

Fair Labor Standards Act (FLSA)

Fraternity Executives Association Webinar
December, 2015

Objectives

- Support members as they navigate and create a strategy related to the proposed changes to the Fair Labor Standards Act (FLSA)
- Provide an update regarding the proposed changes and associated timelines
- Create a forum for members to share what changes they plan to make and what additional guidance and resources they are looking for to ensure compliance
- Discuss traveling consultant roles and House Directors; evaluate potential solutions for this role

Agenda

- FLSA summary
- Regulation and timeline update
- Your options as an employer and important factors to consider
- What you should do now
- Audience poll
- Questions
- Contact information and sources

FAIR LABOR STANDARDS ACT SUMMARY

What is the Fair Labor Standards Act?

- The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.
 - Federal statute passed in 1938
 - Created to prevent workers from being required to work long hours without extra compensation
 - Enforced by the U.S. Department of Labor
- This webinar's focus is on the proposed changes to the law, particularly the overtime and recordkeeping provisions of the law
 - Some employees are exempt ("exempt"), and some are not exempt ("non-exempt") from the overtime pay provisions
 - Exemptions are narrowly defined under the FLSA
 - Record keeping requirements for "exempt" employees are different than for "non-exempt" employees

Who is exempt from overtime?

- Determining if an employee is exempt from overtime is based on the type and frequency of performed duties and responsibilities, and not solely on how often or how much that person is paid, or the preference of the supervisor
- Exempt status under the FLSA include classifications are generally described as:
 - Executive
 - Administrative
 - Professional (learned and creative)
 - Computer
 - Outside Sales

Exempt guideline examples

- There are three tests to qualify for each type of exemption, including but not limited to an evaluation of:
 - Salary basis
 - Salary level
 - Duties Test
 - Authority and supervision
 - Discretion and independent judgment regarding matters of significance
 - Advanced knowledge, creativity, computer skills
 - Outside sales activity

Exempt position examples

- **Executive:** President, Dean, Executive Director
- **Professional:** Professor, Physician, Pharmacist, Engineer
- **Administrative:** Marketing Manager, Development Officer, Accountant
- **Computer:** Systems analysts, Programmers, Software Developer
- **Outside Sales:** Door-to-door salesman

Non-exempt Jobs

- Jobs that are classified as non-exempt are entitled to overtime pay
- Jobs that are typically non-exempt include:
 - Manual laborers and skilled-trade workers
 - Customer service representatives
 - Receptionists
 - Stagehands
 - Administrative support positions

REGULATION AND TIMELINE UPDATE

FLSA—regulation update

- If proposed changes to the Fair Labor Standards Act (FLSA) overtime regulations are enacted, it is reported that:
 - The proposed rule would more than double the salary level under which employees qualify for overtime pay when they work more than 40 hours in any given week
 - The current threshold of \$455 per week/\$23,660 annually would be adjusted to 2016 estimates of about \$970 per week/\$50,440 annually (note: may be higher in 2017)
 - The salary threshold for qualifying as an exempt "highly compensated employee" will raise from \$100,000 to a projected \$122,148
- Thresholds are tied to an annual (CPI-U) index
- Final regulations may be different than what has been proposed, but most anticipate **it will not be significantly different**

FLSA—timeline update

- Proposed regulation came out of a 60-day "comment period" that ended on September 4, 2015 and is now in a "wait and see period"; initial releases indicated a final ruling will likely not be made until the middle of 2016
 - On November 13th the Wall Street Journal reported that the DOL's Solicitor of Labor remarked to an audience at an American Bar Association (legal professional association) event that the overtime regulation was not likely to appear "before late 2016"
 - On Nov. 20, 2015 the Obama Administration released its fall 2015 Regulatory Agenda, revealing that the U.S. Department of Labor (DOL) has pegged July 2016 as the anticipated date to publish the final rules

FLSA—timeline update

- Department of Labor wants to finalize the rules and have them take effect before the Obama Administration leaves office
 - The last time updates were made employers only had four months to comply
 - The proposed rule asks for guidance on having the new rule take effect 60 days from when the rule is finalized; recent speculation anticipates it could be as short as 30 days
- The later the final rule is published, the smaller the window of time to become effective
- If a Republican is sworn in as president in January 2017, there is a greater likelihood that any regulation enacted could be significantly changed or even overturned.

FLSA—what counts as salary?

- The DOL is seeking comments on if it should allow incentive compensation and nondiscretionary bonuses to be considered in the salary test
- The Department proposes that employers could include nondiscretionary bonuses in the salary level to count toward a portion of the standard salary-level test if paid monthly
- WorldatWork advocates that “in order to best reflect how nondiscriminatory bonuses are awarded by employers, the Department should abandon its suggestion that such payments be made at least monthly with no ability for employers to count annual payments toward the salary-level test”

YOUR OPTIONS AS AN EMPLOYER

Your options as an employer

- Raise the salary for positions that qualify for exempt/salary status based on the (possibly revised) duties test
- Reclassify positions that meet the duties test but not the new exempt/salary threshold to non-exempt/hourly and pay them overtime
- Reclassify positions that meet the duties test but not the new exempt/salary threshold to non-exempt/hourly, reduce their hourly equivalent rate to offset the addition of overtime pay
- Restructure the positions, transition some full-time positions to part-time, reduce normal "work hours," eliminate positions and/or change operational processes
- (POLL Question: how many of you already track time for salaried employees?)

Important factors to consider

- Don't make any changes until the final rules are released; there could be wide variation between proposed and final rulings
- Don't underestimate the individual emotions involved in moving employees from exempt/salary to non-exempt/hourly
- Consider the impact on your workplace culture
- Evaluate the ripple effect of making this change, especially if you choose to increase the salaries of some employees
 - Will this cause compression with supervisor?
 - Internal equity in relation to other positions?

WHAT YOU SHOULD DO NOW

What should you do now?

- Conduct an audit to identify which current exempt/salary employees make less than \$50,440; create a list of the positions and salaries of who would fall in this range
 - Assess how much overtime these employees work in a typical year
 - Calculate the cost of overtime if this same position was non-exempt based on your state's overtime rules (can vary by state, see <http://www.dol.gov/whd/state/state.htm>)
 - Determine the "worst case scenario" cost associated with these changes
- Create a strategy for how to budget NOW for the impact of these changes that will likely be effective in Q4 of 2016 or early 2017

What should you do now?

- Conduct a job analysis and ensure the job descriptions for these positions and ideally all jobs in the organization are accurate and up-to-date
 - See the FEA website for job descriptions tools and templates: <http://fea-inc.org/resources>
 - Leverage this forum to identify what other organization are doing with similar positions
 - Keep good records with effective dates and last date updated for job descriptions

What should you do now?

- Ensure your job descriptions include:
 - Essential functions or duties of the job
 - Secondary functions or duties
 - Supervisory duties
 - Education and required experience
 - Knowledge, skills and abilities (competencies)
 - Physical demands
- Consider how much time is spent on each core duty in addition to what the actual duties are from day to day
 - Evaluate for the job today
 - Estimate for the revised job given proposed changes

What should you do now?

- Review your policies and procedures
 - Work hours—when does the day begin and end?
 - Travel—when does travel time count towards hours worked?
 - Timekeeping rules and systems
 - Do you have a timekeeping program or use paper or excel to report time worked?
 - Who tracks hours and reports time? Hourly only or salaried employees too?
 - What happens when employees who have never tracked time are asked to do so?
 - Who will review and approve hours?
 - Flex-time and other time-related programs
 - Other compensation programs (on-call pay)

What should you do now?

- Review your benefit and retirement plans
 - Some benefits may define eligibility by exemption status; revisit to ensure the classifications still make sense (e.g. paid time-off program)
 - Some benefits may be a multiple of “salary” and may need to be revisited or clarified
 - The cost associated with these benefits may change; calculate and plan for the impact
- Partner with a human resources and/or compensation and benefits consulting firm to ensure your programs align and are compliant

What should you do now?

- For Consultant Program and House Directors:
 - Prepare membership for these changes
 - Educate House Corporation Boards and other key resources
 - Inform the Chapter Advisors and others on the impact of these new rules and how it may affect how consultants and/or House Directors spend their time

AUDIENCE POLL

Audience poll questions

- Have you included potential cost of changes in 2016 budget?
- What successful solutions have you implemented for consultant activity tracking?
- What changes do you plan to make?
- What other programs will this change impact?

The cost of non-compliance

- Employers who willfully or repeatedly violate the overtime pay requirements of the FLSA are subject to:
 - Penalties of up to \$1,100 per violation (each paycheck counts as a single violation)
 - Criminal penalties that can result in prosecution and a \$11,000 fine
 - Back pay, liquidated damages, and attorney fees
- Often, the biggest exposure to risk is due to a “messy” termination that leaves a long-time employee feeling dissatisfied with the circumstances surrounding his or her departure from the organization
- The recent spotlight on the FLSA and proposed changes will bring increased attention to compliance

QUESTIONS?

Your presenters today

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- Deb Hunter, Advisor, FirstPerson
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Sources

- Society for Human Resource Management (SHRM)
 - Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management.
- WorldatWork
 - WorldatWork is a nonprofit HR association focused on compensation, benefits, work-life effectiveness, and total rewards
- United States Department of Labor (DOL)
- Other miscellaneous legal alerts, publications and professional association communications