

The Fine Print

This presentation is not intended to serve as a substitute for legal advice. For advice specific to a given situation, please consult with an attorney.

New Overtime Rule Reveals Longstanding Confusion

- May 23, 2016 – DOL Final Rule
 - Increased minimum salary for certain exemptions from overtime to \$47,476 from \$23,660
 - Increased HCE level to \$134,004
 - Automatic increase every 3 years
- Effective December 1, 2016

New Overtime Rule Reveals Longstanding Confusion

- Are non-profits covered by FLSA?
- What triggers coverage of FLSA?
- www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf

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FLSA Coverage

- No “per se” exception for non-profits
- Sufficient relationship to interstate commerce
- *Wickard v. Filburn* (1942)
- *Tony & Susan Alamo Foundation* (1982)
- Two alternative tests for coverage
 - Enterprise – everyone covered
 - Individual – depends on each employee’s duties

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Enterprise Coverage

Deemed Enterprises

- Public agencies
- Hospitals
- Residential care facilities for aged or mentally ill
- Schools – preschool through institutions of higher education
- Mass transit

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Enterprise Coverage

Enterprise

1. Employees engaged in commerce, production of goods for commerce, or *handling, selling or working on goods or materials that have been moved in or produced for commerce*
2. Business purpose *and*
3. \$500,000 annual "sales made or business done"

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Enterprise Coverage

DOL Examples

- Non-profit organization that provides free veterinary care, adoption services, and shelter not a covered enterprise even if donations exceed \$500,000 because no business purpose
- Non-profit charitable organization that operates a resale shop selling donated items is a covered enterprise if revenue is \$500,000 or more
- Income used by a non-profit for charitable purposes does not count, e.g., membership fees, donations, and dues *except* for the portion for which the payer receives more than token value in return

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Enterprise Coverage

What about non-profit trade associations?

- Purpose is not necessarily charitable
- Dues surely provide more than nominal value in return
- 2013 Case – No business purpose where non-profit trade association did not compete in the general public with commercial enterprises
- Note, plaintiff did not allege individual coverage

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Individual Coverage

- Any employee engaged in interstate commerce or production of goods for interstate commerce
- DOL examples:
 - Making out-of-state phone calls
 - Receiving/sending interstate mail or electronic communications
 - Ordering or receiving goods from an out-of-state supplier
 - Handling credit card transactions or performing the accounting or bookkeeping for such activities
 - Interstate travel

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Individual Coverage

DOL Examples of Individual Coverage

- An office manager at a non-profit organization regularly sends e-mails to out-of-state suppliers to purchase office materials and equipment
- An employee works at a homeless shelter that regularly receives food and clothing donations from corporations located across state borders. The employee's job duties consist of receiving and logging these donations

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Individual Coverage

- DOL has said that an employee who on “isolated occasions spends an insubstantial amount of time” will not be considered covered individually
- Where is line drawn?
- Litigation strategy v. compliance advice
- War story – are restaurant bus-persons engaged in commerce?

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Exemptions

“White Collar” Exemptions ~ both minimum wage and overtime

- Executive
- Administrative
- Professional
- Certain computer employees
- Outside sales employees

Funky “good lobbyist” exemptions ~ e.g., evergreen wreath makers

www.dol.gov/whd/overtime/fs17a_overview.pdf

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What are the Tests?

Generally, three tests must be satisfied in order to prove an exemption

1. Primary Duty
2. Manner of compensation – payment on a “salary basis” is usually necessary, and
3. Amount of compensation – increase to \$913/per week on December 1, 2016 with 10% allowance per quarter for nondiscretionary incentive pay

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Possible “Reprieve?”

- Regulatory Relief for Small Businesses, Schools, and Nonprofits Act
 - 6 month delay to June 1, 2017
 - Passed by House 246 to 177 on 9/28/16
- The Overtime Reform and Enhancement Act (OREA)
 - Incrementally phase in the new salary threshold over the next three years; \$35,948 on December 1
 - Eliminate automatic updates to the salary threshold every three years

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Possible "Reprieve?"

- The Congressional Review Act
 - Application unclear
 - Depends practically on outcome of November elections
- Lawsuits filed on September 20, 2016
 - 21 states, including Texas
 - Unconstitutional, contrary to Congressional intent, and automatic increases violate the APA
 - U.S. Chamber of Commerce, National Federation of Independent Business, National Retail Federation and other business groups

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Primary Duty Details

The principal, main, major or most important duty that the employee performs

Executive
Administrative
Professional
Computer
Outside Sales

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Executive Primary Duty

- Managing the enterprise or a customarily recognized department or subdivision
- Customarily and regularly directing the work of at least 2 full-time employees or the equivalent
- Have the authority to hire or fire or recommendations are given particular weight

Administrative Primary Duty

- Performance of office or non-manual work directly related to management or general business operations, e.g.,
 - Tax, finance, accounting, auditing, budgeting, insurance, marketing, advertising, human resources, public and governmental relations, legal and regulatory compliance, computer network, internet and database administration
 - Not production workers

Administrative Primary Duty, continued

- Exercise of discretion and independent judgment with respect to matters of significance
 - Consideration of possibilities and choice or action free from immediate direction or supervision
 - High level of importance or significance, not just risk of loss
 - Not skill in application of standards

Administrative Exemption Examples

- Insurance claims adjusters
- Certain financial services industry workers (not if primarily selling)
- Team leader on major projects (purchasing or selling a business, negotiating real estate purchase)
- HR managers
- Some systems analysts and computer programmers

Professional Primary Duty

Learned Professional

- Performance of work requiring advanced knowledge in a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction
- Consistent exercise of discretion and judgment

Professional Primary Duty

Creative Professional

- Performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
- Not routine mental, manual, mechanical or physical work
- Fields such as music, writing, acting, and the graphic arts

Professional Exemption Examples

- Commonly exempt professionals
 - Lawyers, teachers, accountants, pharmacists, engineers, actuaries, certified athletic trainers, chemists, chefs, etc.
- Not exempt
 - Licensed practical nurses, bookkeepers, cooks, paralegals, engineering technicians

Exempt Computer Primary Duty

- The application of systems analysis techniques and procedures, including consultation with users, to determine hardware, software or system functional specifications
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications,

Exempt Computer Primary Duty, continued

- The design, documentation, testing, creation or modification of computer programs related to machine operating systems
- A combination of the above which requires the same level of skills
- Not repair, help-desk, or CAD workers

Outside Sales Primary Duty

- Making sales / obtaining orders or contracts for services or facilities
- Customarily and regularly engaged away from the employer's place of business in performing the primary duty
 - not sales made by mail, telephone or the internet unless merely an adjunct to personal calls