

FLSA: Client & Service Perspective Through the PEO Lens in Preparation for The New Overtime Rules

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National Association of Professional Employer Organizations

<http://timer.leftplusright.com/#/2278/countdown>

National Association of Professional Employer Organizations



How did we get here?

A Brief History

National Association of Professional Employer Organizations



- **HR 6094**
- **Lawsuits filed by 21 States**

What Changed?

- Salary Basis Test (fixed pay) – ***No Changes***
- Duties Test (specific to exemption) – ***No Changes***
- Salary Level Test (minimum weekly pay) – ***Revised***
 - Executive / Administrative / Some Professionals
 - \$455 per week (\$23,660 annual) to **\$913 per week (\$47,476 annual)**
 - Highly Compensated
 - \$100,000 per year to **\$134,004 per year**

Only the Beginning

Automatic updates to the salary threshold will keep all employers on their toes.

- Every three years – Beginning 1.1.2020
- 40th Percentile of full-time salaried in lowest-wage region
- 90th Percentile of full-time salary nationally

The Auto Index

- Salary threshold expect to exceed \$50K in 2020
- Use of wage index skews salary level because it:
 - Includes employees not covered by the rule
 - Includes employees not subject to salary level test
- Use of wage index may result in upward shift because:
 - Current exempt employees may receive raises to avoid salary compression
 - Those converted to salary non-exempt may have increased earnings due to overtime pay
 - Those re-classified to hourly will be excluded from data

Biggest Impact

- Employers with exempt employees earning less than \$48,000
- Geographic Regions – South & Midwest
- Industries – Hospitality, Retail, Restaurants, Health, Higher Education & Technology
- Job categories – store managers, bank branch managers (or asst. managers), finance departments

Impacts on Workforce & Hiring

- Exempt Employees
 - Longer hours
 - More duties
 - Salary compression
- Non-Exempt (Reclassified) Employees
 - Less training, mentoring and education
 - Less flexibility and more restrictions
 - Less full-time and more part-time
- New Hiring Postponed

Practical Audit Tips

- Audit exempt positions currently earning under \$50K (including “part-time”), and determine the amount of OT hours by:
 - Tracking hours worked while auditing and evaluating
 - Pulling existing data (log-in and log-out; swipe cards) and
 - Shadowing positions while auditing and evaluating
- Audit exempt positions > \$50K for compliance with duties test
- Consider state laws and any CBAs
- Consider involving legal counsel

Tips for Maintaining Exempt Classification



- Increase salary to satisfy new threshold
- Consider non-discretionary bonuses
- Budget for tri-annual automatic increases
- Consider pay compression on others already making over \$50,000

Candidates for Exempt Status

- Employees earning just under the threshold
- Employees with substantial non-discretionary bonuses/commissions
- Positions where salary compression is not an issues
- Positions requiring lots of OT hours

A large, yellow rectangular sign with rounded corners and a thick black border. The word "EXEMPT" is written in the center in a bold, black, sans-serif font, all in capital letters.

EXEMPT

Candidates for Reclassification



- Employees well below the threshold
- No or minimal non-discretionary bonuses
- Salary increases would cause compression
- Employees who do not work much OT
- Employees who work consistent or predictable OT

Tips for Reclassifying to Non-Exempt

- Reverse engineer the compensation package
 - Configure hourly rate, bonuses and anticipated OT so that total comp package of reclassified workers is about the same as when salaried and exempt
- Reduce scheduled hours of non-exempt
- Hire additional personnel to spread out hours, reducing OT
- Transfer certain tasks to exempt employees
- Consider effects on bonus eligibility
- Consider compensation required for training and mentoring time (training pay rate?)

Non-Exempt Pay Rate Options



- Hourly Rate plus OT Premium
- Salary plus OT
 - Fluctuating work week program (fixed salary for all hours worked plus half-time OT Premium)
- Piece Rate plus OT
- Commissions plus OT

Pay Structure Considerations

- Employee perceptions of demotion
- Set work hours or variable work hours?
- Consistent OT or infrequent OT?



Reclassification Tips

- Develop Employee Communications Plan
 - Required by Department of Labor
 - Position still valued by company
 - Your pay will vary each week you work (if hourly)
 - You will be expected to be at work during core hours
 - Not as much flexibility

More Reclassification Tips

- Timekeeping / Record-keeping policies
 - Train newly non-exempt and their managers
- Restrictions on work outside normal work hours
- Mobile devices and remote access
- Update offer letters, handbooks, and job descriptions:
 - Make hours expectations clear and
 - Document whether salary is for all hours worked

More Reclassification Tips

- Compliance with meal and rest periods
- Telecommuting
- Travel Time
- Overtime restrictions – require approval
- Consider timing of implementation
- Consider timing of annual pay increases
- Consider auditing again after initial period to test compliance

Litigation Risks Remain the Same



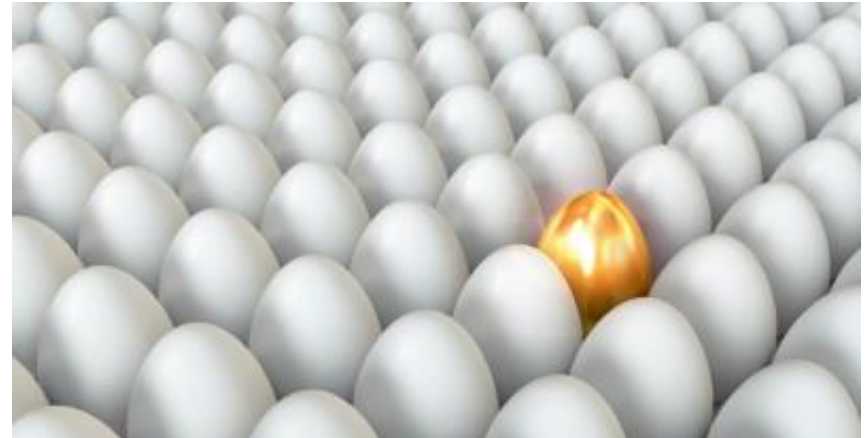
- Vulnerable positions are those that pay \$47,476 - \$50,000 where duties test will be litigated
- Litigation involving reclassified claims
- Off-the-clock claims
 - Reclassified workers accustomed to working at all hours and not tracking time

Special Considerations for PEOs

- Physician, Heal Thyself!
- Review your Client Service Agreement
- Develop your Client Communications Plan and Audit or Review Strategy
 - How will you deal with clients who refuse to comply?
- Add payroll reports targeting the new threshold
- Remind clients of overtime obligations
- Consider periodic spot auditing for compliance
 - Beware the straight 80 hour timesheet

True PEO Value-Add

- All PEO Payroll and HR professionals should be on the lookout for misclassified employees, and empowered to work proactively with clients
- New OT Rules present a golden opportunity to dig-in with clients to review job descriptions and duties



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**For additional materials:
www.hnbllc.com/NAPEO2016**

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