

# *Off the Hook or Off to Court?* What Employers Need to Know about the Blocked FLSA Overtime Rule

Presented by



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# What We Will Cover

- What is the FLSA?
- What is the new rule?
- What is the current status of the new rule?
- What could happen next?
- What do you do now?
- What are the risks your company could face?
- How can you make the best of this situation?

# Why Is This Webinar So Important?

**Even innocent mistakes can lead to BIG settlements for FLSA violations. Just ask:**

- Fed Ex - \$228 million
- Bank of America - \$36 million
- Publix - \$30 million
- Department of Labor - \$7 million
- Zillow – up to \$6 million
- PNC Bank - \$6 million
- McDonalds - \$3.75 million



# What Does the FLSA Cover?

**Enacted in 1938, the FLSA regulates:**

- Federal Minimum Wage (currently \$7.25)
- Overtime Pay (over 40 hours in a workweek for non-exempt)
- Child Labor Laws (employees under 18)
- Equal Pay for Equal Work (regardless of gender)

***State and local laws may grant employees greater protection than the FLSA.***



# Exempt vs. Non-Exempt

**What are the differences between exempt and non-exempt?**

- **Non-exempt:**
  - Overtime pay required for all hours worked over 40 in a workweek
  - Must be paid at least minimum wage for all hours worked
  - Accurate time records must be kept
  - Common examples – blue-collar workers, first responders, and manual laborers

# Exempt vs. Non-Exempt (Cont.)

**What are the differences between exempt and non-exempt?**

- **Exempt:**
  - Overtime pay not required
  - Time records not required
  - Common examples – executives, high-level managers, and professionals

# Exemptions

## How to qualify for an exemption:

- Must be paid on a salary basis
- Must meet the minimum salary threshold
- Must meet a duties test for an exemption

# Exemptions (Cont.)

## **Types of Exemptions:**

- White Collar Exemptions
  - Administrative
  - Executive
  - Professional
  - Creative
  - Outside Sales
- Business Owner
- Highly Compensated Employee



# What Is the New Rule?

## **What changed when the new rule was issued?**

- The salary threshold was raised from \$455/week to \$913/week
- 10% of the \$913 can come by way of nondiscretionary bonuses
- A mechanism to increase the salary threshold every three years was established

*The new rule was scheduled to go into effect on December 1, 2016.*

# What Is the New Rule? (Cont.)

## What did not change?

- The duties tests for white-collar exemptions
- Federal minimum wage
- Child labor laws
- Labor law postings

# Current Status of the New Rule

A Texas judge issued a **temporary** injunction that blocked the rule from taking effect December 1, 2016.

## What does this mean?

- It means the *current* rule remains in effect
- The *new* rule is now in limbo and may go into effect at a later date ... or could be permanently stopped
- DOL recently appealed the temporary injunction

# Summary of the Judge's Ruling

## **The Court concluded that:**

- Congress intended for the white collar exemptions to turn on job duties as opposed to salary
- By more than doubling the salary threshold, the DOL in effect made salary the sole reason an employee qualifies for an exemption

# Summary of Possible Outcomes

**There are several possible outcomes:**

- Judge could make a final ruling on the validity of the rule
- Congress could act
- The new administration could act

# Possible Outcomes by Court Ruling

## **Possible outcomes:**

- The Court of Appeals could rule on DOL's appeal
  - This appeal is only on the temporary block of the rule, not a final determination on the validity
- The DOL could drop its appeal, leaving the temporary block in place

# Possible Outcomes by Court Ruling (Cont.)

- The Court could make a final determination on the validity of the new rule
  - Lift the temporary block and declare rule valid (*not likely*)
  - Declare the new rule invalid – permanently blocking it from taking effect
  - Declare some parts of the rule invalid and some parts are valid – only the valid portions would take effect
- An out-of-court settlement could be reached
  - An agreement could be reached to modify the rule

# Possible Congressional Outcomes

## Possible avenues for Congress to act:

- Pass a bill regarding the rule
  - Bills already introduced
    - One would delay the effective date until July 1, 2017
    - Two different bills that would phase in the salary level
  - Introduce new bills to attack new rule
- Congressional Review Act
  - Congress could rescind a new regulation through joint resolution
  - This has only been successful one time since 1996



# Possible Executive Outcomes

**Once the new administration takes over, it may have some avenues to pursue depending on the timing and status of the pending court cases. For example:**

- If the rule is not in effect, executive orders can be issued to modify, rescind or suspend the rule from becoming effective for a certain amount of time
- If the rule goes into effect, then rule making procedures would have to take place to modify the existing rule

# What Does This Mean for Businesses?

- Businesses are left in limbo
- This is not a free pass
  - Employees still must be classified correctly and paid correctly
- Do not need to make changes based on the higher salary threshold at this point (if you haven't done so)

# What to Do if You Made Changes

## **Did you convert employees to non-exempt?**

- If you did, it is recommended that you do not change classifications back
- Keep in mind that the duties test still applies regardless of the salary threshold
- If an employee doesn't meet a duties test, he or she is non-exempt regardless of the salary

# What to Do if You Made Changes (Cont.)

**Did you increase employees' salaries to meet the minimum threshold?**

- It is recommended that:
  - You do not reduce employees' compensation back to where it was before
    - Could have legal implications
    - Bad for morale

# What if You Have Not Made Changes?

**Did you hold off on making any changes to employees' classification or to payroll?**

- If yes, then it is recommended that:
  - You take a “wait-and-see” approach
    - Avoids potentially unnecessary and costly changes
    - But have a plan to implement changes quickly, if necessary
  - Do not make any changes based on the new salary threshold
    - Exempt employees must still meet a duties test regardless of salary level

# Costs vs. Risk

## What are your costs?

- These vary, depending on what your situation is (i.e., have you implemented changes or not?)
  - Man hours to evaluate and convert (re-convert) employees
  - Increased payroll to cover either raises or overtime costs
  - Money and time updating timekeeping systems and procedures
  - Training for employees and managers

# Costs vs. Risk (Cont.)

## What are your risks?

- Lawsuits
  - Class actions, back wages, double damages, attorney's fees
- DOL investigations
- Poor employee morale

# Cases Filed in Federal Court

**The number of federal cases continues to rise almost every year and spike around rule changes.**

## **Number of cases filed:**

- 1993 - just a little over 1,400 cases were filed
- 2003 – spiked to over 4,000 when new rule was announced
- 2007 – spiked again to over 6,700 when new rule was implemented
- 2015 – over 8,700 cases filed and will likely continue to rise



# Back Wages Recovered by DOL

**The DOL has recovered nearly \$1.6 BILLION for employees since 2009.**

2015 DOL Statistics:

- 22,000 complaints received
- 28,000 cases concluded
- \$246 million in back wages recovered



# Make the Best of These Uncertain Times

## **This is a great opportunity to:**

- Evaluate your employees' classifications and make sure they are correct
  - Do all of your exempt employees meet at least one duties test for an exemption?
    - Salary AND duties test required for exemption
- Correct any misclassification errors based on the duties test

# Questions?

