

Money Matters: An Update on Wage/Hour Classifications and Recent Court Decisions and DOL Guidance

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2019 Wage and Hour Update



Part I: What's New at the DOL:

- ✓ DOL Finalizes Overtime Exemption Rule
- ✓ DOL Rule Proposals
- ✓ Recent DOL Opinion Letters

Part II: Determining Exempt Status:

- ✓ Exempt v. Non-Exempt
- ✓ Salary Basis Requirement
- ✓ Salary Level Requirement
- ✓ Duties Test
- ✓ Sample Job Descriptions

DOL Finalizes Overtime Rule



Federal Overtime Exemption Rule Update:

- In September 2019, the DOL finalized a rule that boosts the salary threshold for exempt status to **\$684/week** (roughly **\$35,568/year**)
 - The new rule is effective January 1, 2020
- The previous salary threshold for exempt employees was \$455/week or \$23,660/year
- The new rule also increases the threshold for highly compensated employees from \$100,000/year to \$107,432/year

DOL Proposed Rulemaking



DOL 80/20 Rule and Tip Pooling Regulations:

- Under FLSA rules for tipped employees, employees are entitled to receive at least the federal minimum wage from their employer.
- However, the FLSA permits employers to apply a “tip credit” toward that minimum wage amount by counting a limited amount of tips from tipped employees.
- “Tipped employees” – those who customarily and regularly receive more than \$30/month in tips.
- Currently, if employee engages in non-tipped work for more than 20% of shift (cleaning tables, etc.), employee is entitled to full minimum wage without tip credit deductions.



DOL 80/20 Rule and Tip Pooling Regulation:

- In October 2019, DOL proposed a rule that would permit employers to take a tip credit regardless of the amount of non-tip generating work an employee performs (cleaning tables, etc.), so long as work is performed contemporaneously with (or within reasonable period of time of performing) tipped duties.
- Rule would eliminate some regulatory restrictions regarding tip pooling when employer does not take tip credit.
- Employers who do not take tip credit are permitted to include back-of-the-house employees (cooks, dishwashers) in tip pool.
- Existing rule prohibiting employers from keeping tips or participating in tip pooling arrangements remains intact.

DOL Proposed Rulemaking



The Fluctuating Workweek Method of Computing Overtime:

- If certain conditions are met, the DOL allows employer to pay “a fixed salary for fluctuating hours” and overtime at a half-time rate. The requirements to utilize this method are:
 1. an agreement with the employee to pay “a fixed amount” each week regardless of hours worked,
 2. that the employee’s hours fluctuate week to week,
 3. that the fixed amount will be greater than the minimum wage for all hours worked in any given week, and
 4. the overtime rate is equal to half of “the amount of the salary” divided by the total hours worked in a week.
- The definition of “fixed salary” and “amount of salary” has led courts to disagree on whether any additional compensation, including various types of bonuses, would negate an employer’s ability to use this method of overtime computation.

DOL Proposed Rulemaking



The Fluctuating Workweek Method of Computing Overtime:

- Under the proposed rule, five conditions must be met:
 - I. Employee's hours must fluctuate week to week;
 - II. Employee receives fixed salary that does not vary week to week;
 - III. Salary is sufficient to pay at least minimum wage for all hours worked;
 - IV. There is a clear and mutual understanding that the fixed salary is compensation for all hours worked each week – fixed salary excludes overtime premiums, bonuses, premium payments or any payment excluded from the regular rate; and
 - V. Calculation of the overtime rate will be equal to the amount of the fixed salary plus any bonuses, premium pay, or additional pay of any kind (unless excluded from the regular rate under Section 7(e)) earned in that week divided by total hours worked within the same week. The overtime premium will be equal to half of the overtime rate times the number of overtime hours worked.

DOL Proposed Rulemaking



Regular Rate Rule Proposal and the Current State

- Under the FLSA, employers must pay overtime of at least one and one-half times the “regular rate” of pay for hours worked beyond 40 in a workweek
- Regular rate includes: hourly wages and salaries for non-exempt workers, most bonuses, on-call pay, commissions
- In March 2019, the DOL proposed a rule clarifying the types of benefits that employers can exclude from the regular rate of pay
- The exclusion of these benefits in the regular rate will likely result in lower overtime calculations

DOL Proposed Rulemaking



Regular Rate Rule Proposal and the Current State

- Under the proposed rule, employers may exclude the following:
 - Cost of providing wellness programs, on site specialist treatment, gym access, and fitness classes
 - Payments for unused paid leave (including sick leave)
 - Reimbursed expenses, including travel expenses
 - Discretionary bonuses
 - Benefit plans
 - Tuition programs
- The proposed rule also clarifies other forms of compensation, such as pay for meal periods and “call back” pay
- Final rule under review by Office of Management and Budget

DOL Proposed Rulemaking



DOL Proposes its Own Joint Employer Rule:

- In March 2019, the DOL proposed test to determine whether businesses are joint employers (and share liability) for FLSA wage/hour violations
- Four-factor test used to determine whether potential joint employer has power to:
 - Hire or fire
 - Supervise and control schedule and working conditions
 - Determine rate and method of pay
 - Maintain worker's employment records
- Reserving right to control not enough; employer has to exert control
- Likely to result in fewer joint employer findings under the FLSA

Recent DOL Opinion Letters:



Classification of Gig Workers:

- In April 2019, the DOL issued opinion letter examining whether service workers for a virtual marketplace company (VMC) are employees or independent contractors.
- Opinion letter provides roadmap for online brokers of services provided by independent contractors to ensure they are not misclassified.
- A determination of gig workers' status under DOL guidelines is fact specific and can be complex; the opinion letter analyzed, among other factors, whether the service providers use the platform to engage directly with the consumer, and whether providers can offer services on competing VMCs.

Recent DOL Opinion Letters:



Classification of Gig Workers:

- The DOL noted that the touchstone of independent contractor vs. employee status is “economic dependence,” which is determined based on six factors:
 - Nature and degree of potential employer’s control;
 - Permanency of worker’s relationship with potential employer;
 - Amount of worker’s investment in facilities, equipment, helpers;
 - Amount of skill, initiative, judgment, or foresight required;
 - Worker’s opportunities for profit or loss; and
 - Extent of integration of worker’s services and potential employer’s business.

Recent DOL Opinion Letters:



Classification of Gig Workers:

- DOL determined service providers in question were independent contractors and not employees of the VMC.
- The DOL noted the business' "primary purpose" is not to provide services to end-market customers, but to provide a referral system that connects service providers with customers.
- DOL found the VMC did not seem to exert control over the service providers and did not have a permanent working relationship with the providers.
- It found the service providers had great opportunity for profit or loss depending on the jobs they chose, the platform they worked with, and whether they canceled jobs.

Recent DOL Opinion Letters:



Compensability of Sleep Time:

- Most long haul drivers are exempt from overtime under FLSA, but are not exempt from minimum wage requirements.
- In the past, this has led to liability for employers who failed to pay minimum wage for time spent in sleeper berth (sleeping quarters in truck) while on long haul duty.
- In July 2019, DOL issued opinion letter shifting burden to drivers to prove they were performing compensable work.

Recent DOL Opinion Letters:



Compensability of Sleep Time:

- Presumption is now that time spent in sleeper berth is non-compensable.
- However, driver may demonstrate he or she was “on duty” while in sleeper berth, making time compensable.
- Examples of compensable time: being on call, completing paperwork, studying job-related materials.
- Carriers must still comply with state laws that may differ and jurisdictions that do not adopt DOL opinion letter.

Exempt v. Non-exempt Status Under the FLSA:



- Most employees must be paid minimum wage and overtime of one and one-half times the regular rate of pay for all hours worked over 40 in a workweek.
- However, the FLSA provides an exemption from both minimum wage and overtime pay for employees working in an **executive, administrative, professional, or outside sales** capacity, and certain **computer employees**.
- Three Components Must be Met:
 1. **Salary Basis**
 2. **Salary Level**
 3. **Duties Test**

Salary Basis:



- “Salary basis” means the employee “regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” 29 C.F.R. § 541.602(a)

Salary Basis:



- Employee must receive full salary for any week in which the employee performs any work, regardless of number of hours worked, subject to several exceptions.
- Employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level.
- “An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis.” 29 C.F.R. § 541.603(a)

Salary Basis:



Salary Basis Exceptions – When deductions from pay may be made:

- An employee is absent from work for one or more full days for personal reasons.
- Absences of one or more full days due to sickness or disability, so long as the deduction is made pursuant to a bona fide plan, policy or practice.
- Penalties for infractions of safety rules of major significance.
- Unpaid disciplinary suspension of one or more full days for violations of workplace conduct rules or workplace violence policies.
- Unpaid leave under Family and Medical Leave Act.
- During initial/terminal weeks of employment.

DOL Safe Harbor Policy



- “Safe-harbor” policy can preserve the exemption even if improper deductions from salary
- “Safe harbor” policy provides for correcting and reimbursing improper deductions
- Must be clearly communicated and implemented

Salary Level:



Salary Level Requirement:

- Until January 1, 2020, the salary threshold for exempt employees is **\$455/week** or **\$23,660/year**
- After January 1, 2020, the salary threshold for exempt status increases to **\$684/week** (roughly **\$35,568/year**)

Duties Requirement – Executive Exemption:



- Paid on a salary basis;
- Primary duties are managing enterprise, or managing department or subdivision of enterprise;
- Customarily and regularly direct work of two or more full time employees; and
- Must have authority to hire or fire other employees, or the employee's suggestions as to hiring, firing, or other changes in employment status must be given particular weight.

DOL Exemptions – Primary Duty:



What is the primary duty?

- “Primary Duty” is the most important duty, under all of the circumstances.
- Fact sensitive - “Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.”
- The amount of time spent on exempt versus non-exempt work “can be a useful guide,” but is not dispositive.
- More than 50% of time on exempt work usually satisfies “primary duty” requirement. § 541.700.

Duties Requirement – Administrative Exemption:



- Paid on a salary basis;
- 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 the employer's customers; and
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Duties Requirement – Administrative Exemption:



- Definition: directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.
 - Examples: includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. § 541.201
- CAUTION: Not every employee in these areas is automatically exempt.

Duties Requirement – Professional Exemption:



- Paid on a salary basis
- Primary duty requires advanced learning
 - knowledge of an advanced type in a field of science or learning
 - customarily acquired by a prolonged course of specialized intellectual instruction – degree indicative, not always required
- Examples: the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status § 541.301(c)

Duties Requirement – Professional Exemption:



- Work must be predominantly intellectual in character and require the consistent exercise of discretion and judgment
- Additional examples:
 - Doctors, registered or certified medical technologists, physicians assistants, RNs, but not LPNs
 - CPAs and other accountants with similar duties, but not accounting clerks, bookkeepers or other employees who normally perform routine work
 - Lawyers, but usually not paralegals

Highly Compensated Employee Exemption



- Primary duty includes performing office or non-manual work;
- Employee receives total annual compensation of at least \$100,000 (after January 2020, this will increase to \$107,432); and
- Employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. 29 C.F.R. § 541.601

DOL Exempt Status Summary:



To Qualify as Exempt, an Employee Must:

- Be paid on a salary basis
- Be paid the right amount
- Perform the right duties

Sample Job Descriptions – Division Administrative Assistant (DAA)

Primary Duties:

- Correspondence, procedural problem solving, area of finance and meeting planning
- Performs or delegates all administrative duties (takes calls, greets visitors, etc.)
- Leads and oversees administrative team for Division: including interviewing, providing training, and guidance for Local Administrative Assistants (LAAs)
- Evaluate LAA performance reviews and coach LAAs
- Support the Division Manager, Assistant Division Manager and Safety Coordinator
- Provide administrative direction and training to sales representatives regarding policies and procedures
- Provide human resources, marketing, and sales support
- Implement and support Company's core policies

Sample Job Descriptions – Startup Technician Coordinator

Primary Job Duties:

- Direct and exercise control over operational, functional, and performance phases of tests
- Directs/coordinates engineering activities related to development, procurement, installation, and calibration of instruments, equipment, and control devices
- Schedule, coordinate and conduct startup tests on commercial and industrial machinery and equipment, controls, and systems, while avoiding overlap of like system in the event of another Startup Technician's absence
- Complete field alterations in control panels to meet code requirements and specifications, and to resolve system problems related to design
- Monitors and coordinates material returns and replacements as required by product specs and performance
- Promote sales and service agreements

Sample Job Descriptions – Startup Technician Coordinator

Primary duties, continued:

- Provides general technical assistance to sales staff to assist in labor quotes for startup and testing services
- Determines conditions under which tests are conducted and further determines sequences and phases of test operations
- Maintains and updates technical knowledge and skills regarding systems through factory representatives and training
- Confers with engineering and technical personnel to resolve testing problems, such as product or system malfunctions, incomplete test data, and data interpretation
- Analyzes and interprets test data, and prepares technical reports based on their analysis for use by engineering and management personnel
- Follows truck maintenance guidelines and maintenance of vehicle appearance based on company standards

Sample Job Descriptions – Startup Technician

Primary duties:

- Conducts startup tests on commercial and industrial machinery and equipment
- Completes field alterations in control panels to meet code requirements and to resolve system problems related to design
- Monitors and coordinates material returns and replacements as required by product specs and performance while maintaining proper tools and parts inventory in assigned vehicle
- Coordinates engineering activities concerned with development, procurement, installation, and calibration of instruments, equipment, and control devices required to test, telemeter, record, and produce test data for internal and external customers
- Provides general technical assistance to sales staff to assist in labor quotes for services;
- Determines conditions under which tests are to be conducted and sequences and phases of test operations
- Exercises control over operational, functional, and performance phases of tests
- Maintains and updates technical knowledge and skills regarding systems
- Confers with engineering and technical personnel to resolve testing problems, considering such factors as conditions under which test was conducted and instrumentation, procedures, and phase of test used to obtain and record data
- Provides general technical assistance to Startup Service Coordinators to facilitate time and materials management and manpower to complete work
- Analyzes and interprets test data and prepares technical reports for use by engineering and management personnel

Additional Guidance on Exemptions

DOL Opinion Letter on Highly Compensated Employee Exemption:

- In July 2019, the DOL issued an opinion letter addressing whether a trade organization's paralegals are exempt under the highly compensated employees exemption.
- Paralegals earned at least \$100,000 and were engaged in non-manual work.

Additional Guidance on Exemptions

Primary job duties of paralegals:

- Keep and maintain records
- Prepare and distribute notices
- Prepare and submit music licensing and annual state registration reports
- Assist finance department with bank account matters
- Maintain legal department budget
- Assist with real estate matters
- Assist with annual audits
- Help to form new entities and maintain existing entities
- Prepare legal department training seminars
- Liaise between in-house and outside counsel
- Notarize documents

Additional Guidance on Exemptions

Analysis of Paralegal's Exempt Status:

- In its opinion letter, the DOL instructed that because a high level of compensation is a strong indicator of an employee's exempt status, the highly compensated employee exemption eliminates the need for a detailed analysis of an employee's job duties.
- The DOL found that the paralegals appeared to satisfy the highly compensated employee exemption:
 - they earned the requisite salary;
 - they performed non-manual duties; and
 - they customarily and regularly performed at least one exempt duty of an administrative employee, including: keeping and maintaining corporate and official records, assisting the finance department with bank account matters, and budgeting.

Key Takeaways

Advice to employers:

- It is important to conduct an audit to ensure employees are properly classified, particularly following the DOL's new rule that raises the salary threshold for FLSA exemptions.
- This is also a good time to analyze job descriptions and take a close look at an employee's job duties in comparison to DOL guidelines.
- Determine whether to re-classify employees, increase salaries, or consider alternative compensation methods.

Questions?

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