

# ARE YOU READY?

## *Understanding the Impact of the DOL's Changes to the Exempt Employee Classification*

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*Jill M. Lashay, Esq.  
Buchanan Ingersoll & Rooney PC  
409 N. Second Street, Suite 500  
Harrisburg, PA 17101  
(717) 237-4856  
[jill.lashay@bipc.com](mailto:jill.lashay@bipc.com)*

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# AGENDA

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## Overview – The Fair Labor Standards Act

### ■ The Present

- Basic FLSA Summary
- Coverage for employers and who is an employee?
- Most common exemptions – white collar exemptions from overtime
- What are hours worked?
- FLSA liability
  - Double damages, costs, attorneys fees
  - Personal liability

### ■ The Future

- **New minimum salary rule**
- Expect additional updates to the white collar exemptions?
- Changes to your staffing?
- Changes to you overall business model?
- Linger Questions...

# AGENDA – Deeper Dive

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- Preparation
- How to Accomplish Seamless Conversion
- Conclusion
- Questions and Answers

# FLSA Basics – What We Know Today

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- The Fair Labor Standards Act (FLSA) is administered by the Wage and Hour Division (WHD) - Enacted in 1938
- The Act establishes standards for minimum wages, overtime pay, recordkeeping, and child labor.
- Specifically:
  - sets statutory minimum wage of not less than \$7.25/hour (effective July 24, 2009),
  - requires 1½ times regular rate of pay for all hours worked over 40 in a workweek, and
  - requires employer to keep track of hours worked.

# FLSA Basics – What We Know Today

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- **Virtually all employers are covered:**
  - Enterprise coverage – \$500,000 annual revenue
  - Employees covered – use goods in/instrumentalities of commerce (e.g., telephone)

# FLSA Basics – What We Know Today

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## WHO ARE EMPLOYEES?

- Presumption is all workers benefitting the company are “employed.”
- Independent contractors are not employed, but employer must establish the independence.



# FLSA Basics – What We Know Today

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- FLSA provides an **exemption** from minimum wage and overtime requirements for certain “white collar” workers.
- White collar exemptions:
  - **Executive, Administrative and Professional (Learned/Creative) = “EAP”**
  - Highly Skilled Computer Professional
  - Outside Sales
  - Highly Compensated Employee
- Three factors must be met before an employee can be considered “exempt.”

# FLSA Basics – What We Know Today

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- Three factors to qualify for exemption:
  - Salary Basis: Employee must be paid a pre-determined and fixed salary; cannot be changed because of variations in quality or quantity of work.
  - Salary Level: Minimum salary must be \$455/week or \$23,660/year.
  - Job Duties: Employee duties must be considered primarily “*exempt*” duties, as defined by FLSA regulations.



# FLSA Basics – What We Know Today

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- **Hours Worked:**

- Under the FLSA, the term “hours worked” refers to work that is “suffered or permitted” by an employer.
  - work an employee performs or which an employer knows or should know is being performed.
  - time in which an employee is “necessarily required to be on the employer’s premises, on duty or at a prescribed place.”



# FLSA Basics – What We Know Today

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- **Hours worked:**

- Includes unauthorized work “suffered or permitted” by the employer.
- May include waiting time, on-call time, training time, travel time and resting time.
- All hours “permitted” is the time you want employees to work.
- All hours “suffered” is the time you benefit from the employee even if without prior approval.

# FLSA Basics – What We Know Today

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- **Hours Worked:**

- **Additional Duties**

- Blackberry, cell phone and remote computer access
      - Consider who really needs devices.
      - Train employees on boundaries for contacting other employees while “off the clock.”
      - Pay for off-schedule time.

# FLSA Basics – What We Know Today

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## ■ EXECUTIVE EXEMPTION

### — Whether the Primary Duty is Management

- Interviewing, selecting, and training employees
- Adjusting rates of pay or hours
- Planning and directing work tasks
- Maintaining documents used for performance evaluations
- Conducting employee reviews
- Addressing workplace complaints or grievances
- Budgetary decisions and oversight
- Monitoring or implementing legal compliance measures
- Ensuring employee safety

# FLSA Basics – What We Know Today

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## ■ PROFESSIONAL EXEMPTION

- To qualify for the professional exemption, the employee must have as the primary duty the **performance of work which requires either:**
  - Knowledge of an advanced type or field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
  - Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- **Two types of professional exemptions:**
  - Learned Professional
  - Creative Professional

# FLSA Basics – What We Know Today

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## ■ PROFESSIONAL EXEMPTION

### — Learned Professional

- The work must require advanced knowledge.
  - Intellectual in character
  - Requires consistent discretion and independent judgment
  - Not routine mental, manual or mechanical work
- **Usually acquired through prolonged specialized study.**
  - Specialized degree or period of instruction.

# FLSA Basics – What We Know Today

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## ■ PROFESSIONAL EXEMPTION

### — Common examples:

- Lawyers
- Doctors
- Pharmacists
- Registered Nurses
- Physician Assistants
- Chefs
- Athletic Trainers

# FLSA Basics – What We Know Today

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## ■ PROFESSIONAL EXEMPTION

### — Creative Professional

- The employee's primary duty must require invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
  - Not routine mental, manual or mechanical work.
- A recognized field of artistic creative endeavor.
  - Original and creative in character
  - Not mere reproduction by an employee with ability and training.
  - *E.g.*, music, writing, acting, graphic design.



# FLSA Basics – What We Know Today

## ■ COMPUTER PROFESSIONAL EXEMPTION

### — The employee must have as the primary duty:

- Application of systems analysis techniques and procedures, e.g., consulting with users to diagnose and fix IT problems;
- Design, development, analysis, testing or modification of computer systems or programs, e.g., creating prototypes or design specifications;
- Design, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of any of the above, so long as the duty requires the same skill level.

# FLSA Basics – What We Know Today

## ■ COMPUTER PROFESSIONAL EXEMPTION

### — Salary Test

- Unlike other white collar exemptions, allow for hourly rate:
  - \$455 or more per week and on salary basis; or
  - \$27.63 or more per hour.
- Not recognized by all states.

# FLSA Basics – What We Know Today

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## ■ ADMINISTRATIVE EXEMPTION

- To qualify for the administrative exemption, the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or its clients/customers.
- The employee's primary duty must also require the exercise of discretion and independent judgment with respect to matters of significance.

# FLSA Basics – What We Know Today

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## ■ ADMINISTRATIVE EXEMPTION

### — Whether Duties Directly Related to the Management or General Business Operations:

- Duties related to running or servicing the enterprise instead of manufacture, sales or retail (*i.e.* not production).
  - *E.g.*, finance, auditing, budgeting, purchasing, advertising, human resources, quality control, legal and regulatory compliance, employee benefits, labor relations and health and safety.

# FLSA Basics – What We Know Today

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## ■ ADMINISTRATIVE EXEMPTION

- Duties must be of substantial importance to the management or operation of the of the employer's clients/customers.
  - *E.g.*, employees consulting for the employer's clients/customers.
- **Exercise of Discretion and Independent Judgment**
  - The employee chooses between two or more possible courses of conduct.
  - The choice is free from immediate direction or supervision on matters of significance.

# FLSA Basics – What We Know Today

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## ■ ADMINISTRATIVE EXEMPTION

- The employee's decisions may still be reviewed at times.
- The decisions may be recommendations for action rather than direct action.
- Merely following procedures is not sufficient.
- **Matters of Significance**
  - Major assignments related to employer's operations
  - Must affect the operations in a substantial manner

# FLSA Basics – What We Know Today

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## ■ ADMINISTRATIVE EXEMPTION

- Authority to implement, interpret or create management policies or operating practices.
- Authority to deviate from established policies or procedures without prior approval.
- Employee may commit the employer in significant financial matters.
- Involvement in planning of long- or short-term business objectives.
- Conducts investigations or resolves matters for management.
- Represents the employer in complaints and disputes.

# FLSA Basics – What We Know Today

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## ■ LIABILITY

- Violations of the FLSA may result in:
  - Compensatory Damages.
    - Unpaid wages and overtime
  - Liquidated Damages (Double).
  - Attorneys fees.
  - Equitable Relief.
  - Personal Liability (officers and directors).





# FLSA Basics – What We Know Today

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## ■ PERSONAL LIABILITY

- “Any person acting directly or indirectly in the interest of an employer in relation to the employee.”
- An owner, officer, director, participating shareholder, manager or supervisor may be subject to liability where he or she was responsible in whole or in part for the alleged violation.
- Potential criminal liability for willful violations.

# FLSA Basics – What We Know Today

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- DOL last revised the regulations governing the white collar exemptions in 2004.
- This revision *significantly* altered the interpretation of federal laws regarding classification and exemption from overtime.
  - Result = from 2004 to 2007 the number of FLSA lawsuits rose 40%....collective actions increased by 98%!
  - In 2012, 90% of all federal and state court employment law class actions filed in the U.S. were wage and hour matters (most in hotel/motel, food services, manufacturing, construction, laundry services/domestic work and nail salons).

# Litigation – What We Know Today

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- **FLSA lawsuits hit a record high in 2015!!**
  - 8,781 suits in fiscal year ending September 30, 2015.
  - Increase of 450% since 2000 – 1,935 filings.
  - Violations carry a hefty civil penalty (back pay wages, liquidated damages, attorneys fees, interest).
- **DOL has increased its compliance audits** and investigations of wage complaints in recent years.
  - DOL may assess civil penalties per employee for each repeated or willful violation.
  - DOL may pursue criminal penalties for willful violations(\$10k and jail).
- **DOL has increased its enforcement budget** --- 2016 set-aside of \$277 million for Wage and Hour Division.

# Where Are We Today?

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# March 13, 2014: Memo to DOL

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- President Obama signed a presidential memorandum for overtime protections for workers.



# Presidential Memorandum

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- “I hereby direct you to propose revisions to *modernize and streamline the existing overtime regulations*. In doing so, you shall consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to *make them easier for both workers and businesses to understand and apply*.”

-President Obama

# Now What?

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- Key Rule Changes

- The Notice of Proposed Rulemaking (“NPRM”) was published on June 30, 2015 in the Federal Register
- Written comments on the Proposed Rule closed on September 4, 2015.
- DOL issued Final Rule on May 18, 2016.
- Compliance deadline is December 1, 2016.



# Why Needed?

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- According to DOL and Proponents...Now is the right time:
  - Continued increase in white collar exempt positions resulting from expansion mostly in the services industry – lower income supervisors
  - Limited adjustments since 1938
  - No current indexing
  - They can....



# New Rule - Key Changes

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- Standard Salary Level Increase
  - Increases the standard salary level more than two times the current salary basis (\$455/\$23,660).
  - \$913/week, or \$47,476/year, in 2016.
  - Change comes from the 40<sup>th</sup> percentile of weekly earnings for full-time salaried employees in the lowest-wage Census Region.
- Inclusion of Incentive Payments

# New Rule - Key Changes

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- Highly Compensated Employees (HCE)
  - Increase total annual compensation requirement from \$100,000 to \$134,004.
    - Change comes from the annualized value of the 90<sup>th</sup> percentile of weekly earnings for full-time salaried employees nationally.
- Automatic Updates
  - DOL has included a mechanism for automatically updating the salary and compensation levels going forward.
    - Using a fixed percentile of wages
    - January 1, 2020 projections:
      - \$51,168/yr and \$147,524/yr (HCE)

# New Rule - Key Changes

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- DOL will allow employers to include a portion of *nondiscretionary bonuses*, incentive payments and commissions, in meeting the salary-level requirements.
  - Before the new rule bonuses are only included in calculating total annual compensation under the HCE test.
  - HCE allowed to make a “catch up” payment at or shortly *after year end* to reach compensation level.
  - DOL historically rejected the “catch up” idea for other EAP exemptions.
  - DOL still wants to “strictly limit the amount that could be satisfied through payment of nondiscretionary bonuses and incentive pay.”
  - NEW RULE...10% of the standard salary requirement is permitted for EAP exemptions, as long as it is paid at least quarterly.

# New Rule - Key Changes

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- Outside Sales Exemption
  - There remains no salary basis/level test.
  - So far, Outside Sales is not affected by the revised regulations.
  - Employers argue that there is currently no difference between inside sales and outside sales...does not reflect the realities of the modern workplace.
    - DOL cannot change it because “outside salesman” is exempted in the language of the Act.

# New Rule - Key Changes

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- Highly Skilled Computer Exemption
  - Current regulations require \$455/week OR not less than \$27.63/hour.
  - Salaried computer workers must now meet the new salary level of \$913/week.
  - However, “hourly computer workers” who earn at least \$27.63/hour and meet job duties test are still exempt under Section 13(a)(17) of the FLSA.
  - Thus, they are not impacted by the final new rule.

# Consequences

- **Five million additional workers** are projected to be newly **eligible for overtime**.
- Projected **transfer of income from employers to employees** of between **\$1.1 and \$1.2 BILLION** a year!
- White collar **exempt employees** expected to be **reduced by at least 50%**.



# Impact of These Salary Level Changes

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- “That’s how America should do business. In this country, a hard day’s work deserves a fair day’s pay. That’s at the heart of what it means to be middle class in America.”

- *President Obama*



# Other Acknowledgements by the DOL

- Although not directly addressed in the proposed or final rule -- considered “beyond the scope of this rulemaking” -- DOL acknowledged that currently exempt employees who work remotely on electronic devices may pose overtime concerns for employers if they lose their exempt status due to the rule change.



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## Other Acknowledgments by the DOL

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- In response to this concern, DOL stated it will publish a Request for Information “in the near future” seeking information from stakeholders on the use of electronic devices by overtime-protected employees outside of scheduled work hours.

# Other FLSA Revisions Under Consideration by DOL

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- Although DOL has not proposed changes to the existing “duties test” at this time, the DOL is still considering.
  - Adoption of the California 50% rule.
  - Reinstatement of long and short duties test; and
  - Elimination of the “concurrent duties” rules for executive employees (which currently allow a manager to perform exempt and non-exempt work)

# Other FLSA Revisions - Comments Were Solicited

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- What changes if any, should be made to the duties test?
- Should employees be required to spend a minimum of time as their “primary” duty model? Is there a better indicator?
- Does the single standard duties test appropriately distinguish between exempt and non-exempt employees as opposed to the short and long tests?
- Should DOL include additional classifications as examples for exempt and non-exempt positions?

# Reactions to Rule Changes

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- The Obama administration welcomed DOL's changes, hailing them as measures designed to ensure that employees receive fair pay and that employers are not undercut by low-wage competitors.

# Reactions to Rule Changes

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- Critics warn that this increased overtime threshold will result in increased business costs and a rise in the use of part-time entry-level workers.
- Critics further caution that many reclassified employees will lose benefits, flexibility, status and opportunities for advancement.

# What Should Employers Do?

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- Don't wait!
- Self Audit -- With Assistance of Legal Counsel (Privilege)
  - Review current employee classifications, existing jobs and job descriptions.
  - Make sure each position is properly classified as exempt or non-exempt.
  - Analyze impact of new salary level on:
    - Budgets
    - Possible job restructuring
    - Time keeping systems (manage “hidden OT”)
    - Whether a management position has both exempt and non-exempt
  - It is critical to communicate with those who know the job and understand what the job actually entails. What's the OT?
  - Be careful with questioning exempt employees about past OT.



# 1938 Workplace – Easy to Track OT



# Today's Workplace – Who's Keeping Track of Time Worked

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# Today's Workplace -- Employees Are Not Chained to Their Desks

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# What Should Employers Do?

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- Look closely at each position's "primary duty" and make sure any reclassification falls within the guidelines.
- If any employer decides to make changes to employees' classifications, clearly communicate those changes to the impacted employees.
- Shifting employees from salary to hourly or from overtime-exempt to overtime-eligible will have a wide range of operational and legal implications.

# What Should Employers Do?

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- Regardless of reclassification, have employees review and sign off on their job descriptions.
- Make sure employees comply with job descriptions, as the DOL may focus more on what an employee actually does, rather than how that employee's job is described in determining compliance.
- Be prepared for increased costs.

# What Does All This Mean To My Organization?

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- **Decide how to treat classifications that will not meet the new salary threshold.**
  - Increase salary or re-classify position.
  - Financial impact of salary increases over time
  - Workforce morale
  - Limit hours worked if position can be performed in 40 hours.

# What Does All This Mean To My Organization?

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- **Prepare for salary increases.**
  - Establish baseline for positions earning \$47,476.
  - Determine if more highly paid positions should include enhanced duties.

# What Does All This Mean To My Organization?

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- Calculate financial impact.
  - Prepare revised budgets.
  - Establish processes to update required (every 3 years) increases as specified by DOL.

# Reclassification From Exempt To Non-exempt – Steps To Take

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- **First step is communication – often and at various levels**
  - Need to educate the senior team.
  - General communication of what is to come.
  - Individual communications with affected employees with or without appeal opportunity.
- **Administrative aspects of reclassification**
  - Ensure accurate time keeping with no off-the-clock work.
  - Monitor and control hours worked.
  - Confirm supervisors understand the concepts.

# Supervisor's Role

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- Essential
- Track hours worked
- Enforce discipline policies
  - Proper time keeping
  - Proper breaks
  - No unapproved overtime
  - Limits on overtime
  - Limits on non-exempt duties for those positions classified as exempt
  - Full accountability of all



# Final Questions?

*Jill M. Lashay, Esq.  
Buchanan Ingersoll & Rooney PC  
409 N. Second Street, Suite 500  
Harrisburg, PA 17101  
(717) 237-4856  
[jill.lashay@bipc.com](mailto:jill.lashay@bipc.com)*

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