



# HR Strategies: The new FLSA Overtime Rules and What Options Do You Have?

April 21, 2016



## AGENDA

### 1. NOTICE OF PROPOSED RULE MAKING REGARDING SALARY THRESHOLD

- A. INCREASE TO STAY EXEMPT?
- B. CHANGE TO NON-EXEMPT?
- C. HOW DO I STAY IN BUDGET?

### 2. W2 VS. 1099

# Federal Labor Standards Act (FLSA)–Notice of Proposed Rule Making (NPRM)

- Proposes changes to the salary base for most white collar exemptions: Executive, Administrative and Professional Exemptions of the FLSA, potentially increasing the salary requirement from \$455 per week (\$23,660/ year) to \$970 per week (\$50,440/yr).

**DOL's rationale is that the new salary level reflects the 40th percentile of earnings for full-time salaried employees.**

# FLSA–NPRM (Continued)

- How will this affect my business?
  - Positions potentially impacted:
    - Managers and Supervisors
    - Administrative Employees
    - Certain Professional Employees

# Executive / Managerial Exemption

## Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a [salary basis](#) (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

# Administrative Exemption

## **Administrative Exemption**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

# Professional Exemption: Learned & Creative

## Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

## Creative Professional Exemption

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

# FLSA–NPRM (Continued)

- What can my business do to prepare now?
  - Review current positions in “threshold” and determine feasibility of
    - Revisions of extent of non-exempt amount of work performed by exempt employees.
    - Increase pay
    - Reduce hours
    - Restructure pay to account for regular and overtime hours

# Increase Pay:

- Review current pay structure. i.e. \$44,000.00/yr
  - Divide by 2080 hours in a year = hourly rate; i.e., \$21.15/hr
  - Calculate the OT rate = rate \* 1.5 = \$21.15 \* 1.5 = \$31.73
  - Calculate difference between threshold increase and employee's salary: i.e., \$50,440 MINUS \$44,000 = \$6,440
  - Divide by OT rate: \$6,440 / 31.73 = 202.93 hours in a year
  - Divide by 52 weeks: Approximately 3.90 hours of overtime per week

**Analysis: if employee normally works 40-45 hours each week, increasing the base to meet the new threshold at \$50,440.00 will potentially be more budget friendly (and morale friendly) than moving the employee to a non-exempt basis.**



# Reduce/Control Work Hours to 40

- You will need to track actual hours worked NOW and worked performed
- Identify tasks that can be automated, reassigned, eliminated or restructured to minimize time impact
- Reduce overall workload to ensure that employee does not work any hours beyond 40 in a work week
- Closely monitor hours to ensure employee doesn't work longer hours at the beginning of the week justifying leaving earlier at the end of the week.
- Closely monitor performance and overall tasks completion and output
- Address variances (performance and attendance) from a disciplinary standpoint
- **NOTE: You are still responsible for tracking and paying all hours worked above 40 within a workweek as overtime at time and a half.**

# Restructure Current Pay Accounting for Regular AND Overtime hours

This will probably be the most “controversial” approach. Although no true “change” should take place, perception will and it can be negative!

- Consider all actual hours worked. In other words, evaluate (track, discuss, ask, observe) the hours actually worked by your salaried employee today. Say it is 50 hours each week.
- Then, break current earnings into the same number of hours, except this time, instead of a salary basis, take the annual pay and break it down into 40 regular and 10 overtime each work week:

	# hrs	Rate	Week	Annual
Reg	40	11.19	447.6	23275.2
OT	10	16.785	167.85	8728.2
			615.45	32003.4

# FLSA: Misclassification of Employees as Independent Contractors

- According to Jackson Lewis
  - “When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as minimum wage, overtime compensation, unemployment insurance, and worker’s compensation.”
  - “Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws.”

# FLSA: W2 or 1099? (Continued)

## **New DOL 6 – Factor Guidance: All or Nothing!**

- Factor 1: Is the work an integral part of the employer's business?
- Factor 2: Does the worker's managerial skill affect his opportunity for profit or loss?
- Factor 3: How does the worker's relative investment compare to the employer's investment?

# FLSA: W2 or 1099? (Continued)

## New DOL 6 – Factor Guidance

- Factor 4: Does the work performed require special skill and initiative?
- Factor 5: Is the relationship between the worker and employer permanent or indefinite?
- Factor 6: What is the nature and degree of the employer's control?

**NOTE: *If your business relationship does not pass any of the above factors, then you have an employment relationship, not a business relationship! Reclassify ASAP!***

# FLSA part 2: W2 or 1099? (Continued)

- What to do?
  - Evaluate your 1099s on the basis of each one of those factors.
  - Key Element? **ALL OR NOTHING!**
  - Risks?
    - Back wages
    - Back taxes
    - Late filing of tax reports with associated fines and penalties
    - DOL – ERISA too!
    - Look out for Agency Reciprocity!

# Questions?

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