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# The New FLSA Regulations: What Changed, What Didn't, What's Next for School Districts

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DIFFERENT  
BY DESIGN

# Goals for Today's Presentation

- Overview of the Current Overtime Pay Rule
- Proposed New Regulations
  - Concerns
  - Status
- Next Steps for School Districts
- Areas of Potential Liability

# FLSA Basics

## Guarantees to Non-Exempt Workers:

- Minimum Wage
  - Current federal minimum wage is \$7.25 (Set 7/24/2009)
  - MO current minimum wage is \$7.65
- Overtime
  - Paid to nonexempt employees
  - 1½ times regular rate of pay for all hours worked in excess of 40 in a workweek
- Record keeping requirements

# Potential Liability

## Penalties for misclassification of employees include:

- Payment of back overtime for 2 years (3 years for willful violation)
- Liquidated damages (2x actual damages)
- Attorneys' fees
- DOL audit of entire workforce
- Failure to correct any misclassification can increase liability

# Exemptions

## Exempt occupations include:

- Executive
- Administrative
- Professional
- Others – such as computer professionals

These are known as “white collar” exemptions.

## Must meet:

- Primary duties test AND
- Salary basis test
  - Including minimum salary test
  - Salary may be paid on a weekly, bi-weekly, bi-monthly, or monthly basis.

# Exemptions

## Executive Employee Exemption

- Employee must earn - currently - no less than \$455/week
- Employee's primary duty must include management of the enterprise, a department or subdivision;
- Employee must regularly and customarily direct the work of 2 or more other FTEs; and
- Employee has hiring/firing authority OR his/her recommendations for hiring/firing are given weight.

# Exemptions

## Administrative Employee Exemption

- Employee's salary is - currently - not less than \$455/week;
- Primary duty consists of the performance of office or non-manual work *directly related* to the management policies or general business operations of employer or customers; and
- Primary duty includes the exercise of *discretion and independent judgment on significant matters*.

# Exemptions

## Professional Employee Exemption

- Employee's salary is – currently - not less than \$455/week; and
- Primary duty consists of work requiring knowledge of an advanced type in a field of science or learning that required a lot of study OR the performance of work requiring the invention, imagination, originality or talent in a recognized field of artistic or creative endeavor OR **teaching**.



# Exemptions

## Other Exempt Employees

- Certain computer systems analysts, software engineers, or related occupations
  - Primary duty includes computer systems analysis and consultation, design, development testing, modification or related work in software functions
  - Doesn't include help desk, manufacture or repair of computer hardware
  - Special exemption for pay rate of \$27.63/hour
- Highly compensated employees
  - Minimum annual salary of \$100,000.00 – currently
  - Modified duties test

# DOL's Proposed Changes

The Department of Labor (“DOL”)’s proposed rule changes—

- Would raise the minimum salary level required to qualify for a “white collar” or “highly compensated employee” exemption

# DOL's Proposed Changes

## Why the proposed change?

- Minimum salary level to qualify for a “white collar” exemption has not been raised since 2004
- Not adjusted for inflation
- Current minimum salary level is below federal poverty guidelines for a family of four

# DOL's Proposed Changes

## Why the proposed change?

- To ensure FLSA's intended overtime protections are fully implemented
- To simplify the identification of exempt and nonexempt employees
- DOL's longstanding concerns about employers misclassifying employees as exempt to avoid having to pay overtime

# DOL's Proposed Changes

## What DOL proposes:

- Raise the minimum salary level for the “white collar” exemptions (executive, administrative, professional, and certain computer professional employees) from \$23,660/year to \$50,440/year;
- Raise the minimum salary level for the “highly compensated” employee from \$100,000/year to \$122,148/year; and
- Add an automatic annual update to these salary levels to avoid the rulemaking process in the future

# DOL's Proposed Changes

## What DOL proposes:

- Proposed regulations ONLY change the salary level test
  - Affects “white collar” and “highly compensated employee” exemptions
- No changes made to the salary basis test
- Requests comments as to whether any changes to the “duties” tests may be necessary
  - Suggests DOL is contemplating changing the duties tests, as well

# DOL's Proposed Changes

## Proposed Increase to Minimum Salary Level for "White Collar" Exemptions

- Would require employers to review classification of employees who currently qualify for executive, administrative, professional, and certain computer professional exemptions
- Some employees who are currently exempt will fall below the new minimum salary level necessary to maintain their exempt status
  - These employees would become non-exempt and would be eligible for overtime pay

# DOL's Proposed Changes

## Proposed Increase to Minimum Salary Level for "White Collar" Exemptions

- Example: Facilities supervisor currently makes \$40,000.00 per year
  - The employee is currently classified as exempt and is not eligible for overtime pay
  - Under the new regulations, the school district would need to increase this employee's salary to at least \$50,440/year, in order for her to retain her exempt status
  - If the employee's salary is not increased to at least \$50,440, she will be classified as nonexempt and must be paid overtime for all hours worked over 40 per week



# DOL's Proposed Changes

## Impact of Proposed Increase to Minimum Salary Level for "White Collar" Exemptions

- The salary level test does not apply to teachers
- Under the revised regulations, teachers will remain exempt, regardless of their salary levels

# DOL's Proposed Changes

School district personnel likely to be impacted by the salary level increase for "white collar" exemptions:

- Personnel with "manager," "supervisor," "coordinator," "director," etc., in their titles
- Other non-educator supervisors
- Mid-level personnel (not necessarily in management)

Consider all school departments (cafeteria, custodial, transportation, finance, physical plant, special education, student services, human resources, etc.)

# DOL's Proposed Changes

## Proposed Increase to Minimum Salary Level of Highly Compensated Employees

Currently:

- Salary must be at least \$100,000/year (\$455/week)
- Must perform office or non-manual work
- Must meet the “duties” test necessary to qualify for the executive, administrative, or professional exemptions

# DOL's Proposed Changes

## Proposed Increase to Minimum Salary Level of Highly Compensated Employees

### Revised Regulations:

- Raise the minimum salary level to \$122,148/year
  - This is equal to the 90<sup>th</sup> percentile of workers' earnings
- Goal is to ensure that this exemption only covers those who will almost always qualify for some other exemption (i.e., executive, administrative, or professional exemptions)

# DOL's Proposed Changes

Typical school district employees who qualify for the highly compensated employee exemption include:

- Superintendent
- Assistant/Associate Superintendent
- Building Principals (possibly APs)
- Department Heads
- Directors

However, ***the employee's job title is not determinative***. Must also meet the "duties test" to qualify for exemption.

# DOL's Proposed Changes

## Proposed Increase to Minimum Salary Level of Highly Compensated Employees

- Example: Building Principal who currently makes \$105,000/year
  - Currently exempt
  - Will school district be required to increase this Principal's salary to \$122,148/year?
  - NO. The Principal will almost certainly qualify for one of the other "white collar" exemptions.

# DOL's Proposed Changes

## Proposed Automatic Salary Increases

- DOL will determine the annual salary increase through either the use of a fixed percentile of wages or the Consumer Price Index (CPI)
- The annual increase will occur on the same date each year
- Employers will have 60 days from publication of the salary increase to put the increase into effect for the following year

# Concerns

- Exempt employees converted to non-exempt status will require school districts to pay more overtime
- Exempt employees may be asked to do more
- Budget shortfall may result if the initial minimum salary increase occurs in the middle of the district's fiscal year
- Minimum salary level for employees will continue to increase, regardless of school district budgets, decrease in federal, state, and local revenue
- Date of annual increase could fall on a date inconvenient for school district calendars
- Perceived as "demotion" by employees who lose exemption because their salary level falls below the new required minimum



# Status

## Final regulations expected in late 2016

- Grace period expected to be short
- Possible 120 days
- Schools should be proactive; consider making changes now

# To Do Now

- Identify which positions might be affected by the new regulations
- Review the salaries of those positions to determine whether it would cost more to increase salaries to the new minimum, or to pay the employees overtime
  - Also compare the cost of paying overtime to the costs of adding additional support positions
  - Other options include layoffs or reducing employee's hourly wages
- While reviewing the positions likely to be affected, review the duties assigned to those positions to ensure that those employees are truly doing exempt work
- Develop a plan for how to reclassify or modify compensation of any positions impacted by the proposed rule
- Contact your school district's attorney for guidance

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