Department of Labor
New Overtime Rule

Key Provisions
for
Your Business

September 2016

This summary aims to help MHI members understand how the new wage and hour changes affect them, but also suggests what actions can be taken to help with compliance. Please note – each state has its own wage and hour laws, and some cities have adopted wage and hour laws, as well. Businesses must comply with the Fair Labor and Standards Act ("FSLA") plus any state or local laws that apply in each location where employees are working. ***This guidance does not constitute legal advice, and MHI strongly encourages that you consult with payroll specialists, human resource professionals, or an attorney for advice on your specific business.***

Key Points

There are seven things you need to know about the new Department of Labor ("DOL") rule on overtime:

- The effective date of the new rule is December 1, 2016.
- The salary threshold for Exempt Employees is increased to $913/week ($47,476 per Year).
- The salary threshold for "Highly Compensated Employees" is increased to $134,004 annually.
- In order to meet the threshold, up to 10% of an Exempt Employee's salary can come from bonuses or commissions.
- There will be an automatic salary threshold increase every 3 years.
- The "Duties Test" to establish who is an Exempt Employee remains unchanged.
- For **retailers**, the new rule does not seem to impact the manufactured home retail sales exemption.
- For **communities**, the new rule also does not seem to impact credit toward employee wages for lodging.

Background

In July of 2015, MHI joined the Partnership to Protect Workforce Opportunity ("PPWO"), a coalition of organizations opposing a new overtime rule being proposed by DOL. In essence, the new rule would, amongst other things, double the salary threshold required for an employee to meet the overtime exemption under the FLSA.

Enacted in 1938, the FSLA established the maximum number of hours for the regular workweek (currently 40 hours) as well as the eight hour workday. It also created the national minimum wage and set the requirement of overtime pay. Finally, the FSLA provided exemptions for salaried executive, administrative, professional and highly compensated employees, as well as employees in certain sales roles ("Exempt Employees").

Prior to issuance of the final rule, MHI signed onto four coalition letters, including a comprehensive comment letter to DOL. MHI staff also attended a DOL field hearing on the matter and reached out to state MH organizations encouraging them to file comment letters via the PPWO's web site.

In May of this year, DOL issued its new rule regarding overtime pay under the FLSA. The new rule established by the DOL makes several changes to how Exempt Employees are defined and treated under the FSLA.

After the final rule was issued in 2016, MHI continued to work within the PPWO by lobbying Congress for legislation to repeal DOL's administrative action. Legal action by PPWO member organizations is expected.

In the event legal action and/or legislation is unsuccessful, MHI is preparing a compliance guide for use by member organizations.

What You Need to Know

Effective December 1, 2016, the minimum salary at which a full-time salaried worker can be exempt from overtime rules increases to $47,476 annually or to $913 weekly. This change means that if you have an employee currently exempt and paid at annual salary less than $47,476, that employee is now eligible for overtime when working over 40 hours per week. You may credit nondiscretionary bonuses and incentive payments toward the threshold, however, such payments must be paid at lease quarterly.

For example, if you have an assistant manager currently classified as exempt (not eligible for overtime) with an annual salary of $30,000, on December 1, 2016, that employee will become eligible for overtime pay when working over 40 hours per week.

> **The purpose of this specific summary is to focus on the new salary thresholds and the implications for paying overtime under the new threshold.**
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> **The "Duties" required for an employee to be exempt have not changed and vary based upon whether the employee exemption being applied is executive, administrative or professional.**
>
> **State and local wage and hour laws remain unchanged.**
>
> **This guidance does not constitute legal advice, and it is strongly encouraged that you consult with payroll specialists, human resource professionals, or an attorney for your specific business.**

Practical Considerations to Comply with the New Rules

1. Identify salaried employees in your organization that currently make less than $47,476 per year (or $913 weekly). Create a plan for these employees, noting outcomes may vary by employee. The rules require weekly compliance. Thus, an employer cannot average hours over a month.

2. Determine the actual hours worked per week for these employees. This step is absolutely critical to understanding the potential economic impact of the new rules.

3. Based upon your findings of the actual hours worked, **determine the appropriate hourly rate for affected employees**.

4. Talk to your employees. One significant outcome of the rule is to be ready to discuss pay and compensation with employees. Some of these conversations may be uncomfortable, because employees may not understand why these changes are necessary.

For example, a trusted exempt employee who gets reclassified to non-exempt might feel slighted for being required to track hours worked and overtime.

This also becomes very important as procedures are established for who may approve overtime hours in advance.

5. Tracking, tracking, and more tracking. These new rules may result in reclassifying many exempt employees to non-exempt and begin paying them on an hourly basis (or salaried basis) plus overtime. Tracking these newly classified employees' hours as evidence of compliance will protect your business in the event of a "wage and hour audit" by the regulators.

6. The FSLA still allows credit toward employee wages for employer provided housing. This remains unchanged under the new overtime rule. However, like crediting bonuses, this is a bit tricky. For instance, the credit should be based upon "reasonable cost" which is "not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees." In other words, "reasonable cost" "does not include a profit to the employer."

Please consult the DOL's Wage and Hour Division Field Assistance Bulletin 2015-1 (12/17/2015) for further information regarding compliance.

Realistically, the most likely outcomes of the new threshold effective in December will result in some combination of the following outcomes for most businesses:

- Keep salaries the same, and eliminate or reduce overtime. But, tracking of hours and overtime is critical.
- Raise salaries to the new minimum, allowing unpaid overtime of qualified employees.
- Keep salaries the same, pay overtime. This is financially beneficial if overtime is limited or irregular and current pay is at the low end of the present minimum. Again, tracking of overtime is critical.
- Lower wages, pay overtime. While expenses may stay the same, disgruntled employees may increase the risk of turnover.
- Hire more employees. The regular need for overtime from current employees may suggest the need to hire additional hourly workers to pick up the extra hours.
- Utilize independent contractors for specific tasks which otherwise would be completed with employee overtime.

Example of Compensation Formula

Name	Current Salary	Hours Worked	New Annual Pay Under New Rule	Increase
Bob	$30,000	48 hours/week	$38,998	$8,998
Tim	$40,000	50 hours/week	$55,002	$15,002
Beth	$24,000	40 hours/week	$24,000	--
Alice	$45,000	44 hours/week	$51,750	$6,750
Total	$139,000		$169,750	$30,750

In the chart above, three employees will now account for a $30,750 increase in your payroll expense.

Let's look more closely at Bob. He is currently an exempt employee with an annual salary of $30,000 who routinely works 8 hours of overtime. Under the new rules, here are the most common choices an employer has:

1. Increase Bob's salary to $47,476 and not worry about tracking overtime hours.
2. Reclassify Bob to non-exempt (hourly) and do not allow him to work overtime. You must still pay him if he works unauthorized overtime so tracking his time is critical. Not allowing him to work overtime means you lose 8 hours of work.
3. Reclassify, or not, without calculating a new proper rate and see your expense grow by $8,998.
4. Reclassify from salaried to hourly and adjust the hourly rate to reflect the expected overtime.

> **Note: Other options may exist beyond the four presented. Contact your legal counsel or employment specialist for other options that could work for your business.**

Assuming that you are trying to keep your expenses (relatively) flat, let's examine Option #4 and how to calculate a new hourly rate for Bob.

The basic formula is as follows:

[Overtime hours x (1.5x New Rate)] + (40 hours x New Hourly Rate) = same approx. weekly pay

$30,000 annual salary / 52 weeks = $576.92 per week
40 hours, plus 8 hours of overtime

- If you only divide by 40 hours, you end with increased costs as shown in the chart above.

Dividing by the total 48 hours gets you closer, but is still incorrect because it fails to account for the fact that 8 hours will be at 1.5x of the hourly rate. However, it is a starting place from which you can subtract down, and work through the formula. For example:

$576.92 / 48 hours = $12.02 standard hourly
1.5 x $12.02 = $18.03 for overtime rate

[(8 hours x $18.03) = $144.24] + [(40 hours x $12.02) = $480.80] = $625.04 weekly pay

But, that represents an increase of $48.12 per week. Let's subtract $1.00 from the $12.02 calculated standard rate and see what happens:

$12.02 - $1.00 = $11.02 standard hourly
1.5 x $11.02 = $16.53 for overtime rate

[(8 hours x $16.53) = $132.24] + [(40 hours x $11.02) = $440.80] = $573.04 weekly pay

In reality, through trial and error, the proper rate to keep Bob's weekly pay close to $576.92 is $11.09 and an overtime rate of $16.64:

[(8 hours x $16.64) = $133.12] + [(40 hours x $11.09) = $443.60] = $576.72 weekly pay

Again, it is critically important to talk to your employees to help them understand any potential changes to their circumstances. It is vital to know the hours they are working, and to be very clear about who may authorize overtime so that you can forecast your payroll expenses. You still must pay for any unauthorized overtime your employee works.

For Further information on DOL's new overtime rule, please feel free to contact Rick Robinson, MHI General Counsel and Sr. VP for State and Local Affairs at rrobinson@mfghome.org.