When Taking Care of Business Requires Working Overtime

Responding to the Department of Labor's New Overtime Pay Obligations – A Guide for Broadcasters

Sponsored by the National Alliance of State Broadcasters Associations

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NASBA National Alliance of State Broadcasters Associations

The Fair Labor Standards Act's Overtime Rule

- Employers must pay employees an overtime rate of 1.5 times their regular rate of pay for all hours worked above 40 hours per workweek.
- FLSA exempts from overtime certain classes of employees who are:
  - Paid on a salary basis;
  - Meet a specific salary threshold; and
  - Meet specific "white collar" duties tests.

Obama Administration Overtime Requirements

- The Obama Administration previously published regulations that would have:
    - More than doubled the minimum salary level requirement for the white-collar exemptions;
    - Increased the minimum salary level for the highly compensated employee exemption by a third; and
    - Instituted automatic increases every three years.
- November 22, 2016, just nine days before the regulations were to become effective, a U.S. District Court in Texas issued a nationwide preliminary injunction against enforcement of the 2016 Final Rule, followed by a permanent injunction on August 31, 2017.
- On September 24, 2019, the Trump Administration published a long-awaited Final Rule formally rescinding the Obama Administration’s Final Rule.

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DOL Adopts New Overtime Requirements

- The increases under the Trump Administration's Final Rule are much more modest.
- The 2019 Final Rule increases:
  - Standard Salary Level: Executive, Administrative, and Professional ("EAP") employees must receive a guaranteed weekly salary of at least $684 ($35,568 annually) to be exempt.
    - Up from $445 per week ($23,660 annually).
  - HCE Annual Compensation Level: Highly Compensated Employees ("HCE") must receive total minimum annual compensation of $107,432 (including a weekly salary of $684) to be exempt. Additionally, they must "customarily and regularly" perform any one or more of an EAP employee's exempt duties.
    - Up from $100,000 annually, which included a $445 weekly salary.
- Changes go into effect January 1, 2020. Minimum salary and compensation levels will not be updated automatically, but will be updated more regularly using notice and comment rulemaking methods.

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General EAP Exemption Requirements

- Beginning January 1, 2020, to qualify for the EAP exemption, an employee must meet ALL of the following requirements:
  1. The employee must be paid a predetermined and fixed salary of at least $684 per week ($35,568 annually); AND
  2. The employee's job duties must primarily involve Executive, Administrative, or Professional duties as defined by the regulations.
- Under the rule, employers can use *non-discretionary* bonuses, incentives, and commissions to satisfy up to 10% of an employee's salary level to reach the exemption threshold.
  - Such payments must be made on an annual or more frequent basis.
  - Employers can make one catch-up payment, up to 10% of the total standard salary, within one pay period of the end of the 52-week period to meet the required salary level.

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EAP Salary-Basis Test

- To qualify for the EAP exemption, an employee must receive a fixed salary that is not subject to reductions based on variations of quality or quantity of work performed.
- An employer is not required to pay an employee for workweeks in which the employee does **no work**.
- Employers with paid vacation and paid sick leave policies may make **full-day** deductions for personal or illness-related absences.
  - However, docking an exempt employee's pay for a partial-day absence would violate the salary-basis test and negate the employee's exempt status, resulting in potential liability for back overtime pay.
  - Regularly making improper salary deductions could negate the exempt status of all similarly-situated employees subject to that same policy.

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EAP Duties Tests: Executive Employee

- Executive Employee (must satisfy ALL):
    1. The employee must have a primary duty of managing the enterprise or a department or subdivision of the enterprise; AND
    2. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent ; AND
    3. The employee must have authority to hire or fire other employees, or have their opinion or recommendations given particular weight when considering changes in employment status for other employees.
- Employers must consider factors such as an employee's position in management and the employee's role in retaining, releasing, or otherwise affecting the status of other employees.

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EAP Duties Tests: Administrative Employee

- Administrative Employee (must satisfy ALL):
  1. The employee's primary duty must be in 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
  2. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.
- The regulations emphasize duties that involve the exercise of discretion with respect to matters of significance.
  - For example, administrative employees who have the discretion to commit the employer in matters of financial significance (such as through purchasing or budgeting) are generally classified as exempt.

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EAP Duties Tests: Professional Employee

- Professional Employee (pick one):
  1. **Learned Professional** – The employee's primary duty requires performance of work that is predominantly intellectual in character, which entails the regular exercise of discretion and judgment, and that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.
  2. **Creative Professional** – The employee's primary duty requires work that is original and creative in a recognized field of artistic endeavor. This includes such fields as music, writing, acting, and the graphic arts. This exemption category tends to be particularly useful to broadcast stations given the amount of creative effort involved in running a broadcast business.
  3. **Teachers and employees practicing law or medicine** – A class of employee not likely to be found at your average broadcast station.

Employee Classification Must Be Made On A Case-By-Case Basis

- Job titles **do not** determine whether an employee qualifies as exempt.
- Common broadcast jobs that may fall within the Professional Employee category are photographers, designers, some forms of on-air talent, digital media creators, and investigative journalists.
- However, given the wide variety of job duties at a broadcast station, many of which involve creative effort, decisions must be made on a **case-by-case basis**. Factors to consider include:
  - How much of the employee's work requires invention, imagination, originality, or talent?
  - Does the employee offer a unique interpretation of news items, or is the employee's role closer to collecting, organizing, or recording information?

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"Intelligence, Diligence, and Accuracy" vs. "Invention, Imagination, or Talent"

- Relevant to broadcasting, reporters provide a good example of how case-specific the "Creative Professional" classification can be:
  - According to the DOL and some courts, reporters whose job consists primarily of "general assignment" work such as covering hearings, police activity, or local events are not "creative" because their work depends on their "intelligence, diligence, and accuracy" rather than on "invention, imagination and talent".
  - But, the DOL notes that "journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator."

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Other Potentially Relevant Exemptions

- The FLSA exempts several other classifications of employees who do not qualify under the EAP exemption.
- The following exemption classifications may be relevant to certain broadcast employees:
  - Highly Compensated Employee
  - Small-Market Radio and Television Station Employee
  - Outside Sales Employee
  - Computer Employee

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Other Exemptions: Highly Compensated Employees

- A Highly Compensated Employee ("HCE") is an employee who:
  - Customarily and regularly performs one or more duties of an EAP employee; and
  - Beginning January 1, 2020, receives minimum annual compensation of at least $107,432, including a weekly salary of $684 (up from $100,000 annually, including $445 weekly).
- Total annual compensation can include commissions, *nondiscretionary* bonuses, and other *nondiscretionary* compensation earned during the year.
  - Unlike the EAP exemption, employers must pay 100% of the new white-collar standard salary amount per week ($684) on a salary or fee basis, without consideration of any non-discretionary bonuses or incentive payments.
  - Employers may make a yearly catch-up payment to meet the minimum annual compensation level for the HCE exemption.

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Other Exemptions: Small-Market Radio and Television Station Employees

- To fall under this exemption, an employee must satisfy all of the following criteria:
  1. The employee must work at a radio or television station whose major studio is located in a city or town that, as determined by the Census Bureau, has a population of:
     a) 100,000 or less, provided that the city or town is not within a larger metropolitan area that has a population greater than 100,000; OR
     b) 25,000 or less, even if the city or town is within a larger metropolitan area that has a population greater than 100,000, provided that the smaller city or town is at least 40 miles (by air) from the principal city in the larger metropolitan area.
  2. The employee must be **primarily** employed as an **announcer**, a **news editor**, or a **chief engineer**.

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Small Market Broadcaster Exemption: Definitions

- An **announcer** is an employee who appears before the microphone or camera to introduce programs, read news announcements, present commercial messages, station identifications, time signals, and similar routine on-air material.
- A **news editor** is an employee who gathers, edits and rewrites the news. A news editor may also select and prepare news items for broadcast and present the news on-air.
- A **chief engineer** is an employee who primarily supervises the operation, maintenance, and repair of all electronic equipment in the studio and at the transmitter site and is licensed by the FCC as a Radio Telephone Operator First Class.

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Other Exemptions: Outside Sales Employees

- The Final Rule **does not impact** the existing exemption for "outside sales employees", a classification that, depending on their exact duties, may apply to account executives selling advertising time on broadcast stations.
- To fall within this exemption, a station employee must satisfy all of the following criteria:
  1. The employee must have as their primary duty 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; AND
  2. The employee must be customarily and regularly engaged away from the employer's place of business in doing that job.

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Penalties For FLSA Violations

- Non-complying employers risk civil penalties of up to $2,014 per violation.
- In addition, the FLSA authorizes the Department of Labor and aggrieved employees to bring suit for back pay and liquidated damages.
- FLSA authorizes class action lawsuits.
- Prevailing employees are entitled to recover attorneys’ fees.
- Decision-makers responsible for misclassifying employees can face individual liability.

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Next Steps for Employers

- Assess the anticipated impact on affected employees **NOW** so that you can make informed decisions before the effective date.
  - Identify those exempt employees who will be converted to non-exempt.
  - Do they work overtime?
  - If so, how much?
  - What are the reasons for the overtime?
- Review any existing benefit plan offering different benefits to exempt and non-exempt employees and consider whether any modifications to eligibility rules are necessary or desirable.

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Strategies for Addressing the New Overtime Requirements: **Adjusting Salaries/Wages**

- Threshold issue – is overtime worked?
  - No change necessary if no overtime needed, other than converting to non-exempt status.
- Pay employees a salary for the first 40 hours of work per week, and then pay overtime for any hours over 40.
  - Good for employees who infrequently work overtime.
  - Cost increase is the same as with converting to hourly and paying overtime, but avoids morale issue of converting to hourly.
- Raise salaries for employees who meet the duties tests, whose salaries are close to the new salary level, and who regularly work overtime.

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Strategies for Addressing the New Overtime Requirements: **Adjusting Salaries/Wages**

- Adjust the amount of an employee's earnings to reallocate them between the regular wages and overtime pay.
  - Likely best approach to keep costs the same
  - But also likely the most difficult for employees to digest as their base salary will be reduced
- Pay employee a salary for more than 40 hours a week, and pay overtime in addition to the salary. Under this method, overtime for hours included in the salary is paid at half-time overtime premium
  - Best for employees who regularly work more than 40 hours

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Strategies for Addressing the New Overtime Requirements: **Adjusting Salaries/Wages Comparison**

- John works 50 hours a week. His current salary is $35,000. Here are various options (not including fluctuating workweek):

	Convert to Hourly and Pay Overtime	Salaried at 40 Hours a Week and Pay Overtime	Salaried at 40 Hours a Week and Reallocate Earnings Between Regular Pay and Overtime Pay	Salaried at 50 Hours a Week, Pay Additional Half-Time for Hours 41-50, and Time-and-a-Half for Hours 51+
Straight Time Pay	$35,000 / 52 weeks / 40 hours = $16.83 an hour	Same as hourly	$25,500 / 52 weeks / 40 hours = $12.26 an hour	$35,000 / 52 weeks/ 50 hours = $13.46 an hour
Overtime Costs for Hours 41 - 50	$25.25 an hour $252.50 a week $13,130 a year	Same as hourly	$18.39 an hour $183.90 a week $9,562.80 a year	$6.73 an hour $67.30 a week $3,499.60 a year
Total Compensation (Straight Time and Overtime) for 50 Hours a Week	**$48,130**	**Same as hourly**	**$35,062.80**	**$38,499.60**
Any Additional Overtime Over 50 Hours a Week	$25.25 an hour	Same as hourly	$18.39 an hour	$20.19 an hour

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Strategies for Addressing the New Overtime Requirements: Fluctuating Workweek

- Best for employees whose hours fluctuate from week to week.
- Employers pay the non-exempt employees a fixed salary, and pay overtime at half-time (rather than time-and-a-half).
- But certain conditions **MUST** be met:
  - There must be a mutual understanding between the employer and the employee that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period. This understanding should be memorialized in writing.
  - The fixed salary must be sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those weeks in which the number of hours of work is greatest, and the employee must receive at least one-half the employee's regular rate of pay for all overtime hours in addition to the fixed salary.

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Illustration: Fluctuating Workweek

- Employee whose work hours vary from week to week, whose total weekly hours never exceed 50 hours.
- Paid $600 a week with the understanding that this salary constitutes the employee's compensation, except for overtime premiums, for whatever hours are worked in the workweek.
- If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $15.00, $16.00, $12.00, and $12.50, respectively.
- Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due for hours above 40.
  - For the first week (40 hours) the employee is entitled to be paid $600.
  - For the second week (37.5 hours) **$600.00**.
  - For the third week (50 hours) **$660** ($600 plus 10 hours at $6.00).
  - For the fourth week (48 hours) **$650** ($600 plus 8 hours at $6.25).

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Strategies for Addressing the New Overtime Requirements: **Re-Organize Workloads, Adjust Schedules, Spread Hours Between Employees**

- If costly to have a junior or mid-level employee work overtime, higher-level exempt employees may need to take responsibility for those work commitments (but be careful of diluting exempt work).
- When employees regularly perform duties outside of a 9 to 5 workday, you may adjust those employees' schedules so as to encompass when most of their work takes place.
- When employees regularly perform work on the weekend, you can adjust the workweek (for example to Wednesday to Tuesday rather than Monday to Sunday) and give employees time off on Monday or Tuesday (however such a change should be permanent as you cannot regularly shift your workweek to avoid overtime).
- Bring on additional workers or redistribute work hours across current staff so that no one is above 40 hours a week.

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Strategies for Addressing the New Overtime Requirements: **Trim Activities That Don't Add Sufficient Value**

- While it may impact culture, employers may not be able to maintain some activities that count as compensable working hours for non-exempt employees.
- For example, convert a paid 30 minute lunch break to unpaid lunch breaks (in which employees are not required to do any work) and convert a 40 hour workweek to a 37.5 hour workweek.
- Reconsider frequent staff meetings that consume work time.
- Evaluate whether travel to an in-person meeting is necessary or whether a video conference call or shared screen technology may be sufficient.
- Scrutinize whether and how many non-exempt employees need to participate in calls or meetings.

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Educate Employees Now

- Even if it will mean larger paychecks, many employees view conversion from exempt to non-exempt as something negative – they may see this as a demotion or as a sign that you do not regard them highly.
- It will be important to explain to affected employees that the change results from new regulations, that it is based only on their compensation levels, and that it affects all similarly compensated employees on a national level.

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