Wage and Hour Update: New Department of Labor Final Overtime Rules

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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.
Overview

• **Fair Labor Standards Act**
  • Independent Contractors vs. Employees
  • Joint Employment
  • Special Cases – Volunteer and Trainees
  • Exempt v. Non-Exempt Employees
  • Challenging Cases
  • Changes to Overtime Regulations

• **Maryland Law**
  • Maryland Wage & Hour laws
  • Significant Differences from the FLSA

• **Equal Pay Act**
Fair Labor Standards Act

- Establishes standards for:
  - Minimum wages
  - Overtime pay
  - Wage deductions
  - Child labor
  - Calculation of hours worked
  - Recordkeeping
  - Anti-retaliation

- Generally requires employers to pay 1 ½ times the employee’s regular rate of pay for all hours worked in excess of 40 hours per week
Employees vs. Independent Contractors: Definitions

• **Employee**: An individual employed by an employer and who, as a matter of economic reality, is dependent on the business that they serve. 29 U.S.C. § 203(e).

• **Employer**: Any person acting directly or indirectly in the interest of an employer in relation to an employee.

• **Independent Contractor**: One who performs a service for a business, but is not in an employment relationship with the business.
Employees vs. Independent Contractors: Economic Realities Test

- **Consider the following factors:**
  - Degree of control
  - Investment in facilities
  - Opportunity for profit and loss
  - Permanency of relationship
  - Required skill

- **Additional factor under Maryland law:**
  - Whether employee’s work is an integral part of the business
Special Cases: Trainees/Interns

- **Not employees if training/internship is:**
  - Similar to training in educational environment
  - Primarily for benefit of intern
  - Doesn’t displace regular employee
  - Trainee works under supervision of regular staff
  - No immediate advantage to employer
  - Mutual understanding that trainee is not entitled to compensation
  - No guarantee of a future job
Special Cases: Volunteers

• Individuals can volunteer services to non-profit, religious, or charitable organizations

• **Relevant factors:**
  • Who receives greater benefit from the work
  • Whether work is integral to the business
  • Presence of coercion
  • Whether activity occurs during normal work hours
  • Similarity between volunteer activities and regular job duties
  • Length of relationship
  • Number of hours spent volunteering
The “White Collar” Exemptions from Overtime

• Must meet **BOTH** the Salary Basis Test and the Duties Test

  • **Salary Basis Test:** Under *current* standard, must be paid at least $455 on a salary basis. No deductions for quality or quantity of the employee’s work.

  • **Duties Test:**
    • Administrative
    • Professional
    • Outside Sales
    • Computer Professional
    • Executive
    • Highly Compensated
Administrative Exemption

Duties

• Primary duty is 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

• Primary duty must include the exercise of discretion and independent judgment with respect to matters of significance
Executive Duties

• **Primary duty must include:**
  
  • Managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
  
  • Customarily and regularly direct the work of at least 2 or more full-time employees or their equivalent; and
  
  • **Authority to hire or fire** other employees, or suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.
Professional Exemption
Duties

“Learned” Professional

• Work requires advanced knowledge in a field of science or learning, which is customarily acquired by a prolonged course of specialized intellectual instruction

“Creative” Professional

• Work requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
Computer Professional Exemption Duties

• **Primary duty must include:**
  • The application of systems analysis techniques and procedures;
  • The design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or
  • A combination of the preceding duties, the performance of which requires the same level of skill.
Outside Sales Exemption Duties

• Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.

• Employee must be “customarily and regularly engaged away” from the employer’s place of business.

• No Salary Requirement!
Highly Compensated Employees

• Employee *currently* must be paid at least $100,000 per year total annual compensation

• Employee *currently* must be paid on a salary basis of at least $455 per week

• Must “customarily and regularly” perform at least one of the duties of an exempt executive, administrative, or professional employee
Salary Basis Test - Overview

• Under the salary basis test, the employee must be paid a salary that meets the minimum required by the DOL, and the employer cannot deduct from the employee’s weekly salary, unless authorized by the DOL or FMLA.

• **Currently**, the salary minimum is $455/week, but the new DOL final overtime rule will raise the salary minimum for the white collar exception.
Final Changes to White Collar Exemptions

• On September 24, 2019, the DOL issued its final overtime rule.

• Effective January 1, 2020, Changes to Salary Basis Test Minimum Levels:
  • New salary minimum increases to $684 per week ($35,568 per year); and
  • New minimum for highly compensated employees increases to $107,432 per year
Nondiscretionary Bonuses & Incentive Payments - Overview

• The new rule permits employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level.

• For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, they must make such payments on an annual or more frequent basis.
Nondiscretionary Bonuses & Incentive Payments – Catch Up

• If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the Department permits the employer to make a “catch-up” payment within one pay period of the end of the 52-week period.

• This payment may be up to 10 percent of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year’s salary amount and not toward the salary amount in the year in which it is paid.
Salary Basis Test: Allowable Deductions

- FLSA only allows for specific deductions from salary of exempt employees:
  - Absence of 1 or more full days for personal reasons other than sickness or disability
  - Absence 1 or more full days for sickness or disability if in accordance with bona fide policy
  - Jury fees, witness fees, military pay
  - Penalties imposed in good faith for infraction of safety rule of major significance
  - Unpaid disciplinary exemption 1 or more full days imposed in good faith for infraction of workplace conduct rule
  - Proportional payment initial or terminal week of employment
  - Weeks in which employee takes unpaid leave under FMLA
Nonexempt Employees: Compensable Time

• General Rule:
  • “Suffer or permit to work”

• Special Cases
  • Waiting Time
  • Rest Periods
  • Meal Periods
  • Prep Time and Concluding Activities
  • Meetings and Trainings
  • Travel Time
Nonexempt Employees: Waiting Time

• “This is a 9-5 job that is spaced out over the course of the day.”
  - Lady Gaga

• **Factors:**
  • Requirement to live on premises
  • Excessive geographic restrictions on employee movement
  • Frequency of calls
  • Fixed time limit to respond to a call
  • Whether trading of on-call responsibilities is permitted
  • Whether employee can be reached by pager or cell phone
  • Whether employee actually engaged in personal activities during the on-call time.
Nonexempt Employees: Rest and Meal Periods

• **Rest Periods**
  • Rests of short duration should be counted as hours worked
  • Longer breaks need not be counted if the employee is relieved of all duties

• **Meal Periods**
  • “Bona fide” meal period not compensable, provided employee not required to perform any services
  • “Bona fide” meal period usually 30 minutes or more
  • **Maryland**: Employee must be free to leave worksite (or desk area)
Best Practices for Avoiding FLSA Liability

• Dealing with New Technology and Off-the-Clock Work

• Importance of Job Descriptions
  • Updated?
  • Actually describe what the employee does?
FLSA Safe Harbor

- Improperly docking exempt employees’ pay may jeopardize exempt status.
- Exemption is not lost if an employer:
  - Has a clearly communicated policy prohibiting improper deductions, and includes complaint mechanism;
  - Reimburses employees for improper deductions; and
  - Makes good-faith commitment to comply in future.
FLSA Safe Harbor (cont.)

• Should Include:
  • Statement of Policy and Practice to accurately compensate employees;
  • Statement of Purpose;
  • Statement of Responsibility;
  • Prohibition of off-the-clock work;
  • Confirmation that company will promptly correct mistakes brought to its attention; and
  • Reporting Procedures.
Maryland Wage & Hour Law

- **General Provisions**
- Establishes exemptions from minimum wage and overtime
- Similar to FLSA but contains some important differences
- Prohibits retaliation
Maryland Wage Payment and Collection Law

• Sets forth the rights by which employees receive wages.

• States when and how often employees must be paid, general guidelines for making wage deductions, which actions are prohibited and how employees may enforce their rights.
Wage Deductions

- Maryland law prohibits deductions except where:
  - Court ordered
  - Permitted by law or regulation
  - Authorized expressly in writing by employee
  - Commissioner of Maryland DLLR has allowed to offset or “pay for” something of value the employee received
Minimum Wage Increase - Overview

• Maryland Law
  • Currently set at $10.10 (last increased July 1, 2018).
  • New increases will be effective Jan. 1, 2020 and every subsequent January until 2025 (or July 2026 for small employers).

• FLSA
  • Federal minimum wage does not apply to Maryland employers, since the state minimum wage is more generous than the federal law.
  • But certain tipped workers regulations do.
House Bill 166

- Raised the State-wide Minimum Wage
  - Starting January 1, 2020, the minimum wage will incrementally increase for most employers every following January until 2025.

- Increases for employers with 15 or more employees:
  - Jan. 1, 2020: $11.00
  - Jan. 1, 2021: $11.75
  - Jan. 1, 2022: $12.50
  - Jan. 1, 2023: $13.25
  - Jan. 1, 2024: $14.00
  - Jan. 1, 2025: $15.00
Small Employers

• A late amendment created a smaller incremental rise for “small employers.”

• Increases for small employers (fewer than 15 employees):
  • Jan. 1, 2020: $11.00 (same as all other employers)
  • Jan. 1, 2021: $11.60
  • Jan. 1, 2022: $12.20
  • Jan. 1, 2023: $12.80
  • Jan. 1, 2024: $13.40
  • Jan. 1, 2025: $14.00
  • Jan. 1, 2026: $14.60
  • July 1, 2026: $15.00
Young Employees

• Effective immediately, employees who are younger than 18 years old may be paid 85% of the applicable minimum wage.

• For example:
  • 85% of $11.00 = $9.35
  • 85% of $13.00 = $11.05
  • 85% of $15.00 = $12.75

• Previous wage law limited this exception to only the employee’s first 6 months of employment – the new law eliminates this limitation.

• The previous law exempted employees younger than 20, or amusement/recreational employers (both exemptions are now eliminated).
Budget Increase Tie-Ins

• The law requires the Governor to tie a budget increase for “community providers” and “providers” each year until 2026.
  • This is intended to ensure that community providers have enough funding to meet the demands of the new minimum wage.
• “Community providers” are community-based agencies or programs which serve individuals with (1) developmental disabilities, or (2) mental disorders, substance-related disorders, or a combination of both disorders.
• “Providers” are nursing home services, medical day care services, private duty nursing services, personal care services, home- and community-based services, and services provided through the Community First Choice program.
Future Changes to Minimum Wage

• The wage increases will be analyzed each year before October to determine any negative consequences to the State.

• The Board of Public Works (which includes the Governor, Comptroller, and Treasurer) is tasked with analyzing the seasonal employment statistics and compare job totals to the totals of the previous year.
  • If the Board notes a downward trend in job totals, it is authorized to suspend the next minimum wage increase, which will result in whatever the current rate is being effective for another year, and the next increase being delayed a full year.
QUESTIONS?

THANK YOU!