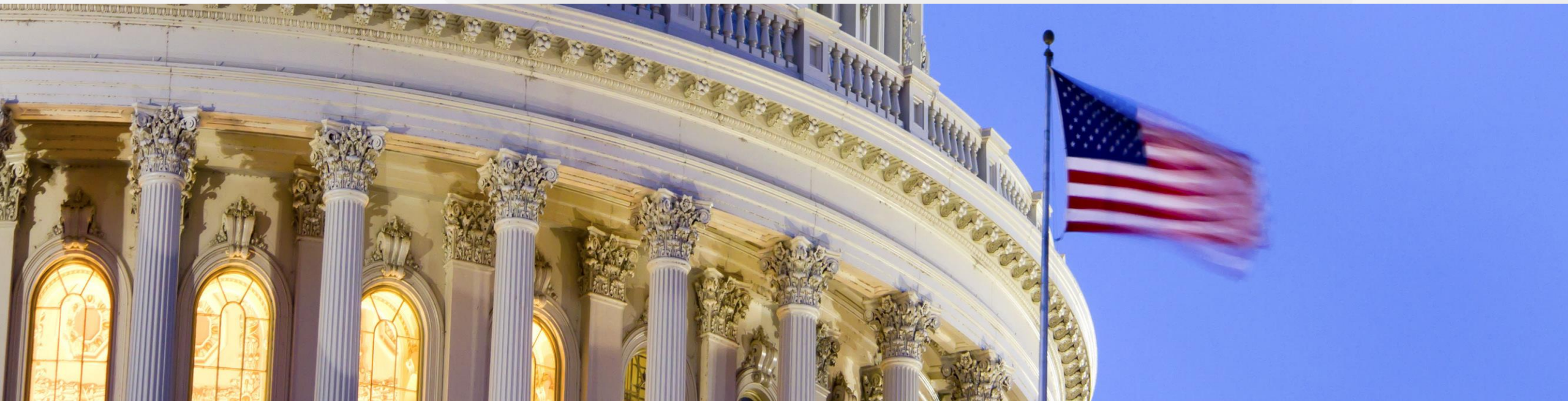


# The Fair Labor Standards Act: Exemption Changes And Challenges



# What's Going On?

- 2014 – President Obama charged the DOL with revising and updating the 2004 definitions for certain exemptions under the federal Fair Labor Standards Act.
- 2015 – The DOL published its proposed changes and received numerous comments.
- May 2016 – The DOL published revised definitions that would affect most employers in at least some way on **December 1, 2016**. Biggest change was increase in salary requirement from \$455 per week to \$913 per week.
- November 22, 2016 – Federal Judge blocked new overtime rule. (Estimated that 84% of employers had already taken steps to comply.)
- December 2016 – Obama DOL launches appeal to salvage rules.
- January 20, 2017 – New occupant in White House.

# The End of Overtime Rule 1.0?



Case: 16-41606 Document: 00514055444 Page: 1 Date Filed: 06/30/2017

No. 16-41606

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

STATE OF NEVADA; STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA;  
STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF INDIANA; STATE OF  
KANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF OHIO; STATE OF  
OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF UTAH; STATE OF  
WISCONSIN; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G.  
Bevin; TERRY E. BRANSTAD, Governor of the State of Iowa; PAUL LÉPAGE, Governor of the  
State of Maine; SUSANA MARTINEZ, Governor of the State of New Mexico; PHIL BRYANT,  
Governor of the State of Mississippi; ATTORNEY GENERAL BILL SCHUETTE, on behalf of  
the people of Michigan,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR; EDWARD C. HUGLER, ACTING  
SECRETARY, DEPARTMENT OF LABOR, in his official capacity as Secretary of Labor; WAGE  
AND HOUR DIVISION OF THE DEPARTMENT OF LABOR; MARY ZIEGLER, in her  
official capacity as Assistant Administrator for Policy of the Wage and Hour Division; DOCTOR  
DAVID WEIL, in his official capacity as Administrator of the Wage and Hour Division,

Defendants-Appellants.

On Appeal from the United States District Court  
for the Eastern District of Texas

REPLY BRIEF FOR APPELLANTS

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## Judge strikes down overtime rule

- USDOL says – We aren't going to fight
- District Court ruled that USDOL “exceeded its authority” by essentially eliminating duties test for those paid less than \$913 per week
- Appeals court then dismissed effort to overturn 2016 injunction

# What's Going On?

- March 2019 – The DOL has proposed “Overtime Rule 2.0.”
- Management should be thinking about:
  - What this means for the organization
  - What steps to take in response

# Four Main FLSA Requirements

1. A minimum wage (currently \$7.25 an hour - \$8.60 in Missouri).
2. Premium pay for overtime work (at a rate of 1.5 times the "regular rate" of pay for over 40 hours worked in a single workweek).
3. Certain recordkeeping, including accurate time records.
4. Limitations on the employment of minors under 18.



# What Are "Exemptions"?

- "Exempt": Not Subject To One Or More FLSA Requirements
- Some apply only to the overtime requirements, some apply to the minimum-wage and overtime requirements
- Default rule: Everybody is non-exempt, unless an exemption clearly applies
- New rule affects "white collar" exemptions from minimum-wage and overtime

# "White Collar" Exemptions Affected



- Executive, Administrative, Professional
- Also "Computer Employees", "Highly Compensated" varieties
- Three general requirements for most of them:
  1. Paid on a "salary basis"
  2. Salary is at least a certain amount
  3. Employee performs specific kinds of work

# Example: Executive Exemption

- Primary duty is managing the enterprise or a customarily-recognized department or unit
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire, or suggestions and recommendations about hiring, firing, advancement, promotion, other status changes are given particular weight
- Paid on a "salary basis" at a rate of at least \$455 a week (for now)



# Example: Administrative Exemption

- Primary duty is office or non-manual work directly related to management or general business operations of the employer or the employer's customers
- This work includes the exercise of discretion and independent judgment as to matters of significance
- Paid on a "salary basis" at a rate of at least \$455 a week (for now)
- Possibly one of the most often erroneously-applied FLSA exemptions

# Other Examples

- Job titles do not determine exemption status, but some examples of employees who might meet the requirements for other "white collar" exemptions include:
  - "Learned" Professional: Doctor, Some Engineers, Teacher, Scientist
  - "Creative" Professional: Painter, Musician, Screenwriter
  - Computer Employee: Programmer, Software Engineer, Systems Analyst
  - Highly-Compensated: "Project Manager" meets only one of the duties required for the administrative exemption

# Overtime Rule 2.0 – What's Changing?



- Minimum salary threshold will be \$679 per week (paid on a "salary basis") – annualizes to \$35,308.
- Requirement still applies each pay period (not annualized)
- Total-annual-compensation threshold for "highly compensated employee" exemption will increase from \$100,000 to \$147,414
- No automatic "update" every three years like the old rule

# Overtime Rule 2.0 – What’s Changing?

- Employers may be able to satisfy up to 10% of the salary threshold from “nondiscretionary bonuses and incentive payments”
- Includes commissions
- Can count only those paid quarterly or more frequently
- If, at the end of 13-week quarter, employee’s salary (from base and permitted non-discretionary bonus) is lower than 13 x required weekly salary level (\$8,827), may make one “catch up” payment, provided it is paid on first payday after quarter ends.
- Cannot do this as to the salaries of employees treated as exempt under the “highly compensated” exception

# What Should You Do?

- Don't panic!!! You've seen this before.
- Evaluate exempt employees' current status and develop an action plan
  - Continue to treat some or all as "white collar" exempt?
  - Treat as exempt on some other basis?
- Consider the FLSA alternatives (but don't forget the applicable state laws)



# Are They *Really* Exempt?

- Default position: Each employee is non-exempt, that is, each is subject to FLSA's requirements
- Exemptions are strictly interpreted
- The employer has the legal burden to prove when challenged that each one is met
- Otherwise, the employer loses

# Are They *Really* Exempt?

- Exemptions relate to individuals – Not to job descriptions, pay classifications, positions, job groups, conventional wisdom, etc.
- Detailed, accurate, current job information is essential
- Must be based upon actual work, real facts
- Opponents will dig-into what the employees actually do
- Job descriptions alone do not “make employees exempt”

# What If They're Non-Exempt?

- Different ways to pay non-exempt workers, such as:
  - Pay by-the-hour?
  - Pay a salary as straight-time compensation for 40 hours (or some other number)?
  - Pay a salary as straight-time compensation for all hours (i.e., fluctuating worker week or variable rate overtime)?
  - Pay on a commissions-plus-overtime basis?
  - Another approach (for example, a day-rate, job-rate, or piece-rate basis)?
  - Check applicable state and local laws

*Tip: Remember that the "regular rate" includes more than just base pay*



# Accurate Timekeeping

- If non-exempt, must keep accurate records of worktime:
  - Know everything that counts
  - Have a system and policies for capturing the time accurately
  - Train employees to follow
  - Train supervisors/managers to enforce
  - Periodically see whether the time records appear to be accurate



# What Else Should You Do?

- Exemptions aside, are you sure you're 100% in compliance?
- Publicity will cause all employees (exempt or not) to focus upon their pay (the 2004 changes did)
- Find out now where you stand, especially if it's been a while since you looked
- Are you sure you are accurately recording worktime, properly computing overtime, making only lawful deductions, correct about all "contractors" . . . ?

# Non-Compliance Consequences



- Back wages, plus equal amount ("liquidated damages")
- Civil money penalties up to \$1,100 per person
- 2-year limitations period, 3 years if "willful"
- Court-ordered compliance in the future (possible "contempt of court" for later violations)

# Non-Compliance Consequences

- Pay plaintiff's "reasonable" attorney's fees, costs (and yours)
- Possible individual management liability
- Possible criminal penalties
- Diversion, distraction, disruption
- Adverse publicity



# Some Closing Thoughts



- Don't fall for "conventional wisdom":
  - "*Everybody* treats this job as exempt."
  - "The employee *wants* to be exempt."
  - "The employee *agreed* to be exempt."
- Consider applicable state and local laws:
  - Might not have the same exemptions
  - Might define exemptions differently
  - Might affect pay-plan options or designs

# Final Questions



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