What law are we talking about?

- Federal Fair Labor Standards Act ("FLSA")
  - Statute, federal regulations, DOL opinions and enforcement materials, cases
  - New regulations may be enacted in late 2015 or early 2016

Who is Covered?

- Employees are covered. DOL assumes EVERYBODY is an employee.
- Independent contractors are NOT covered.
  - But, the law, not the parties, gets to decide who is a true IC
  - Are you sure?
  - Key concepts:
    - CONTROL OF WORK
    - ECONOMIC DEPENDENCE/INDEPENDENCE
  - See new Administrator's Interpretation--
What Subjects Does the FLSA Cover?

- Minimum wage ($7.25)
- Overtime
  - Over 40 hours in a 7-day workweek
  - Time must be recorded and overtime must be paid
- Recordkeeping
- Other
  - Child labor, equal pay, notice/posting

FLSA Exemptions
Certain employees are exempt from the rules we’ve been talking about so far. No time records, no overtime, no math, no hassle. So, what’s the catch?

White Collar Exemptions

- Executive, administrative, professional
- Must
  - Be paid on a salaried or fee basis
  - Perform exempt duties
Salaried Basis

- Currently $455 per week non-fluctuating salary
- Additional forms of comp may be paid but don’t count towards salary—will likely significantly increase!
- Not subject to deductions based on quality or quantity of work
- With a finite list of exceptions
- Careful with ANY deductions from salary of exempt employee—get advice
- What happens if you illegally deduct?
  - Exemption is lost
  - Enact a safe harbor policy

White Collar Exemptions

- Executive, administrative, professional
- Must
  - Be paid on a salaried or fee basis
  - Perform exempt duties as primary job function

Primary Duty

- “principal, main, major or most important duty that the employee performs”
- Some non-exempt duties OK
  - But this may change!
- Look at relative importance of exempt versus non-exempt duties
- Are exempt duties periodic, or constant
Executive Exemption
- Salaried basis of payment
- Primary duty of management of the enterprise in which he is employed or a customarily recognized subdivision
- Customarily and regularly directs the work of two or more employees
  - 80 person power hours
- Has authority to make or influence personnel decisions

Administrative Exemption
- Salaried basis
- Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers
- Has a primary duty that includes exercise of discretion and independent judgment with respect to “matters of significance.”

Professional Exemption

Learned Professional Exemption
- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week (except for doctors, lawyers, teachers, or 20% business owners)
- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
  - The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge by be customarily acquired by a prolonged course of specialized intellectual instruction

Creative Professional Exemption: The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
Other Exemptions

- Outside sales
  - No salaried basis requirement
  - Selling is primary duty
  - Must be regularly engaged away from place of business (inside sales positions not covered)

- Retail Sales
  - Partial exemption only

- Computer Professionals
  - $455 per week or $27.63 per hour

Other Exemptions (continued)

- Highly compensated employees ($100,000 or more, salary of $455 per week, plus one exempt duty)
  - Bonuses and other additional pay does count towards annual salary requirement

- Motor Carrier Exemption

- Companion Exemption
  - Hot topic in 2015

Status

- 60-day comment period ended on September 4, 2015
- More than 250,000 comments were submitted
- Waiting for DOL to publish the final rule in the Federal Register
Proposed Regulations

• Double (+) the minimum salary threshold for the “white collar” exemptions (executive, administrative, professional)
• Increase the minimum salary threshold for Highly Compensated Employees (HCE)
• Adjust salary threshold for the Computer Employee exemption
• Provide for annual automatic updates of the minimum salary thresholds

Salary Threshold Doubled for White Collar Exemptions

Salary level test is, according to the DOL, the “best single indicator of exempt status”

• Currently $455 per week $23,660 per year, which is below poverty line for family of 4
• Proposed regulations increase this amount to $921 per week or approximately $47,892 per year—more than double!
• President Obama announced a minimum salary threshold of $50,440 on an annualized basis. Expected to be at this level in 2016.

How Did DOL Get There?

• The minimum salary threshold is based on the earnings for full-time (at least 35 hours per week) non-hourly paid employees
• Sets the minimum salary threshold at the 40th percentile, which is $921 per week and $47,892 on an annualized basis
• Final rule will be updated and based on predictions, the minimum salary threshold for 2016 will be $970 per week or $50,440 on an annualized basis
Fun facts about the salary increase

- The proposed rule would raise the salary threshold 113 percent
- Average salary for CEO of small nonprofits is $59,510
- Average salary for CFO of small nonprofits is $40,000
- A $55,000 salary in Washington, D.C. is comparable to a salary of $35,000 in Martinsburg, W. Va.
- A salary of $75,000 in San Francisco is comparable to a salary of $47,500 in Fresno, California
- Of the 4.6 million employees directly affected by the salary level, only 988,000 work more than 40 hours a week.

Automatic Increases to Salary Thresholds

- Last overhaul of overtime regulations was in 2004, when weekly salary threshold was raised from $150/$170 (less than 2004 minimum wage) to $455
- Proposed regulation provides for automatic, annual increases tied to either the:
  - 40th percentile of earnings for full-time, non-hourly paid employees; or
  - Consumer Price Index for all urban consumers (CPI-U)
- DOL is seeking comments on the method for updating the salary thresholds

Other Exemptions with Increased Salary Thresholds

- Computer Employee Exemption
  - $27.63 per hour or $455 per week on a salary basis
  - Proposed to raise from $455 to salary threshold for white collar exemptions updated automatically
- Highly Compensated Employees (HCE)
  - Currently, paid at least $100,000 per year and at least $455 per week on a salary basis. May include nondiscretionary bonus income; employer may make a catch-up payment
  - Proposed to raise to $122,148 per year, which is the 90th percentile of full-time salaried workers
Automatic Increases to Salary Thresholds

- Proposed regulation provides for automatic, annual increases tied to either the:
  - 40th percentile of earnings for full-time, non-hourly paid employees; or
  - Consumer Price Index for all urban consumers (CPI-U)
- DOL received comments on the method for updating the salary thresholds, as well as updating ann

DOL Request for Comments On Bonuses

- Currently, nondiscretionary bonuses are not included in calculating whether the minimum salary requirement has been met for the “white collar” exemptions
- DOL is considering including nondiscretionary bonuses provided bonus income may only be used for 10% of the salary, and bonuses would have to be paid at least monthly or more frequently (no catch-up payment would be allowed)

DOL on the Duties Tests and Possible Changes

- DOL recognizes that the salary level test is “initial bright-line test for white collar overtime eligibility,” but “recognized the salary level test works in tandem with the duties test”
- In the NPRM, DOL commented that prior to 2004 there was a long and a short duties test, and the long test had a lower salary threshold and required that nonexempt duties could not make up more than 20% of the exempt employee’s duties
- In 2004, simplified and eliminated dual tests. Exempt duties the primary duties, but not necessarily 50% of the exempt employees’ time
Comments Requested on Duties Tests

DOL requests comments to determine if changes are needed to “adequately protect OT eligible white collar employees who exceed the salary threshold.”

- What if any changes should be made to the duties tests?
- Should there be a minimum amount of time exempt employees must spend performing exempt work, and if so, what should the minimum be?
- Should the DOL adopt CA 50% model?

- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt? Should DOL consider reinstating the long/short duties tests?
- Is the regulation for executive employees allowing the performance of concurrent duties (both exempt and nonexempt) working as intended? To what extent are exempt lower-level executive employees performing nonexempt work, and should there be a limitation?

Additional Requests for Comments

- Finally, the DOL is seeking comments on whether it should provide further guidance on specific occupations that may or may not be exempt?
- Should the DOL provide guidance on specific occupations in computer-related fields that may or may not be exempt?
Overview of Comments Submitted to DOL

- More than 250,000
- Usual players
  - SHRM
  - U.S. Chamber of Commerce
- National Employment Law Project (NEL)
  - Nonprofit research, policy, and advocacy organization
  - Ensure all workers receive protection of employment laws
- Others
  - National Retail Federation (complained deadline was not extended)

Nature of the Comments

- Salary threshold too high
- Salary threshold should recognize differences in industry and geographic region
- Salary threshold should not be updated annually, and should be update in less frequent intervals or only through an official rule-making
- If salary threshold is set at 40th percentile for salaried workers, it should be phased in over 5 years due to impact on business

Nature of the Comments

- The DOL request for comments on including bonuses in the minimum salary threshold for the “white collar” exemptions is meaningless
- DOL grossly underestimates the economic impact of the proposed regulations
- Reclassifying exempt employees to nonexempt will limit their flexibility (work/life balance) and their opportunities for training and advancement by eliminating lower level supervisory jobs
Nature of the Comments

- DOL has exceeded its authority and ignored precedent in setting the proposed threshold
- Under the Administrative Procedures Act (APA), the DOL does not have authority to revise the duties tests, implement a 50% rule, or include bonuses in calculation of the minimum salary without further rule-making

What's Next

- DOL will release the final rule in the Federal Register. The final rule may be different than the current proposal.
- At least 60 days (2 months) before the final rule becomes effective, but may be 120 days (4 months)
- By the time final regulations are released and adjusted for 2016, minimum salary threshold for the "white collar" exemptions is likely to be $50,440 per year or $970 per week

What Employers Can Do Now

- Identify employees currently classified as exempt who are paid less than $970 per week and estimate the number of hours of overtime they work each week
- Identify employees who are classified as exempt under the HCE rule, or as computer professionals, and paid less than the proposed thresholds
- Identify employees who are currently classified as exempt, but would be impacted by a 50% rule or limitation on concurrent duties
What Employers Can Do Now

Analyze the cost of:

- Raising the salaries of employees to the minimum salary threshold
- Reclassifying employees as nonexempt and paying them overtime for hours worked over 40 in a week, and whether hourly rates should be adjusted so total compensation won’t change
- Reclassifying employees and restricting overtime
- Reclassifying employees who would not meet a 50% test or a restriction on concurrent duties

Develop A Game Plan

- Identify employees who will receive salary increases to maintain the exemption
- Identify employees who will be reclassified as nonexempt and determine hourly rates
- Develop overtime plan including the possibility of limiting overtime and adding additional staff to cover hours
- But maintain flexibility and avoid final changes as it is uncertain what the final rule will look like

Budgeting Strategies

- Assume the worst—that proposed salary threshold will become final early in 2016
- Determine whether employees receiving an increase to maintain the exemption will be eligible for any other increase, e.g., COL, merit
- Identify and address issues related to salary compression, pay equity, etc. caused by forced increases
Other Steps to Take Now

- Review and update job descriptions to focus on exempt duties
- Audit exempt status of jobs and make any necessary corrections
- For employers in industries that will be greatly impacted by the new salary threshold, consider how this will effect the business model and what changes may need to be made, e.g., retail and food service

- Develop a communication plan (policies, Q&As, town meetings, etc.)
- Perception that reclassification to nonexempt is a demotion
- Address loss of flexibility
- Revise, distribute, and train on timekeeping and overtime policies
- Implement timekeeping and recordkeeping changes
- Train supervisors and managers

Opportunity to Make Corrections

- Update or correct written policies
- Correct any classification errors as part of the response
- Consult with counsel to identify any existing errors and to decide on a course of action
- Statute of limitations on overtime claims is 2 years, or 3 years if the violation is found to be willful
Take a Deep Breath

- Nothing is final yet
- There is time before the final regulation is released and before it becomes effective
- This is a good time to analyze the financial impact of the new regulations and to make sure changes are reflected in the 2016 budget
- This is also a good time to correct preexisting FLSA compliance issues