

ALTA

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New Overtime Rules a Reality: What Title and Escrow Companies Must Do to Prepare

Shannon D. Farmer, Esq.
Ballard Spahr LLP
(215) 864-8221
farmers@ballardspahr.com

Brent Scheer
Agents National Title Insurance Co.
(573) 442-3351
bscheer@agentstitle.com

Poll Questions

- Do you outsource HR to an outside firm/attorney?
- Do you outsource the payroll function?

Fair Labor Standards Act

- The Fair Labor Standards Act (FLSA) sets the minimum wage and governs overtime payments for workers
- An employee who works more than 40 hours per week is entitled to overtime compensation at a rate of one and a half times the employee's regular rate of pay
- Certain classes of employees are exempt from the minimum wage and overtime provisions
- State laws can impose additional obligations as can private agreements like collective bargaining agreements and individual employment agreements
- Rights are non-waiveable

Coverage Under the FLSA

- Question of whether a business and/or its employees are covered by the law is different than whether some employees are exempt from the minimum wage and overtime provisions
- Enterprise Coverage
 - At least 2 employees and
 - Annual volume of sales or gross business activity of \$500,000 or
 - Hospitals, nursing homes, schools, government agencies

Coverage Under the FLSA

- Individual Coverage
 - Employees of non-covered businesses who regularly engage in interstate commerce
 - Produce goods sent out of state (e.g., making a product or preparing a letter)
 - Make phone calls to people in other states
 - Process transactions involving people in other states (e.g., credit card sales)
- Domestic service workers generally covered as well

Exempt v. Non-Exempt Employees

- Major Categories of Exemptions:
 - Executive
 - Administrative
 - Professional (Learned, Creative, and Computer)
 - Outside Sales
 - Highly Compensated
- Partial Exemptions:
 - Nurses and other health care employees
 - Fire Fighters and police officers

Recordkeeping

- The FLSA requires that records be kept of the work hours of employees
- No particular form is required
- Records of hours worked do not have to be kept for exempt employees
- If accurate records are not kept, the DOL looks to the employee's estimate of hours worked

Self-Audits

- Internal wage and hour audits are the primary way an employer can assess whether they are in compliance with wage and hour laws and regulations.
- Audits afford employers an opportunity to proactively ensure compliance and to brainstorm strategies to remedy potential issues.
- Audits may be used as evidence to defend allegations that misclassifications were willful.

Self-Audits

- Wage and hour audits have three parts:
 - Review job duties and salary to ensure that employees are properly classified as exempt and non-exempt from the minimum wage and overtime provisions
 - For exempt employees, ensure exempt are being paid in a way that meets all the requirements of the “salary basis” test
 - Ensure non-exempt employees are being paid for all their “working time” and their pay is correctly computed

Salary Requirements

- Most exemptions require employees to be paid a minimum amount of money on a salary basis
- On May 17, 2016, the DOL issued its final rule substantially increasing the annual salary an employee must earn to be exempt from overtime pay requirements
- The new rule, which takes effect December 1, 2016, increases the salary requirements from \$23,660 to \$47,476 (at least \$913 per week)
- The salary threshold increases automatically every three years based on data from the U.S. Bureau of Labor Statistics

Salary Basis

- Most exempt employees must be paid at least \$913 a week that is not subject to reduction based on the quality or quantity of work performed
- The regulations only permit deductions in limited circumstances
- Additional payments can be made in the form of overtime (straight time, time-and-a-half, or some other amount), compensatory time, bonuses, and commissions
- Biggest issues and partial day deductions and disciplinary suspensions

Salary Requirements

- The salary requirements do not apply to:
 - Outside sales
 - Lawyers or doctors
 - Teachers
 - Business owners
- Computer employees also can be paid \$27.63 per hour

Primary Duty

- To the quality for an exemption, the employee’s “primary duty” must be the performance of exempt work
- The “primary duty” is the principal, main, major or most important duty that the employee performs
- Consider:
 - Relative importance of exempt duties compared to others
 - Amount of time spent performing exempt work
 - Freedom from direct supervision
 - Salary relative to non-exempt employees

The Executive Exemption

- To qualify for the executive exemption, employees must:
 - Be paid on a salary basis at least \$913 per week as of 12/1/16;
 - Have as their primary duty management of the enterprise or a recognized department or subdivision;
 - Customarily and regularly direct the work of two or more other employees; and
 - Have authority to hire or fire or have their recommendations as to hiring, firing, promotions or other changes of status be given particular weight

The Executive Exemption

- Not all managerial and supervisory employees are exempt
- Must supervise two or more employees, but doing so is not enough
- Managing a recognized department or subdivision must be a primary duty
- Employee must have authority to hire, fire, and discipline or be relied upon to give recommendations on such matters
- Litigation frequently focuses on lower level supervisors, such as first level supervisors or “working foremen”

The Administrative Exemption

- To qualify for the administrative exemption, employees must:
 - Be paid on a salary basis at least \$913 per week as of 12/1/16;
 - Have as their primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
 - Exercise discretion and independent judgment with respect to matters of significance

The Administrative Exemption

- Matters of Significance
 - Is the employee involved in business or strategic planning?
 - Does the employee make decisions that impact business operations or revenue?
 - Does the employee plan or manage a budget?
 - Does the employee direct the work of other employees or manage major projects?

The Administrative Exemption

- Discretion and Independent Judgment
 - What decisions can the employee make without further review?
 - How often are the employee's decisions overruled?
 - How often are the employee's recommendations followed?
 - Is the employee free to choose among a number of possible actions or are decisions constrained by the factual situation?

The Administrative Exemption

- Job categories that are a frequent source of misclassification claims:
 - Executive assistants
 - Insurance adjusters
 - Mortgage loan officers
 - Copy editors
 - Loss prevention managers and employees

The Professional Exemption

- To qualify for the professional exemption, employees must:
 - Be paid on a salary basis at least \$913 per week as of 12/1/16; and
 - Have as their primary duty the performance of office or non-manual work:
 - That requires knowledge of an advanced type;
 - In a field of science or learning; and
 - That is customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience

The Computer Professional Exemption

- To be an exempt computer employee, the employee must:
 - Be paid on a salary basis at least \$913 per week as of 12/1/16 *or* on an hourly basis at least \$27.63 per hour; and
 - Have as their primary duty either (a) application of systems analysis techniques and procedures; or (b) design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or (c) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (d) a combination of duties described in (a), (b) and (c)

The Computer Professional Exemption

- The computer professional exemption generally applies to:
 - Computer systems analysts
 - Computer programmers
 - Software engineers
- This exemption is not meant to be applied to employees whose work is highly dependent on or facilitated by the use of computers and computer software programs
- “Help desk” activities are not exempt

Outside Sales Exemption

- Primary duty of making sales or obtaining orders/contracts
- Customarily and regularly engaged away from the employer's place of business in making sales or obtaining orders/contracts
 - Phone and internet sales do not count
- Need not be paid on a salary basis

Highly Compensated Employees

- An employee paid on a salary basis at least \$913 per week with total annual compensation of at least \$134,004 (effective 12/1/16) is deemed exempt if the employee customarily and regularly performs duties meeting at least one of the executive, administrative or professional exemption requirements

Preparing for December 1st

- If there are employees who you believe are exempt but don't meet the salary requirement, there are a few options:
 - Convert them to non-exempt on or before December 1, 2016 and ensure that they are paid overtime for all hours worked over 40 in a workweek
 - Raise their salary to the statutory threshold effective December 1, 2016
 - Meet the salary threshold through a combination of base wages and non-discretionary bonuses

Preparing for December 1st

- In considering the options, one of the concerns that many employers have is the lack of cost certainty associated with moving employees to non-exempt status
- In order to get a better cost estimate, employers can have exempt employees track all their actual work time (if they don't already) to see typical hours (avoid unusual periods like heavy vacation time)

Preparing for December 1st

- Consider adopting policies requiring employees to get approval for overtime in advance and enforce them
 - Employees must be paid for all hours worked that employers know or should have known about, even if unauthorized
 - Send employees home – do not let employees work OT without authorization
 - Employees can be disciplined for unauthorized overtime work in violation of company policy

Preparing for December 1st

- If you realize that employees have been misclassified as exempt, this is the time to fix it
 - Decide whether you will pay back overtime owed and, if so, how you can calculate it
 - Employers cannot get employees to release FLSA claims, but employees can acknowledge that they have received payment of all monies owed
- Failure to address mistakes could lead to liquidated (double) damages and adding an additional year to the claims period

Preparing for December 1st

- Develop a communication plan for employees whose status will be changing from exempt to non-exempt
 - Many employees will be offended, associating it with a loss of professional respect

Preparing for December 1st

- Develop a plan to ensure that all time worked by non-exempt employees is being captured
 - Time tracking methods vary – no particular method required as long as it accurately captures time
 - Educate employees about the need to report ALL time worked
 - Limit access by non-exempt employees to work tools after hours or have a system to track and pay for this time
 - Educate supervisors about limiting contact with non-exempt employees after hours
 - Meal break challenges

Resources

- The Department of Labor has fact sheets available on the various exemptions and other compliance assistance materials: www.dol.gov
- Consulting firms and accountants offer audit services, but remember there is no attorney client privilege and quality varies
- Only lawyers can provide legal advice and only discussions with lawyers are protected by attorney-client privilege and may provide a good faith defense to certain penalties if you rely on advice of counsel