

Salaried Today, Hourly Employee Tomorrow: 4 Million Reasons Companies Should Prepare Now for New Overtime Laws & Three Effective Steps to Compliance.

By ALIA L. DERRICK

If you have salaried employees who are currently exempt from the FLSA's overtime laws or are planning to convert workers into exempt salaried employees based on old FLSA standards, you better act now to make sure the exemption will still apply to them come December 1, 2016.

For years the rules and statutory minimum threshold limits governing which employees qualified as exempt and which did not have remained the same. Soon that will change. On May 18, 2016, President Barack Obama announced the publication of the US Department of Labor's ("DOL") Final Rule updating overtime regulations. Starting December 1, 2016, an estimated 4 million workers will no longer qualify as exempt salaried employees under the new rule. These 4 million workers will therefore be able to claim and collect overtime pay unless their pay is increased to the new minimum thresholds or companies identify and implement necessary overtime policies and safeguards to control when, if any, overtime is worked and by whom. That's 4 million reasons for companies, that have, or are planning to have, salaried employees who are exempt from the Fair Labor Standards Act's ("FLSA") overtime mandates, to act now to determine whether those employees will still qualify as exempt December 1st, and if not, to identify and implement any necessary changes prior to the December deadline.

What's at Stake. Employees who work any overtime —*i.e.*, over 40 hours in a workweek— must be compensated for that overtime at a rate of 1.5 times that employee's regular hourly rate. The real concern arises because employees *must be paid for all* overtime hours worked including any *unauthorized or un-preapproved overtime*. Employers can get into serious legal trouble if they, either directly or indirectly, instruct or encourage employees not to report unauthorized overtime or fail to pay employees for it. For example, liquidated damages is the penalty for intentional violations of the FLSA and it essentially doubles the employee's recovery. And if it is found to be a company-wide policy applied to multiple workers, it is quite typical for the damages to grow exponentially into the millions as more and more employees take collective action in court or via the DOL to recover and recoup unpaid overtime as well as their attorneys' fees.

Given this, it is crucial that employers act now to review, revamp, and retrain staff on the Company's overtime and salary exemption policies in order to shield the company from heightened liability.

The New Rulebook on Overtime. Before devising an effective plan, companies must know how the law has changed. Under the new rule full-time salaried employees earning less than \$913 per week (\$47,476 annually) are not exempt and therefore qualify for the time and a half overtime rate of pay for every hour over 40 that they work in a week. That is an increase of more than double the old minimum threshold amount of \$455 per week. Excepted from the new rule are teaching professionals, doctors, lawyers, and some computer professionals and outside sales employees.

For highly compensated employees (HCEs) subject to the minimum duties test, the new minimum salary threshold increased to \$134,004.00 annually. Prior to this change, to qualify as a HCE, the salary only had to be \$100,000.00 annually. These minimum thresholds of salary and compensation levels will automatically update every three years.

Other changes include catch up payments and the use of nondiscretionary bonuses and incentive pay to satisfy the new limits. For example, under the new rule, in the case of HCEs, employers may satisfy up to 10% of the total new *annual* salary levels with nondiscretionary bonuses and incentive pay such as commissions or other performance based pay. This 10% rule does not, however, apply to the *weekly* requirements of the standard salary level. Finally, employers are allowed to make catchup payments if the exempt employee does not earn enough from nondiscretionary bonus, commission, or other incentive pay in a given quarter. The catch up payment should pay the employee enough to maintain the salaried exemption. To qualify the catch up payment must be made within 1 pay period of the end of the quarter at issue and only counts towards the prior quarter's salary amount (not the quarter in which it is actually paid).

Armed with knowledge of the major changes, companies can now take the necessary steps to prepare for December 1, 2016.

Effective Steps to Shield Against Overtime Liability. At a minimum then, business owners should have a comprehensive plan to review and revamp their company's overtime and salary exemption policies and retrain staff on the same.

1. Review Positions Close to the Minimum Threshold.

The first step to devising an effective plan to shield your company from increased risks of costly overtime liability is to review any position with a salary close to the new minimum thresholds. Doing so will enable the company to determine if any immediate action is warranted. If workers' salaries still qualify them as exempt, then it is crucial for the company to make it a point to reassess the issue three years from now when the minimum rates automatically update (*i.e.*, increase). If workers no longer qualify, however, then companies should conduct a business necessity assessment.

2. Business Necessity Assessment.

If the employees are no longer exempt, employers should determine whether business needs require over 40 hours of work per week? If not, then convert the employee(s) to hourly rate and skip to step No. 3 below. If overtime is required, employers need to calculate which of the following three options work best for the company. Option 1: If overtime is required only sparingly, then it may make more economical sense to simply let go of the exemption and pay the employee on an hourly basis. Option 2: If overtime is frequently required so that its cheaper to increase the employee's pay so they qualify as exempt salaried, then do so. Keep in mind, however, that with the automatic updates, you will have to revisit this issue every three years when the minimum threshold amount increases. Option 3: Finally, if your company cannot afford to increase the worker's salary to the new minimum threshold levels, consider hiring part-time employees, seasonal or temporary employees to perform the work at the regular rate rather than the overtime rate.

3. Update Overtime Policies & Retrain Workers.

Given the absolute legal requirement that all overtime be reported and paid and the inherent

multi-million dollar lawsuit dangers of unchecked, unmonitored, or uncontrolled overtime, it is crucial that businesses have a safeguard policy prepared and implemented to deter overtime abuse. Overtime abuse can take on many forms. For example, an employee works overtime without prior approval or authorization by either physically working in the workplace or accessing the system or email remotely outside his or her normal work hours. Any resulting overtime must be paid even if not preauthorized or reported.

Luckily, employers are not without a remedy. There are some steps companies can take to protect against overtime abuse. For example, adding proper wording throughout the handbook and complying with it often makes the difference between violating federal law and fitting in an enforceable loophole. Since wording is crucial, it is a good idea to seek legal help from employment law counsel to ensure no important provisions are inadvertently omitted or worse seemingly harmless wording puts your Company on the hook for FLSA violations. Competent employment counsel will help your company get the wording right and help implement the appropriate overtime policies and procedures.

A Final Word of Caution: Plan Ahead. As shown above, there are a number of effective ways to erect the “overtime shield” you need to protect against costly liabilities. It is a smart idea for you to seek legal help to put the necessary policies in place that will ensure your company is in compliance and protected from overtime abuse. Whatever the preventative legal cost —*e.g.*, a couple of thousand dollars for standard reviews and updates and added costs for more complicated and detailed policy overhauls or implementation— it is likely to

pale in comparison to the millions of dollars a company could be ordered to shell out to cover unpaid and unapproved overtime and fees. Ultimately, then, it *is* in every company’s best interest to plan ahead and take the necessary steps now to minimize potential overtime liability.



ALIA L. DERRICK *is the Managing Partner and a Certified Mediator at Derrick Law, PLLC, a premier boutique law firm that helps clients protect their interests and tackle complex employment, business, contract, and civil litigation matters and provides specialized mediation services. Ms. Derrick can be reached at aderrick@dlgam.com. For more information about Derrick Law, PLLC visit: www.dlgam.com.*