



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Impacting Eco Devo Organizations and Employers: How to Prepare for New FLSA Regulations



Missouri Economic Development Council – 2016 Fall Conference

Presented by:

Kameron Murphy, Esq.

Date:

October 27, 2016

DIFFERENT
BY DESIGN

Kameron W. Murphy

Kameron Murphy is a member of the firm's Labor & Employment and Education Law practice areas. Kameron advises clients on labor relations, wage and hour issues, personnel policies, and in employee discipline and termination matters. He also represents employers in Missouri and Illinois on labor law issues including union election campaigns, collective bargaining negotiations, grievance resolution and arbitration, and unfair labor practice proceedings. Prior to joining Tueth Keeney, Kameron practiced in commercial litigation for a well-respected mid-sized St. Louis firm. He has extensive experience in all phases of litigation in Missouri and Illinois state and federal courts.

Education

J.D./M.B.A., University of Missouri
Member, *Missouri Law Review*

B.A. in Spanish/B.J. in Magazine Journalism, University of Missouri
Member, Missouri Honors College • MU in Spain, Universidad de Navarra



Agenda

- Overview of Current Rules
- Details of New Regulations
- Brief update on legal challenge to new regulations
- Practical Considerations
- Guidance to meet December 1, 2016 deadline
- Your Questions!

Legal Challenge to New Regulations

- In September 2016, 21 states filed suit in TX federal court to block new regulations
- Suit argues that FLSA statute does not authorize salary-basis test or automatic updates planned every 3 years
- Suit also alleges that FLSA regulations violate 10th Amendment federalism principles by infringing state sovereignty
- On October 12, states sought injunction against new rules' implementation
- States generally thought to have low likelihood of success in FLSA challenge suit

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 non-exempt 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 in amount equal to unpaid OT
 - Attorneys' fees
 - Civil monetary penalties (i.e., fines)
 - Collective action
 - DOL audit of entire workforce
 - Failure to correct any misclassification can increase liability

Exemptions

- Most exempt employees fall under “white collar” exemption:
 - 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
 - Being paid on salary basis means receipt of a predetermined amount of compensation each pay period on a weekly, or less frequent, basis

Exemptions (cont.)

- Executive Employee Exemption
 - Employee must earn – currently – no less than \$455/week;
 - Annualized for full-time employment, this amount is \$23,660
 - 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 (cont.)

- 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*.
 - Not just working on significant matters, but exercising discretion and independent judgment on such matters.

Exemptions (cont.)

- Professional Employee Exemption
 - Employee's salary is – currently – not less than \$455/week; and
 - Employee's "primary duty" must be work that either requires advanced knowledge in a field of science or learning (learned professional) OR a field that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (creative professional).
 - NOTE: Salary test does *not* apply to doctors, lawyers, or teachers

Exemptions (cont.)

- 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
 - Must meet salary basis, or if paid hourly, minimum of \$27.63/hour

- Highly compensated employees

- Minimum annual salary – currently – of \$100,000.00
 - Modified, less strict duties test

DOL's Changes

- The Department of Labor ("DOL")'s rule changes:
 - Remember that (most) exemptions require both (1) salary basis and (2) duties tests
 - New rule will raise the minimum salary level required to qualify for a "white collar" or "highly compensated employee" exemption
 - In other words, duties tests are unchanged
 - New rules effective December 1, 2016

DOL's Changes (cont.)

- Why the 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 Changes (cont.)

- Why the 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 Changes (cont.)

- What's new, effective December 1, 2016:
 - Raise the minimum salary level for the “white collar” exemptions (executive, administrative, *most* professional, and certain computer professional employees) from \$23,660/year to \$47,476/year;
 - Although typically expressed as annual amount, salary basis is measured weekly (new rule changes weekly minimum from \$455 /week to \$913/week).
 - Raise the minimum salary level for the “highly compensated” employee from \$100,000/year to \$134,004/year; and
 - Add an automatic update to these salary levels every 3 years, beginning in 2020, to avoid rulemaking process in future.

DOL's Changes (cont.)

- Increase to Minimum Salary Level for *Most* "White Collar" Exemptions
 - Will 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 Changes (cont.)

- Proposed Increase to Minimum Salary Level for "White Collar" Exemptions
 - Example: Facilities Manager currently makes \$40,000.00 per year
 - The employee is currently classified as exempt and is not eligible for overtime pay
 - Note: this example assumes employee is otherwise meeting duties test of an exemption
 - Under the new regulations, the Employer would need to increase this employee's salary to at least \$47,476/year, in order to properly retain her exempt status
 - If the employee's salary is not increased to at least \$47,476, she will be classified as nonexempt and must be paid overtime for all hours worked over 40 per week

DOL's Changes (cont.)

- Personnel likely to be impacted by the salary level increase for "white collar" exemptions:
 - Personnel with "manager," "supervisor," "coordinator," "director," etc., in their titles
 - Mid-level personnel (not necessarily in upper management)
- Consider all departments within your organization (i.e., physical plant, human resources, etc.)

DOL's Changes (cont.)

- 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 Changes (cont.)

- Increase to Minimum Salary Level of Highly Compensated Employees (HCEs)

Revised Regulations:

- Raise the minimum salary level to \$134,004/year
- Do not change less stringent duties test for HCE ("customarily and regularly perform at least one" of exempt duties/responsibilities of executive, admin, or professional)
- HCE may be of limited utility, because employees paid at this level likely fall under another exemption

What Has Not Changed?

- Everything else!
- As noted above, the “duties” tests have not changed
- Nor have industry specific rules, such as:
 - Rules related to “academic administrators” employed by educational institutions
 - Special OT rules for “hospital and residential care establishments”
- Also unchanged are exemptions outside of “white collar” exemptions (more on this later)

A Standard Lawyerly Disclaimer

- Today's presentation meant to cover topics most impacted by upcoming FLSA regulation changes
- “White collar” exemptions are most commonly used by employers – administrative, executive and professional
- But employer should thorough in assessing whether employee might qualify for another FLSA exemption

Other possible FLSA Exemptions – outside sales employees

- Outside sales employees are not subject to the salary basis – so this exemption is not impacted by new rules
- Requirements for outside sales exemption:
 - *Primary duty* must be making sales (as defined by FLSA) or obtaining orders or contracts for services or use of facilities
 - Employee must be *customarily and regularly engaged away* from employer's place or places of business
- No such thing as “inside sales” exemption

Other possible FLSA Exemptions – commissioned retail sales employees

- This exemption is unchanged by new FLSA rules
- Provides exemption from OT only, and not from minimum wage
- Employee must work for “retail” establishment as defined by FLSA
- Additionally, the employee must have
 - regular rate of pay in excess of 1.5x the applicable minimum wage for every hour worked in a work week in which OT hours are worked
 - more than half of total earnings in representative period must come from commissions

Other possible FLSA Exemptions – motor carrier exemption

- This exemption is unchanged by new FLSA rules
- Provides exemption from OT only, and not from minimum wage
- Can apply to driver, driver's helper, loaders or mechanics employed by "motor carrier," as defined under federal law
- If employee's duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce
- Applicable regulation can be complex, so consult counsel if you think it could be relevant to your situation

Other possible FLSA Exemptions – a sampling

Aircraft salespeople - OT	Workers with disabilities - MW	Homeworkers Making wreaths – MW, OT & CL	Police officers working in small (less than 5 officers) public police departments – OT	Television station employees in small markets - OT
Airline employees - OT	Domestic employees who live-in - OT	Houseparents in non-profit educational institutions – OT	Radio station employees in small markets – OT	Truck and trailer salespeople – OT
Amusement/recreational employees in national parks/forests/Wildlife Refuge System - OT	Farm implement salespeople - OT	Livestock auction workers - OT	Railroad employees – OT	Youth employed as actors or performers –CL
Babysitters on a casual basis - MW & OT	Federal criminal investigators - MW & OT	Local delivery drivers and driver's helpers – OT	Seamen on American vessels – OT	Youth employed by their parents - CL
Boat salespeople - OT	Firefighters working in small (less than 5 firefighters) public fire departments - OT	Lumber operations employees of small (less than 9 employees) firms – OT	Seamen on other than American vessels – MW & OT	
Buyers of agricultural products - OT	Fishing - MW & OT	Motion picture theater employees - OT	Sugar processing employees – OT	
Companions for the elderly - MW & OT	Forestry employees of small (less than 9 employees) firms - OT	Newspaper delivery – MW, OT & CL	Switchboard operators – MW & OT	
Country elevator workers (rural) - OT	Fruit & vegetable transportation employees - OT	Newspaper employees of limited circulation newspapers – MW & OT	Taxicab drivers - OT	

FLSA Exemptions – takeaways

- FLSA is a statute drafted for an industrial age, not an information age
- Exemptions don't always make intuitive sense
- Most common “white collar” exemptions will see minimum salary basis more than doubled
- But other existing exemptions will remain in place, unchanged, even after new rules take effect

Practical Concerns with New Regulations

- Exempt employees converted to non-exempt status will require employers to pay more overtime
- Exempt employees may be asked to do more
- Employees with the same job title (and same duties) may fall into different exemption statuses (depending on wage)
- Minimum salary level for employees will continue to increase, regardless of budgets, decrease in federal, state, and local revenue
- Change to hourly status perceived as “demotion” by employees who lose exemption because their salary level falls below the new required minimum

Practical Concern: < 12 month employees

- Issue: Employees who work less than 12 months
- To determine salary basis, either:
 - Calculate weekly salary
 - OR convert to yearly salary (i.e. tack on another 3 months of salary at same rate)

Practical Concerns: < 12 month employees (cont.)

- Example: Transportation Supervisor at School District gets paid \$37,000/year (on a 9 month contract)
- FIRST check duties! (likely qualifies for executive exemption)
 - Not paid \$47,476/year, so must either increase salary or move employee to hourly, right?
 - NO!
 - \$37,000 for 9 months (36 weeks) = \$1027.78/week
 - Exceeds the \$913/week salary basis required under new rule
 - OR add \$12,333.33 to yearly salary (additional 3 months of salary at \$4,111.11/month) = \$49,333.33/year
 - Exceeds the \$47,476/year salary basis under new rule

Practical Concerns: < 12 month employees (cont.)

- Question: how does the salary basis test work for 9- or 10-month employees?
 - “Q. We are a seasonal property open 8 months - is the \$47,476 based on that or 12 months?
 - A. The new salary is \$913 per week. During the eight-month period that employees work at your property, you will need to guarantee that at least \$913 per week is paid for an exempt employee. Please see [Department of Labor Field Operations Handbook] 22g10 concerning rules for annual salary earned in a shorter period, which can be found at the following link: https://www.dol.gov/whd/FOH/FOH_Ch22.pdf.”

Practical Concerns: Employees with two rates of pay

- Required to pay 1 ½ times regular rate of pay for all hours worked over 40 hours
- Only required if employee's "primary duty" is non-exempt
- How do you determine the appropriate rate if the employee works at two different jobs, at two different rates?
- There are different options:
 - *Blended rate* calculation (most common)
 - Must calculate OT rate for each work week

Practical Concerns: Employees with two rates of pay (cont.)

- Blended Rate Example: Custodian for 40 hours and driver for 10 hours
- Primary duty (custodian) is non-exempt → need to calculate OT rate
 - 40 hours/week at \$12.00/hr = \$480.00
 - 10 hours/week at \$15.00/hr = \$150.00
 - Total wages for week = \$630.00
 - $\$630 / 50 \text{ hrs (total hours worked)} = \$12.60 \text{ average hourly rate}$
 - $\$12.60 / 2 \text{ (1/2 time weighted average)} = \6.30
 - $\$6.30 \times 10 \text{ hours (amount of OT differential)} = \63.00
- So → employee is owed \$630 in regular wages and \$63.00 in OT differential wages = \$693.00

Practical Concerns: Employees with two rates of pay (cont.)

- Other Options Include:
 - Paying OT at the higher rate
 - By agreement with the employee, paying OT on the rate for the work being performed during OT hours
- What is not an option?
 - Considering them two separate jobs, and NOT paying OT for work over 40 hours performed by the same employee!

Practical Concerns: Travel Time

- Common concern for employers with employees who travel for work
- Can be even trickier where formerly exempt employee transitions to non-exempt status
- How is employer required to pay non-exempt employee who travels?

Practical Concerns: Travel Time (cont.)

- “Home to work travel,” i.e., commuting – travel from home before regular workday and return at end of day is not working (compensable) time
- “Special one-day assignment in another city” – time spent traveling to and returning from the other city is working (compensable) time, except employer may deduct time employee would normally spend commuting
- “All in a day’s work” – travel between job sites during work day is working (compensable) time

Practical Concerns: Travel Time (cont.)

- “Travel away from the home community”
 - Travel time away from home is working (compensable) time when it cuts across employee’s workday
 - Travel time during regular working times on non-working days is also working (compensable) time
- Travel time away from home outside regular working hours on plane, train, bus, boat, car, etc. is not working time *if the employee is a passenger**
 - *Unless the employee is actually doing work while a passenger (taking calls, writing emails, etc.)

What Can You Do?

Reorganizing Workloads, Altering Schedules

- Consider raising salaries
- Reconsider workloads and adjust/alter schedules
- Adjust wages? Informal DOL guidance provides:
 - “Employers can adjust the amount of an employee’s earnings to reallocate it between regular wages and overtime so that the total amount paid to the employee remains largely the same. Employers may not, however, reduce an employee’s hourly wage below the highest applicable minimum wage (federal, state, or local), or continually adjust wages each workweek in order to manipulate the regular rate.”

Fluctuating Work Week

- “Fixed salary for fluctuating hours”
- A/k/a fluctuating work week
 - Pursuant to fluctuating work week, employer can pay employee fixed rate for base pay, then ½ time for hours above 40
 - If employee hours fluctuate both above and below 40 hours, can reach agreement to pay fixed salary to cover all base pay, plus pay ½ time for hours above 40
 - Not merely a method to pay less OT to high hours workers
 - Employer must reach “clear mutual understand” beforehand
 - Should consult counsel before instituting fluctuating work week

Comp Time

- Available only to a “public agency”
- Generally up to 240* hours, must be credited at 1.5 hrs of comp time for each hour of OT
 - * Different rules for law enforcement, fire protection, and emergency response personnel
- Employee must be able to use on date requested unless doing so would “unduly disrupt” agency operations
- Some employers may find comp time difficult to implement

To Do Now

- Identify positions affected by new regulations
- Possible options to respond to higher salary basis
 - Raise salaries to new, higher salary basis
 - Translate current salaries to hourly rate, then pay OT above 40 hours
 - Reorganize work loads, adjust schedules (more on this in a minute)
 - Adjust wages downward
- Any employee whose pay is raised to meet new requirement must still satisfy duties tests
- Contact your attorney for guidance

Required Reading

- *The DOL has issued extensive informal guidance, which may be found at:*

www.dol.gov/whd/overtime/final2016/

Questions?

Kameron Murphy
kmurphy@tuethkeeney.com

Tueth, Keeney, Cooper, Mohan &
Jackstadt, P.C.

Main: 314-880-3600 Fax: 314-880-3601
www.tuethkeeney.com