

**GUIDANCE FOR LIBA
MEMBERS ON THE NEW
OVERTIME RULE**



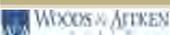
**LINCOLN INDEPENDENT BUSINESS ASSOCIATION
BIZCO TECHNOLOGIES
SEPTEMBER 22, 2016**

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AGENDA

1. Review of overtime requirements.
2. Key provisions of the new overtime rule.
3. Preparing for the impact of the new overtime rule.



3

REVIEW OF OVERTIME REQUIREMENTS

- The Fair Labor Standards Act of 1938
- Depths of the Great Depression
- Federal minimum wage, overtime, child labor
- Intended to reduce unemployment – overtime

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REVIEW OF OVERTIME REQUIREMENTS

FLSA requires payment of overtime at 1.5 regular hourly rate for all hours worked **in excess of 40** in workweek (typically seven consecutive days)

- **UNLESS SPECIFICALLY EXEMPTED.**

Exemptions are numerous and complex.

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REVIEW OF OVERTIME REQUIREMENTS

Common overtime exemptions:

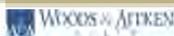
“White Collar” (Executive, Administrative, Professional, Outside Sales, and Computer-Related Occupations)

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REVIEW OF OVERTIME REQUIREMENTS

To qualify for "White Collar" Exemptions:

- Paid minimum salary level
- Paid on salary basis
- Duties test

 7

EXECUTIVE DUTIES

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision.
- Customarily and regularly directs the work of two or more other employees.
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight.

 8

20% OWNER EXECUTIVES

- The executive exemption also includes employees who:
 - Own at least a bona fide 20-percent equity interest in the enterprise.
 - Are actively engaged in management of the enterprise.
- The salary level and salary basis requirements do not apply to exempt 20% equity owners.

 9

ADMINISTRATIVE 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 includes the exercise of discretion and independent judgment with respect to matters of significance.

PROFESSIONAL DUTIES

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
- Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

OUTSIDE SALES DUTIES

- Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities.
- Employee must be customarily and regularly engaged away from the employer's place of business.

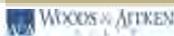
COMPUTER-RELATED OCCUPATIONS DUTIES

- Must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field; and
- Primary duty must consist of:
 - Application of system analysis techniques and procedures;
 - Design, development, documentation of computer systems or programs related to user or system design specifications or related to machine operating systems.

 13

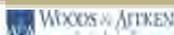
SALARY BASIS TEST

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis).
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed.
- Need not be paid for any workweek when no work is performed.

 14

DEDUCTIONS FROM SALARY

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the employer.
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

 15

PERMITTED SALARY DEDUCTIONS

There are five (5) exceptions from the “no pay-docking” rule.

1. Absence from work for one (1) or more full day(s) for personal reasons, other than sickness or disability.
2. To offset amounts received as payment for jury fees, witness fees, or military pay.
3. Unpaid disciplinary suspensions.

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PERMITTED SALARY DEDUCTIONS
(Cont.)

4. Proportionate part of full salary for time actually worked in the first and last weeks of employment.
5. Unpaid leave taken pursuant to the Family and Medical Leave Act.

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REVIEW OF OVERTIME REQUIREMENTS

MUST satisfy all three tests if “white collar” exempt.

Except:

- Computer professionals not required to meet salary test if paid at least \$27.63 per hour.
- Doctors, attorneys, teachers, and outside sales employees not required to meet salary tests.

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OVERTIME EXCEPTION FOR RETAIL COMMISSIONED SALES EMPLOYEES

Employees of a retail or service establishment who are paid more than half their total earnings on a commission basis may be exempt from the overtime pay requirements of the FLSA.

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RETAIL ESTABLISHMENT

Retail and service establishments are defined as establishments 75% of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

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REQUIREMENTS FOR EXCEPTION

- The employee must be employed by a retail or service establishment.
- More than half the employee's total earnings in a representative period must represent commissions on goods or services.
- Employee's total compensation divided by number of hours worked or regular rate must exceed one and one-half times the minimum wage.

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REQUIREMENTS FOR EXCEPTION

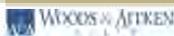
Unless all three conditions are met, the exception does not apply, and overtime premium pay must be paid for all hours worked over forty in a workweek at one and one-half times the regular rate of pay.

 22

KEY PROVISIONS OF NEW RULE

To qualify for "White Collar" Exemptions:

- Paid *minimum salary level* (change)**
- Paid on salary basis
- Duties test

 23

KEY PROVISIONS OF NEW RULE

Effective **December 1, 2016**:

1. Increases minimum salary level for white collar exemptions.
2. Non-discretionary bonuses to satisfy up to 10% of required standard salary level for white collar exemptions.
3. Salary levels automatically escalate.

 24

KEY PROVISIONS OF NEW RULE

Current Minimum Salary Level
\$455 per week
(equivalent to \$23,600 per year)



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KEY PROVISIONS OF NEW RULE

New Minimum Salary Level
\$913 per week
(equivalent to \$47,476 per year)



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MINIMUM SALARY LEVEL: \$913

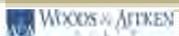
- ❑ For most employees, the minimum salary level required for exemption is \$913 per week.
- ❑ Must be paid "free and clear."
- ❑ The \$913 per week may be paid in equivalent amounts for periods longer than one week.
 - Biweekly: \$1,826
 - Semimonthly: \$1,978.16
 - Monthly: \$3,956.33

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KEY PROVISIONS OF NEW RULE

New – Non-Discretionary Bonuses May Satisfy up to 10% of Salary Level for White Collar Exemptions

Nondiscretionary bonuses (incentives, commissions, bonuses for meeting set production goals, retention bonuses, commissions bayed on a fixed formula) are forms of compensation promised in advance to employees (typically used to motivate employees to work more efficiently).

 28

NONDISCRETIONARY BONUSES

- May be used to satisfy up to 10% of the standard salary level.
 - Minimum of 90% (approx. \$822) of standard salary level must be paid as a weekly salary.
- Payments must be paid on a quarterly or more frequent basis.

 29

CATCH-UP PAYMENTS

- If an employee does not earn enough from the nondiscretionary bonus, commission, or incentive payments in a given quarter to meet the standard salary level – an employer may make a “catch-up” payment within one pay period of the end of the quarter.
- Any such “catch-up” payment will count only toward the prior quarter’s salary amount and not toward the salary amount in the quarter in which it is paid.

 30

KEY PROVISIONS OF NEW RULE

New: Automatic escalating provision.

Purpose: Continue to make clear who is *bona fide* exempt and who is not.

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KEY PROVISIONS OF NEW RULE

New - Automatic Updates

- Beginning January 1, 2020, and every three years thereafter, the standard salary level and the annual compensation level for HCEs will be automatically updated.
- Secretary will publish new levels in Fed. Reg. at least 150 days prior to going into effect.

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KEY PROVISIONS OF NEW RULE

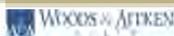
New - Automatic Updates to Standard Salary Level:

- Level based on 40th percentile of weekly earnings for full-time salaried workers in the lowest Wage-Census Region (captured from the 2nd quarter of the year prior to the update per BLS).

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HIGHLY COMPENSATED EMPLOYEES (HCE)

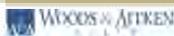
- ❑ HCEs must continue to receive at least the full standard salary level amount (\$913 per week) each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. *(No Change to this principle.)*
- ❑ Nondiscretionary bonuses and incentive payments (including commissions) may be counted towards the highly compensated employees' total annual compensation requirement (\$134,004). *(No Change to this principle.)*
- ❑ The HCE test *does not* allow employers to credit nondiscretionary bonuses or incentive payments (including commissions) towards the standard salary level weekly requirement.

 34

PREPARING FOR IMPACT

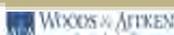
STRATEGY

1. Educate management and key personnel on the rule and payroll impact.
2. Upper level management develops a response plan.
3. Communicate to and train management regarding plan implementation.
4. Communicate changes to employees.
5. Train affected employees.
6. Compare plan expectations to realities.

 35

PREPARING FOR IMPACT

1. Identify all "targeted" employees:
 - ❑ Paid less than \$913/week (\$47,476 annual)
 - ❑ Paid on a salary basis without overtime (i.e., not reporting actual hours worked)

 36

PREPARING FOR IMPACT

- Determine** how many OT hours each target employee works.
- Choose** a method of compliance for each target employee.



37

PREPARING FOR IMPACT

Options for each employee identified:

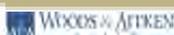
- Increase salary to new level.**
 - Satisfaction of **duties** and **salary basis** tests.




38

PREPARING FOR IMPACT

- Increase salary to new level.**
 - Hidden costs:**
 - Retirement plan.
 - Ripple effect.
 - Balancing costs:**
 - Downsize employee count.
 - Increase operational efficiency.
 - Reduce other spending.



39

PREPARING FOR IMPACT

Options for each employee identified:

2. Keep at same salary and pay overtime

- Limit overtime.
 - Reallocate work duties.
 - Train supervisors regarding work scheduling and planning.
- Employee recordkeeping.

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PREPARING FOR IMPACT

Options for each employee identified:

3. Convert salaried employees to hourly.

- Need good estimate of OT hours worked.
- Calculate the regular hourly rate.

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PREPARING FOR IMPACT

Calculating regular hourly rate **Option A:**

Current salary: \$35,013
2,080 regular hrs per year (40 hours week x 52 weeks)
460 OT hrs (46 weeks x 10 hrs OT per week)
460 OT hrs x 1.5 (OT rate) = 690 regular (straight time) hrs

2,080 regular hrs + 690 regular hrs = 2,770 straight time hrs

\$35,013 / 2,770 total hrs = **\$12.64 regular hourly rate**

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PREPARING FOR IMPACT

Calculating regular hourly rate **Option A:**

\$12.64 regular hourly rate +
460 anticipated OT hours (new hourly
rate + OT) = Current salary \$35,013



43

PREPARING FOR IMPACT

Calculating regular hourly rate **Option B:**

Current salary: \$35,013/
 2,540 hrs per year (460 OT hrs) =
\$13.78 regular hourly wage

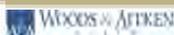


44

PREPARING FOR IMPACT

Calculating regular hourly rate **Option B:**

\$13.78 regular hourly wage (2080 hrs)
+ anticipated OT (\$13.78 x 1.5 x 460
 hrs) = **\$38,170 > Current salary \$35,013**

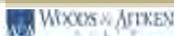


45

PREPARING FOR IMPACT

Calculating regular hourly rate **Option C:**

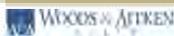
Current salary: \$35,013/
2,080 hrs per year (40 hrs per week) =
\$16.83 regular hourly wage

 46

PREPARING FOR IMPACT

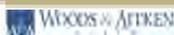
Calculating regular hourly rate **Option C:**

\$16.83 regular hourly wage (2080 hrs) +
(\$16.83 x 1.5 x 460 OT hrs) =
\$46,619 > Current salary \$35,013

 47

PREPARING FOR IMPACT

- Option A:** Employee must work 460 OT hours to maintain same salary.
- Option B:** Employee works 460 OT hours for same pay but increases pay by extra ½ hourly rate for each OT hour worked.
- Option C:** Employee works no OT for same salary, pay increase at 1.5 hourly rate for each OT hour worked.

 48

PREPARING FOR IMPACT

Converting salaried employees to hourly:

- Option A:
 - same labor cost
 - morale concerns

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PREPARING FOR IMPACT

Converting salaried employees to hourly

- Options B and C: Increased labor costs
 - Hire additional workers to limit OT?
(DOL intent)



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PREPARING FOR IMPACT

Clearly articulate requirements if converting to hourly.

- Tracking all hours worked each day.
- On-call time.
- Telecommuting, emails, and devices.
- Preparatory activities.
- Travel time.
- Pre-authorization to work overtime.

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WAITING TIME

- Almost always counted as hours.
- Even when not able to use time effectively.
- Must relieve from duty or send home.

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MEAL AND REST PERIODS

- Meal periods are not hours worked when the employee is relieved of duties for the purpose of eating a meal.
- Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid.

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ON CALL TIME

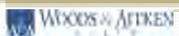
- ☐ **Compensable Time**
 - Employee is required to be on the employer's premises or so close thereto that employee cannot use time for employee's own purposes.
- ☐ **Noncompensable Time**
 - Employee is merely required to carry a "beeper" or leave word at home or with employer where employee can be reached.

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TRAINING TIME

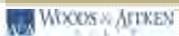
Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless:

- Attendance is outside regular working hours.
- Attendance is voluntary.
- The course, lecture, or meeting is not job related.
- The employee does not perform any productive work during attendance.

 55

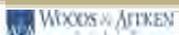
TRAVEL TIME

- Ordinary home to work travel is not work time.
- Travel between job sites during the normal work day is work time.
- Special rules apply to travel away from the employee's home community.

 56

THE FLSA DOES NOT REQUIRE:

- Vacation, holiday, severance or sick pay.
- Premium pay for weekend or holiday work.
- Pay raises or fringe benefits.

 57

ENFORCEMENT:

- FLSA enforcement is carried out by Wage and Hour Division.
- A two-year statute of limitations applies to recovery of back pay.
- Wage and Hour Division may bring suit for back wages and liquidated damages.
- Employee may bring suit for back pay, liquidated damages and attorney's fees plus court costs.
- Double the amount of unpaid back wages.

QUESTIONS?

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