Changes will take effect on December 1, 2016 – no exceptions!
  - SC law requires that employers must give employees seven days' written notice before a reduction in pay.
- Automatic updates to salary test will occur every three years, beginning on January 1, 2020.
- The new rules are not changing any of the existing job duty requirements to qualify for one of the exemptions.
- See DOL Fact Sheet for more information or visit [www.wagehour.dol.gov](http://www.wagehour.dol.gov)




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### Impact of Changes and Implementation Toward Compliance




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### Impact of Changes – A General Preview



- The impact will be significant!
  - Most employers will be required to analyze employee classifications and make changes. These changes will impact **11 million employees**.
- Automatic Salary Threshold Increase:
  - Employers must remember that this will occur every three years. DOL will provide notice "not less than 150 days before the effective date."




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## Impact of Changes – What does this mean for your district?

- New rules may impact the following types of district employees:
  - Personnel with "manager," "supervisor," "coordinator," "director," etc., in employee titles.
  - Mid-level personnel (not necessarily in management).
  - Other non-educator supervisors in the following departments:
    - Cafeteria, nutritional services
    - Custodial
    - Transportation
    - Finance
    - Physical plant
    - Special education
    - Student services
    - Human resources




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## Impact of Changes – Example

- District A employs a Cafeteria Manager named Robert. Before the rule change, Robert was paid a salary of \$40,000/year.
- Robert was very likely an exempt (NO overtime) employee before December 1, 2016.
- Now, Robert is non-exempt (pay him overtime) because his annual rate does not meet the new salary level required by DOL's new rules.
- Robert must make at least \$47,476; if not, he will be owed overtime for any work over 40 hours per work week.




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## Impact of Changes – Major Question



- "Most of our employees are not paid on a 365 schedule, so how do we calculate their salary rates to be sure that they are exempt from overtime?"
- ANSWER: **The exemption is not lost** in the situation where an annual salary covering a duty period of less than a year, when prorated over the full 12 months, computes to an amount less than the required minimum, provided that the amount of salary when prorated over the actual duty period meets the required minimum amount (e.g., employment provided by schools for 10 months of the year, under which the annual salary is paid in 12 equal monthly installments throughout the year).




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## Steps Toward Compliance – What Now?

- Districts should audit their employee workforce NOW to determine employees that will be reclassified as hourly employees under the new salary level rule.
  - Audit for both salary and duties – this is a perfect opportunity to resolve issues with reduced risk for lawsuits.
  - Find out how many hours those employees “on the edge” actually work.
  - Also identify employees who are likely to use overtime hours.
  - Develop a system to accurately track employee time records if you don’t have one in place already.
    - Potential issues: out of office work (email, cell phone use, etc.)




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## Steps Toward Compliance – Viable Options

- What happens when our district has to change salaried employees to hourly employees under the new rule?
- You have several options that include the following:
  - Raise impacted employees’ salaries to comply with new threshold;
  - Consider implementing a reduction in force (RIF);
  - Decreasing employees’ hourly rates and allow them to work overtime to “catch-up” to prior salary amount;
  - Compute employees’ new hourly amounts based on former salary and allow them to work some overtime; and
  - Compute employees’ new hourly amounts based on former salary and lessen their workloads, preventing overtime – this may require hiring more employees.
- Bolster training in your district (employer, HR, and managers – don’t just circulate a memo).




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## Steps Toward Compliance – Considering Employees’ Reactions

- What impact will these changes have on employee morale?
  - Former salaried employees now have to track their hours like non-salaried employees;
  - Additional work of tracking hours;
  - Not in the loop due to limitations on out of office email and cell phone usage; and
  - More work for other employees if overtime is limited and/or a RIF is used.




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### Steps Toward Compliance – Communicate Changes to Employees

- First meet with the managers of the reclassified employees;
- Meet with the employees and explain the changes;
- Need to decide the following:
  - Who is going to present the changes?
  - What is he/she going to say?
  - How and when is this going to occur?
- Consider preparing a FAQs sheet.




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### Steps Toward Compliance – Overtime Policy Overhaul

- You need to review your policy on overtime or implement one if your district does not have one.
- Consider the following:
  - No unapproved overtime;
  - Disciplinary measures;
  - Must pay that overtime even if it is unapproved;
  - Reimbursement if mistakes are made;
  - Good faith commitment to comply in the future; and
  - Avoid retaliation and have a complaint procedure.




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### Steps Toward Compliance –Train Affected Employees

- Train the new hourly employees on your policies:
  - Rest and meal breaks;
  - Clocking-in and clocking-out;
  - Overtime permission;
  - Activities that are compensable; and
  - Other policies that affect your hourly employees.




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### Potential Liability Concerns

- Pay back overtime for two years (three years if a plaintiff demonstrates a willful violation of the rules).
- Liquidated damages (essentially doubles back pay owed).
- Plaintiff's attorneys' fees.
- DOL audit.
- Increased liability if failure to correct any misclassifications.




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### Aftermath – Doing Homework



- Continue to monitor employees' classifications after the initial check.
- Review the duties assigned to ensure employees are performing exempt (NO overtime) work.
- Special cases:
  - Dual employees;
  - Volunteer positions (assistant coaches, club advisors, etc.);
  - Overnight travel and field trips; and
  - Leave without pay.




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Thank you!  
Questions and Answers




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