

## The Department of Labor's New Overtime Rule

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## The Department of Labor's New Overtime Rule?

## DOL'S New Overtime Rule – Blocked

- Federal court in Texas issued a November 22 order blocking DOL's new overtime rule
- DOL cannot implement or enforce the rule “pending further order of this court”
- Injunction applies nationwide

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## DOL'S May 2016 Overtime Rule

- DOL: “In 2014, President Obama directed the Secretary of Labor to update the overtime regulations to reflect the original intent of the Fair Labor Standards Act, and to simplify and modernize the rules....”

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## Fair Labor Standards Act of 1938



- 19% unemployment rate in 1938

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## DOL'S May 2016 Overtime Rule

- DOL: “(W)ill put more money in the pockets of middle class workers – or give them more free time”

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## New Regulations

- Proposed rule published July 6, 2015
- 270,000 comments submitted
- Final rule published May 2016, scheduled to take effect yesterday

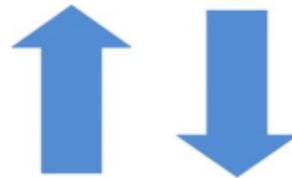


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## New Regulations

- Estimated over 5 million currently exempt employees will be affected and will cost employers \$2 billion in wages the first year alone



INCREASE      DECREASE

- DOL suggests salary increases will reduce litigation costs overall

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## New Regulations

- Increase salary basis test from \$455 per week (\$23,660 annualized) to \$913 per week (\$47,476 annualized)
- Increase highly compensated employee's total compensation from \$100,000 to \$134,004
  - Up to 2/3 may include commissions, nondiscretionary bonuses, and other nondiscretionary deferred compensation

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## New Regulations

- Automatic updates to salary and compensation levels every 3 years (starting January 1, 2020):
  - 40<sup>th</sup> percentile of full-time salaried workers in lowest census region (currently south)
  - 90<sup>th</sup> percentile nationwide for highly compensated employee exemption

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## Salary Basis Test

- Employee must be paid on a salaried basis
  - Predetermined amount of compensation each pay period on a weekly or less frequent basis
  - Compensation not subject to reductions for variations in the quality or quantity of the work performed.

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## DOL'S New Overtime Rule – Blocked

- Fair Labor Standards Act exempts “bona fide executive, administrative, or professional” (EAP) employees
- Statute gives DOL authority to “define and delimit” those terms

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## DOL'S New Overtime Rule – Blocked

- Statute is silent regarding salary requirements
- In 1940, DOL issued a regulation setting minimum salary level
- Seven updates to minimum salary levels in the decades that followed

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## DOL'S New Overtime Rule – Blocked

- November 22 Order of Judge Amos Mazzant (appointed by President Obama in 2014):
  - “Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level”
  - “Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption”

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## DOL'S New Overtime Rule – Blocked

- Judge Mazzant's Order: The FLSA “does not grant [DOL] the authority to utilize a salary-level test or an automatic updating mechanism”
- DOL: “We are currently considering all of our legal options”

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## Action Plan

- Identify exempt employees below \$47,476
- Evaluate bonuses
- Review exempt job descriptions to ensure they accurately reflect duties
- Analyze options:
  - Increase salary
  - Manage hours
  - Fluctuating workweek

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## Increase Salary

- Raise exempt employee's salary above new minimum salary level
- Review job descriptions to ensure they accurately reflect employee's duties
- Review actual duties to ensure they meet the exemption tests

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## Manage Hours

- Reclassify employee as non-exempt
- Convert to hourly rate and pay overtime
- Measure hourly compensation against current or budgeted annual compensation
- Begin tracking hours to determine number of hours the employee is currently working

Frequent 40+ weeks may require redistribution of duties among employees

				TOTAL DAILY HOURS	B
10	W	9a	5p	8.0	
14	T	9a	5p	8.0	
15	F	9a	5p	8.0	

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## Manage Hours

- Consider re-designating the organization's workweek
  - Workweek is any "fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods"
  - Need not coincide with the calendar week but may begin on any day and at any hour

## Manage Hours

- Employers may prohibit overtime
- If employees work unauthorized overtime:
  - Pay for the time
  - Discipline employee

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## Manage Hours

- Implement a timekeeping policy
- Educate managers
- Time is compensable if the employer, “through reasonable diligence,” should have known
- “But reasonable diligence is not an expectation of omniscience.”

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## Fluctuating Workweek (FWW)

- Hybrid model for nonexempt employees whose work hours fluctuate from week to week
- Established by federal regulation since 1968 (29 C.F.R. § 778.114)
- Employer pays a minimum weekly salary
- Employee tracks hours worked each week

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## Fluctuating Workweek (FWW)

- Hourly rate changes each week
- The more hours the employee works, the lower the hourly rate becomes
- Overtime premium is 0.5 of that week's hourly rate, instead of the standard 1.5

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## Fluctuating Workweek Requirements

- Weekly salary is a minimum, no matter how little the employee works
- “Clear mutual understanding” that the weekly salary compensates all hours worked each week
- Hourly rate for any given week cannot fall below minimum wage.
- Hours must have some fluctuation from week to week

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## Fluctuating Workweek – Example

Assume:

- Employee is classified in June 2016 as exempt
- Annual salary is \$35,000
- Employee works an average of 40 hours per week, which includes some weeks of 40+ hours

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## Fluctuating Workweek – Example

### Hourly Model

- Convert employee to hourly rate: \$16.83 per hour

$$\$35,000 \div 52 \text{ weeks} = \$673.08 \text{ per week}$$

$$\$673.08 \div 40 \text{ hours} = \$16.83$$

$$\$16.83 \times 1.5 = \$25.24 \text{ overtime premium rate}$$

- If an employee works 49 hours in a workweek, employer must pay \$900.36

$$\$16.83 \times 40 \text{ hours} = \$673.20$$

$$\$25.24 \times 9 \text{ hours} = \$227.16$$

$$\$673.20 + 227.16 = \$900.36$$

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## Fluctuating Workweek – Example

### FWW Model

- Convert employee to weekly rate: \$673.08 per week
- If employee works 49 hours in a workweek, employer must pay \$734.91

$$\$673.08 \text{ weekly rate}$$

$$\$673.08 \div 49 \text{ hours} = \$13.74 \text{ hourly rate that week}$$

$$\$13.74 \times 0.5 \text{ overtime premium under FWW} = \$6.87$$

$$\$6.87 \times 9 \text{ overtime hours} = \$61.83$$

$$\$673.08 + 61.83 = \$734.91$$

- **FWW method saves employer \$166.45 that week**

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## Fluctuating Workweek – Downsides

- Payroll personnel or vendor must manage weekly calculations of that week's hourly rate
- Some states prohibit or limit its use (e.g. Alaska, California, Connecticut, Hawaii, New Hampshire, New Mexico, Pennsylvania)
- Payment of bonuses or other incentive compensation may create compliance risks based on DOL position

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*"Everybody's getting together after work to do some more work—you in?"*

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