



FAIR LABOR STANDARDS ACT

CHANGES AND FINAL RULINGS

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THE EVOLUTION OF THE FLSA

HOW DID WE GET HERE?

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THE EVOLUTION OF THE FLSA

The Fair Labor Standards Act (FLSA) was signed into effect on June 15, 1938 by President Franklin D. Roosevelt. It took effect on October 24, 1938.



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THE EVOLUTION OF THE FLSA: CONTINUED

At the time, the FLSA:

- only applied to certain industries. The employees of these industries represented only about one-fifth of the total American work force.
- created the Wage and Hour Division to enforce the provisions of the FLSA.
- set the standard work week at 40 hours and the maximum work week at 44 hours.
- required overtime pay of time-and-a-half.
- fixed the minimum wage at 25 cents/hour.
- established laws on child labor.

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THE EVOLUTION OF THE FLSA: CONTINUED

- In 1947, the Portal-to-Portal Act was passed.
 - The Act established a two (2) year statute of limitations for claims under FLSA.
 - Note: the statute of limitations is extended to three (3) years for willful violations.

THE EVOLUTION OF THE FLSA: CONTINUED

- The Act specified the types of activities for which employers were required to compensate their employees.
 - The FLSA did not initially define “hours worked.”
 - Between the enactment of the FLSA and the Portal-to-Portal Act, various courts weighed in on the idea of compensable time.

THE EVOLUTION OF THE FLSA: CONTINUED

- The Portal-to-Portal Act clarified that, for instance, employers are not required to pay employees for their travel time to and from work or for other preliminary or postliminary activities unless those activities are:
 - (1) compensable by agreement,
 - (2) a custom or practice,
 - (3) or are an integral or indispensable part of the principal activities which the workers are employed to perform.

THE EVOLUTION OF THE FLSA: CONTINUED

The FLSA has been amended multiple times through the years. The effect of these amendments has been, among other things, to expand the definition of covered employees, as well as to increase the minimum wage.

Of note, in 1963, the Equal Pay Act was passed. Found at 29 U.S.C. §206(d), the Equal Pay Act amends the FLSA to provide that employers may not discriminate in compensation solely on the basis of a worker's sex.

THE EVOLUTION OF THE FLSA: CONTINUED

The FLSA **does** exempt certain types of employees from the requirement to pay a minimum wage, as well overtime for more than 40 hours worked in a workweek - among them, those working “in a bona fide executive, administrative, or professional capacity.”

The FLSA **does not**, however, define “bona fide executive, administrative or professional capacity” but instead leaves it up to the U.S. Department of Labor to define those terms through its regulations.

THE EVOLUTION OF THE FLSA: CONTINUED

In a presidential memorandum dated March 13, 2014, President Barack Obama stated, “[R]egulations regarding exemptions from the [Fair Labor Standards] Act's overtime requirement, particularly for executive, administrative, and professional employees (often referred to as “white collar” exemptions) have not kept up with our modern economy.”

President Obama directed the DOL to update and modernize the FLSA regulations governing which white collar employees are exempt from the FLSA protections.

THE EVOLUTION OF THE FLSA: CONTINUED

On July 6, 2015, the DOL published a notice of proposed rulemaking.

In response to that notice, the DOL received more than 270,000 comments.

On May 18, 2016, the DOL announced publication of a Final Rule to update the FLSA regulations.

This Final Rule, which we will discuss in more detail, is currently on hold.

FLSA BASICS

WHAT DO I NEED TO KNOW?

THE FLSA: WHO IS EXEMPT

- The FLSA provides that **all** employees must be paid overtime for hours worked in excess of 40 per work week unless they fall into an exemption category.
- In order for an employee to be exempt from the minimum wage and overtime pay provisions of the FLSA, he or she must:
 - (1) be paid on a salary basis of not less than \$455/week; and
 - (2) have principal job duties that fall within one of the exemption categories set forth by the FLSA.

NOTE: the salary level of \$455 is what the Final Rule is proposing to change.

THE FLSA: SALARY BASIS TEST

- “An employee will be considered to be paid on a “salary basis” within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of the variations in the quality or quantity of the work performed.” 29 C.F.R. §541.602.

THE FLSA: SALARY BASIS TEST

- The FLSA does not require employees to be paid for a week in which they perform no work.
- The employee must be paid a full salary for a week in which any work is performed, regardless of days or hours worked. However, there are some exceptions. Also, it is permissible to deduct from an employee's vacation or sick time or other paid time-off bank or policy.
- An employee is not paid on a salary basis if deductions are made for absences that are due to the employer or the operating requirements of the business.

THE FLSA: JOB DUTIES TEST

- If an employee meets the salary basis test (i.e. is paid on a salary basis of not less than \$455/week), then his/her job duties must be examined under the job duties test to determine if the employee is exempt from the overtime and minimum wage requirements of the FLSA.

THE FLSA: JOB DUTIES TEST

- Employers **should not** only look at a job title or job description when determining if an employee meets the job duties test.
- Employers **should** also examine the actual job duties that an employee performs, regardless of his/her title or job description.
 - Ideally, each job description will adequately and correctly describe all duties assigned to the employee

THE FLSA: JOB DUTIES TEST

“The employer in an FLSA case bears the burden of establishing that its employees are exempt, and because of the remedial nature of the FLSA, exemptions are to be “narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.” *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1070 (1st Cir. 1995), quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960).

Reich v. Haemonetics Corp., 907 F. Supp 512 (D.Mass. 1995).

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

1. Executive Exemption

- Primary duty is the management of an organization or recognized department or subdivision
- Directs the work of two or more full time employees or their equivalent
- Authority to hire or fire or whose suggestions on hiring, firing, advancing, promoting or other job change status are given particular weight. 29 C.F.R. §541.100.
 - i.e. Superintendent or other supervisors within the school district

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

2. Administrative Exemption

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employee or the employers customers 29 C.F.R. §541.200(a).
 - Includes but is not limited to, “work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 C.F.R. §541.201 (b).
 - These activities directly related to management or general business operations may be performed by an employee who would also qualify for another exemption. 29 C.F.R. §541.201 (b).

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

2. Administrative Exemption (continued)

- Exercising discretion and independent judgment is a key element.
 - Consider whether the employee: (1) has authority to formulate, affect, interpret, or implement management policies or operating practices; (2) carries out major assignments in conducting the operations of the business; (3) performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; (4) has authority to commit the employer in matters that have significant financial impact; (5) has authority to waive or deviate from established policies and procedures without prior approval; (6) has authority to negotiate and bind the company on significant matters; (7) provides consultation or expert advice to management; (8) is involved in planning long- or short-term business objectives; (9) investigates and resolves matters of significance on behalf of management; and (10) represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 C.F.R. §541.202(b).

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

2. Administrative Exemption (continued)

- Exercising discretion and independent judgment is a key element.
 - Employee can exercise discretion and independent judgment if their decisions are reviewed, and even overturned, at a higher level. 29 C.F.R. §541.202(c).
 - May consist of recommendations for action rather than taking action. 29 C.F.R. §541.202(c).
 - Must be more than the use of skill in applying the employer's well-established techniques, procedures or specific standards described in manuals or other sources. 29 C.F.R. §541.202(e).
 - Does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. 29 C.F.R. §541.202(e).

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

3. Professional Exemption

- Requires advanced knowledge in a field of science or learning which is customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. §541.301(a).
 - i.e. nurse, chefs with a four year specialized academic degree in culinary arts, athletic trainers
- Exercising discretion and independent judgment is a key element

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

3. Professional Exemption (continued)

- Under the FLSA, Computer professionals may be paid on an hourly basis without time and half if they work overtime, however, this is NOT the case under Pennsylvania law and therefore, computer professionals must be paid on a salary basis in Pennsylvania to avoid overtime requirements.
 - Is this your school's IT professional(s)?
 - Employees performing true computer system analysis, programming, software engineering or related work. 29 C.F.R. §541.400(b).
 - Must apply advanced knowledge while using their discretion and judgment. Typically have at least a bachelor's degree.

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

3. Professional Exemption (continued)

- Teachers
 - Any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed or engaged in this activity as a teacher in an educational establishment. 29 C.F.R. §541.303.
 - Includes kindergarten teachers, special ed teachers, vocational and trade teachers, driver's ed teachers, and "faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism" 29 C.F.R. §541.303(b).
 - Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. 29 C.F.R. §541.303(c).

THE FLSA: EXEMPTIONS BASED ON JOB DUTIES

3. Professional Exemption (continued)

- Artistic and creative professionals
- Attorneys and physicians

4. Outside Sales Employees

5. Highly Compensated Employees

- PA state law does not contain this exemption and therefore, it cannot be relied upon in Pennsylvania
- Requires that the individuals perform executive, administrative or professional duties, so these employees will be exempt under the previously discussed categories. 29 C.F.R. §541.601(a)(2).



THE PENDING FINAL RULE

WHAT HAPPENS NOW?



THE FINAL RULE: KEY PROVISIONS

- Originally effective December 1, 2016, the Final Rule will raise the minimum salary of exempt employees from \$23,660 to \$47,476 annually.
 - This salary is the 40th percentile of earnings of a full-time salaried worker in the lowest-wage Census Region, currently the South.
 - \$47,476 breaks down to \$913/week

THE FINAL RULE: KEY PROVISIONS

- The Final Rule will also establish an automatic renewal system that will adjust the minimum salary level every three (3) years.
 - The first renewal is slated to occur on January 1, 2020.
 - According to the Society for Human Resource Management, the minimum salary is expected to rise to more than \$51,000.00 with the first renewal.

THE FINAL RULE: WHAT IT DOESN'T DO

- The Final Rule does not make any changes to the existing job duties test.
- The Final Rule does not make any changes to the Highly Compensated Employee (HCE) **duties test**.
 - The Final Rule will raise the total annual compensation amount for HCE with automatic updates every three years; however, as mentioned above, this is not an exemption which is available in Pennsylvania under state law.

THE FINAL RULE: WHERE DOES IT STAND NOW?

- In October 2016, twenty one (21) states filed an Emergency Motion for Preliminary Injunction in the Eastern District of Texas, asking the court to enjoin the Department of Labor from implementing and enforcing the Final Rule on December 1, 2016.
- On November 22, 2016, U.S. District Court Judge Amos Mazzant granted the Emergency Motion and issued a nationwide injunction prohibiting the DOL from implementing and enforcing the Final Rule.
- Judge Mazzant ruled that the DOL does not have the authority to establish a minimum salary for exempt employees or create an automatic updating system level without the approval of Congress.

State of Nevada, et al v. U.S. DOL, 2016 WL 6879615 (E.D. Texas 2016)

THE FINAL RULE: WHERE DOES IT STAND NOW?

- On December 1, 2016, the Department of Justice on behalf of the DOL filed a notice to appeal the preliminary injunction with the Fifth Circuit Court of Appeals.
- On December 8, 2016, the Appeals Court granted the DOL's request for expedited briefing on its appeal of the preliminary injunction ruling.

THE FINAL RULE: WHERE DOES IT STAND NOW?

- On December 12, 2016, the DOL filed its motion to stay district court proceedings pending appeal (i.e. suspend the preliminary injunction during the appeals process and allow implementation and enforcement).
- On January 3, 2017, Judge Mazzant denied the DOL's motion to stay.

THE FINAL RULE: WHERE DOES IT STAND NOW?

- All briefs were due to the Appeals Court by January 31, 2017.
- Consider that there has been a change in administration since the Final Rule was originally set to be implemented.

THE FINAL RULE: WHAT COULD THIS MEAN FOR SCHOOLS?

Schools will have to raise some currently-exempt employees' salaries to meet the higher threshold or pay overtime to those employees. The affected employees may include those working in or as:

- Finance and accounting
- Human resources
- Public relations
- Security
- Information technology
- Counselors, social workers or therapists
- School nurses
- Athletic trainers
- Directors, managers and supervisors in nonacademic departments such as maintenance, transportation and food service

THE FINAL RULE: WHAT COULD THIS MEAN FOR SCHOOLS?

- Not affected by the pending Final Rule are elementary and secondary teachers, who are FLSA-exempt regardless of how much they make, so long as the primary function of their position is instruction.

THE FINAL RULE: COMPLIANCE RECOMMENDATIONS

- Audit exempt positions to see if any meet the Final Rule's minimum salary levels and duties test.
- Consider raising salaries of employees who usually work more than 40 hours a week in order to keep those employees classified as exempt.
- Think about hiring other employees who work less than 40 hours a week to offset overtime worked by non-exempt workers.
- Create a policy that requires employees to obtain supervisory approval to work overtime.
- Consider paid lunches to lower exempt employees' worked hours in the week.

THANK YOU!

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