

New Overtime Rules

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Overview

Fair Labor Standards Act of 1938

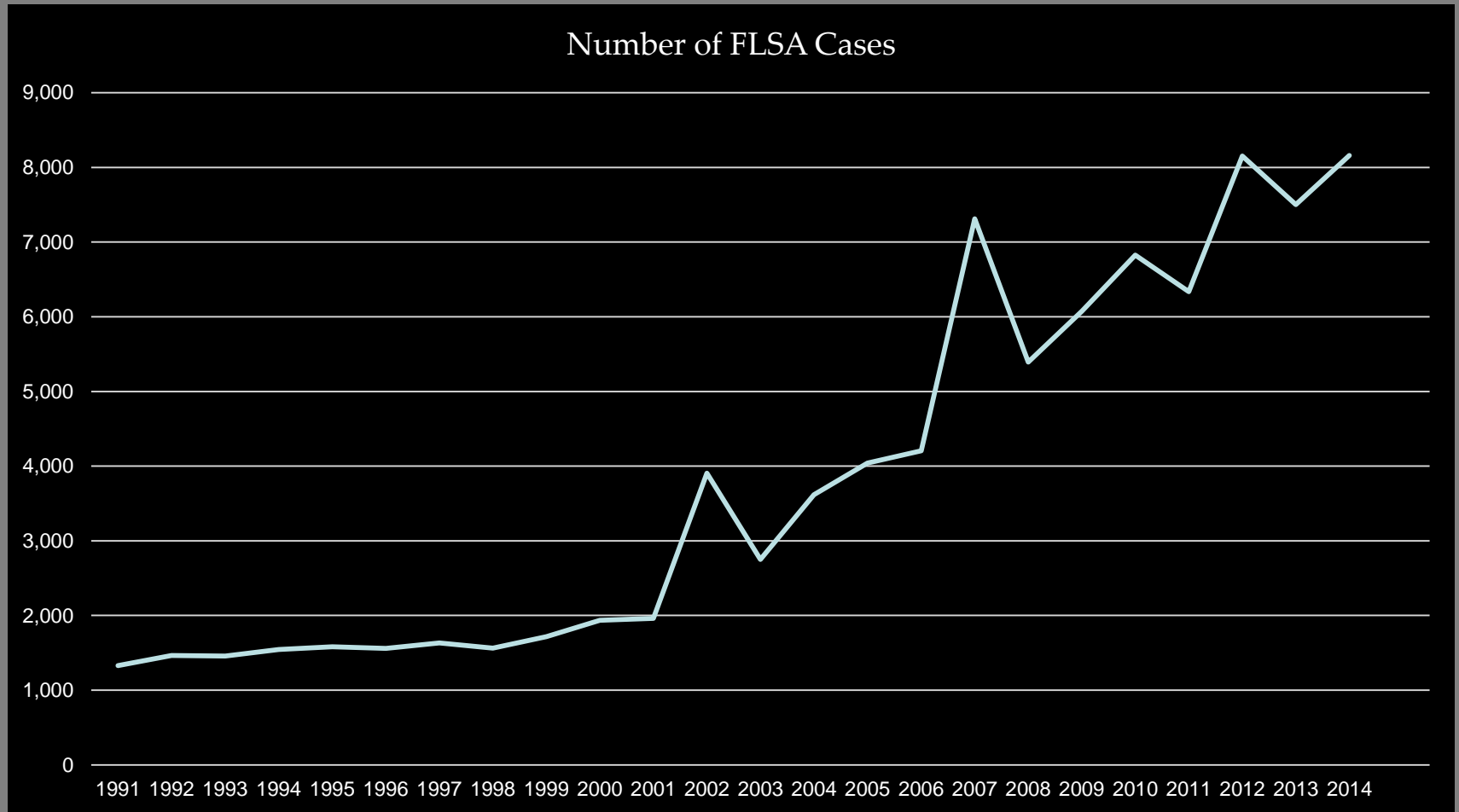
- Exemptions (and anticipated changes)
- In May 2014, President issued memo directing Secretary of Labor to “modernize and streamline” overtime rules.

Overview

Fair Labor Standards Act of 1938

- DOL released proposed regulations in June 2015.
- DOL released final regulations in May 2016.
- Lawsuits
- “Sharing Economy” e.g., Uber

FLSA Lawsuits



FLSA Lawsuits

Causes of the more than 600% increase since 1991

- Law is complex, vague, and antiquated
- Interpretation shifts with political winds
- Greater awareness of rights
- Plaintiff attorney's fee awards
- Collective actions

Fair Labor Standards Act

Assuming employer coverage and employee status

- Minimum wage (\$7.25/hour)
- Overtime pay (if more than 40 hours worked in workweek)
- Exemptions from minimum wage and/or overtime
- Recordkeeping, especially hours worked by nonexempt employees

Exemptions

“White Collar” Exemptions:

- Executive
- Administrative
- Professional
- Certain computer employees

Other Exemptions

- Employees working in specified industries such as transportation, bulk oil distribution, hospitals, seasonal businesses, communications and agriculture;
- Employees performing specific types of work, such as commissioned retail salespersons, fishers, taxicab drivers and newspaper delivery persons;
- Casual baby sitters and companions for disabled and elderly persons; and
- Employees working under special certificates, such as full-time students, learners, apprentices and disabled employees.

Special Exemptions for Schools and Colleges

- School administrative personnel, teachers, and student workers are exempt from FLSA's overtime and minimum wage rules under special exemptions for schools and colleges.
- For the special administrative exemption from FLSA's minimum wage and overtime rules to apply, certain conditions have to be met.

Consequences of Violation

- Liability for unpaid overtime and/or minimum wages within limitations period.
 - Two years
 - Three years if the violation is “willful”
- Liability for “liquidated damages” equal to above amount (essentially double damages).

Consequences of Violation

- Court can reduce or eliminate liability for “liquidated damages” if the employer demonstrates it acted in “good faith” and had “reasonable grounds” to believe it was not in violation.
- Reasonable attorney’s fees, and costs

Common Misconception

Salaried” = Exempt

Not always true!!!!!!!!!!!!

Payment on a salary basis alone is not sufficient to establish an exemption.

What are the tests for the “White Collar “ Exemption?

Generally, three tests must be satisfied in order to prove an exemption:

1. Primary duty
2. Manner of compensation - payment of a “salary” is usually required, and
3. Amount of compensation

New regulations do change #3, but it does not change #1.

Test 1 - Primary Duty

The principal, main, major or most important duty that the employee performs.

How is this determined?

Proportion of time spent or otherwise?

Executive Primary Duty

- Managing the enterprise or a customarily recognized department or subdivision,
- Customarily and regularly directing the work of at least 2 full-time employees or the equivalent,
- Have the authority to hire or fire or recommendations are given particular weight.

Administrative Primary Duty

- Performance of office or non-manual work directly related to management or general business operations, e.g.,
 - Tax, finance, accounting, auditing, budgeting, insurance, marketing, advertising, human resources, public and governmental relations, legal and regulatory compliance, computer network, internet and database administration,
 - Not production workers.

Administrative Primary Duty, continued

- Exercise of discretion and independent judgment with respect to matters of significance:
 - Consideration of possibilities and choice or action free from immediate direction or supervision,
 - High level of importance or significance, not just risk of loss,
 - Not skill in application of standards,

Administrative Exemption Examples

- Insurance claims adjusters
- Certain financial services industry workers (not if primarily selling)
- Team leader on major projects (purchasing or selling a business, negotiating real estate purchase)
- HR managers
- Some systems analysts and computer programmers

Professional Primary Duty

Learned Professional:

- Performance of work requiring advanced knowledge in a field of science or learning,
- Customarily acquired by a prolonged course of specialized intellectual instruction, and
- Consistent exercise of discretion and judgment.

Professional Exemption Examples

- Commonly exempt professionals:
 - Lawyers, teachers, accountants, pharmacists, engineers, actuaries, certified athletic trainers, chemists, chefs, etc.
- Not exempt:
 - Licensed practical nurses, bookkeepers, cooks, paralegals, engineering technicians

Exempt Computer Primary Duty

- The application of systems analysis techniques and procedures, including consultation with users, to determine hardware, software or system functional specifications.

Exempt Computer Primary Duty, continued

- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications,

Exempt Computer Primary Duty, continued

- The design, documentation, testing, creation or modification of computer programs related to machine operating systems,
- A combination of the above which requires the same level of skills, and
- Not repair, help-desk, or CAD workers.

Outside Sales Primary Duty

- Making sales / obtaining orders or contracts for services or facilities,
- Customarily and regularly engaged away from the employer's place of business in performing the primary duty ,
 - not sales made by mail, telephone or the internet unless merely an adjunct to personal calls.

“Highly Compensated” Test

- Performs office or non-manual work.
- Be guaranteed total compensation of at least \$100,000 per year, which includes minimum of \$455 per week on salary basis.
- Customarily and regularly performs one or more exempt duties of an executive, administrative or professional employee.
- Does not apply to computer exemption.

“Highly Compensated” Test

- An employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

Test 2 - Manner of Compensation

- **Salary basis:**
 - Predetermined amount not subject to reduction because of variations in the quality or quantity of work performed.

Test 2 - Manner of Compensation

- **Salary basis, continued:**
 - Unless a specific exception applies, must pay the full salary for any workweek in which the employee performs any work.
 - Need not pay for any workweek when no work is performed.

Test 2 - Manner of Compensation

- **Salary Basis – Permitted Deductions:**
 - Full day absences for personal reasons other than sickness or disability.
 - Full day absences due to sickness or disability under a bona fide system for replacement wages.

Test 2 - Manner of Compensation

- **Salary Basis – Permitted Deductions, continued:**
 - To offset amounts received as jury fees, witness fees or military pay.
 - Penalties imposed in good faith for violating safety rules of major significance.

Test 2 - Manner of Compensation

- **Salary Basis – Permitted Deductions, continued:**
 - Full day disciplinary suspension imposed in good faith for violations of written workplace conduct rules.
 - Proration in first or last week.
 - Unpaid FMLA leave.

Test 2 - Manner of Compensation

- **Fee Basis – Professional and Administrative (can be problematic when determining whether the amount is sufficient).**
- **Different rule for Outside Sales both as to manner and amount.**

Test 3 - Amount of Compensation

Current Minimum Levels

- Salary or Fee Basis - \$455/week or \$23,660/year.
- Highly Compensated Employees - \$100,000/year (and \$455/week salary).
 - Easier primary duty test; at least one customarily and regularly

White Collar Employee Exemption Summary

- Employers must pay overtime to white-collar employees who earn less than the required compensation regardless of employees' job duties and responsibilities.
- Employees who are employed primarily in a white-collar position and are compensated on a salary basis that is less than the minimum required amount must be paid overtime if they work more than 40 hours in a workweek.

Final Changes to Exemptions

- Peg minimum salary to that of the 40th percentile of full-time workers.
- Peg amount necessary to be a highly compensated employee to the annualized earnings of the 90th percentile of full-time workers.
- Establish a mechanism for automatic updates.

Final Changes to Exemptions

- Minimum salary expected to more than double to **\$913/week** or **\$47,476/year** .
- Annual compensation of approximately **\$134,004** necessary to qualify as a highly compensated employee.

Final Changes to Exemptions

The required compensation equivalent amounts for employees who are paid for periods that are longer than one week are:

- \$1,826 for employees who are paid biweekly,
- \$1,978 for employees who are paid semimonthly, and
- \$3,956 for employees who are paid monthly (Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer).

Final Changes to Exemptions

- Employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level.
- Such payments may include, for example, nondiscretionary incentive bonuses tied to productivity and profitability.
- For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, the
- Such payments to be paid on a quarterly or more frequent basis and permits the employer to make a “catch-up” payment.

Final Changes to Exemptions

- An automatic updates to both salary thresholds. Updates occur every three years beginning January 1, 2020.
- The standard exemption salary threshold will rise to the 40th percentile of full-time salaried workers in the lowest-wage Census region.
- At this time, it is estimated the threshold would be approximately \$51,000 in 2020.
- The HCE threshold will increase to the 90th percentile of full-time salaried workers nationally, which is currently estimated to be approximately \$148,000 in 2020

Why the Increase?

- Last increase in 2014, before that 1975
- According to DOL:
 - “The lapses between rulemakings have resulted in salary levels that are based on outdated salary data and thus ill-equipped to help employers assess which employees are unlikely to meet the duties for exemptions.”

Final Changes to Exemptions

- Nearly 5 million workers now properly classified as exempt will be eligible for OT (unless their pay is increased to meet new test).
- What else happens then?

Impact

- The above substantial increase in the salary threshold for exempt employees will result in many employees who had been considered exempt (and not entitled to overtime pay) being re-designated as non-exempt.
- This will result in the need to pay overtime for any hours worked in excess of 40 hours per week. It will also result in increased recordkeeping obligations for employers, who must now track and record the hours of the formerly exempt, but now non-exempt, employees.

Impact

- Employers have a wide range of options for responding to the changes to the salary level. Employers can choose the one that works best for them. Options include:
 - Raise salary and keep the employee exempt from overtime
 - Pay overtime in addition to the employee's current salary when necessary
 - Evaluate and realign hours and staff workload
 - Determine how reclassification of some employees as nonexempt employees will affect their eligibility for employee benefits offered by the employer.

Impact

- It is important under these new regulations for employers keep certain records to ensure that workers get paid the wages they earn and are owed.
- It's up to the employer to choose the method that works best for them and the needs of their workforce.
- There's no requirement that employees "punch in" and "punch out."
- Employers have flexibility in designing systems to make sure appropriate records are kept to track the number of hours worked each day.

Future??????????

- Trump favors a small-business exemption.
- Legislation has been introduced to phase in the overtime rule over four years for all employers and eliminate the automatic triennial increase of the exempt salary threshold.
- A proposal has been passed by the House to delay the effective date but has not yet passed the Senate.

Future??????????

- .Another possibility is for the Trump administration could direct the DOL to withdraw the rule, which would require notice-and-comment rulemaking.
- Or the administration might go through notice-and-comment rulemaking to do away with the automatic increase, if congressional and legal challenges of it fail.

Questions????????????

Contact Information

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