

# FLSA

## Game-Changing Rules for Boards of Education

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Jill E. Hall, Esquire  
Bowles Rice LLP  
600 Quarrier Street  
Charleston, West Virginia 25301  
304-347-1128  
jhall@bowlesrice.com



## Fair Labor Standards Act

- Federal Statute
- Enforced by U.S. Department of Labor
- Mandates payment of minimum wage and overtime to employees who are not exempt
- Sets minimum standards – check state law



## FLSA

- FLSA does not require:
  - Vacation, holiday, severance or sick pay
  - Meal or rest periods, holidays off or vacations
  - Premium pay for weekend or holiday work
  - Pay raises or fringe benefits
  - Discharge notice or immediate payment of final wages



## FLSA Enforcement

- DOL Wage and Hour Division enforces labor laws regarding wages, hours and conditions of employment
- Investigations not limited to wage and hour issues raised in complaint
- May be expanded to include I-9s, FMLA compliance, etc.



## Categorizing Workers

- Exempt
- Nonexempt
- Independent Contractors



## Independent Contractors

- Workers who are independent contractors are outside the scope of employment laws, including FLSA
- Sometimes called “1099” workers
- Independent contractor relationships must be carefully reviewed to avoid wage and other (tax) liability



## Independent Contractors

- Control of work is key factor
- IRS best resource on this topic



## Independent Contractors

- Keys are control and independence
  - Behavioral: Does the company control what the worker does and how the worker does his or her job?
  - Financial: Are the business aspects of the worker's job controlled by the company (such as how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)?
  - Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?



## Risks of Misclassifying IC's

- Payroll tax liability
- Minimum wage liability
- Overtime liability
- Wage payment liability
- Interest, penalties and attorneys' fees
- Consider potential ACA penalties



## Exempt v. Non-exempt

- All workers who are employees fall into one of two categories for FLSA purposes:
  - Exempt/overtime-exempt (*not* subject to minimum wage and overtime rules)
  - Nonexempt/overtime-eligible (subject to minimum wage and overtime rules)



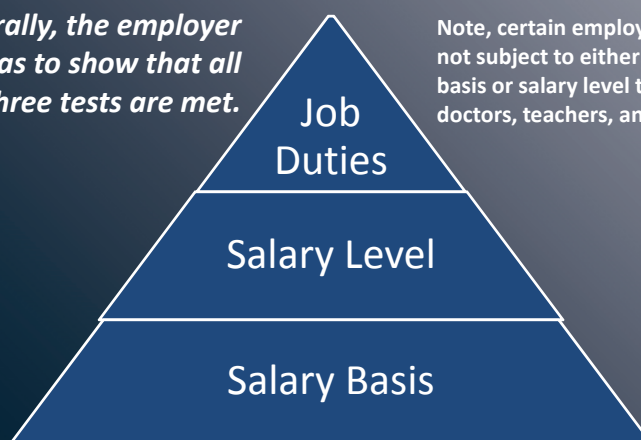
## Exempt v. Non-exempt

- Exemptions are defined by statute and regulation (not by employer)
- Individual analysis required
- All employees outside the exemptions are nonexempt
- Salary v. hourly not necessarily determinative



## Three Tests for Exemption

*Generally, the employer has to show that all three tests are met.*



Note, certain employees are not subject to either the salary basis or salary level tests, *e.g.*, doctors, teachers, and lawyers.



## Three Tests for Exemption

- Employer must show all three tests are met
- Exceptions
  - Teachers, doctors and lawyers not subject to salary tests



## Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs **any** work
- Need not be paid for any work week in which **no work** is performed



## Prohibited Deductions

- Absences the result of employer or by operating requirements
- Absences the result of jury duty
- Absences the result of attendance as a witness
- Absences the result of temporary military leave



## Consequences of Prohibited Deductions

- If deduction generally made and due to unavailability of work, exemption unavailable during entire period deductions were made
- If inadvertent deduction, potential window of correction (but not if policy or practice authorized the impermissible deduction)





## Permitted Deductions

- Absent a full day or more for personal reasons
- Absent a day or more for sickness or disability under plan, policy or practice
- Penalties imposed for violations of safety rules of major significance



## Permitted Deductions

- Absent a day or more for work rule violation
- Pro rata pay for initial or terminal week of employment
- FMLA unpaid leave deduction (including intermittent)



## Salary Level Test

- Start here
- If weekly salary falls below threshold, analysis ends and employee is not exempt
- Employees earning less than the salary level will be overtime-eligible, irrespective of job duties
  - Number of these will increase under new rule



## New Salary Level Test Effective 12/1/16

- Final rule increases the salary level necessary to establish exemption from overtime requirements
  - Prior rule = \$455/week
  - New rule = \$913/week (or \$47,476/year)
- Increases automatically every three years beginning January 1, 2020



## Applying Salary Level to Board Employees

- \$913/week works out to \$47,476 annually
- For employees not working 52 weeks/year, this amount may be prorated
- Example: Employee who works 40 weeks/year must earn \$913/week while actually working (\$36,520/year) to satisfy the salary level
- Ok if salary is spread out over 12 months



## New Salary Level Test

- New level of \$913/week is based on the 40th percentile of earnings of full-time salaried workers in the country's lowest-wage Census Region (South)
- Every three years, the number will adjust based on this same percentile of full-time salaried workers in the lowest-wage Census Region



## Employer Response to New Overtime Rule

- Regardless of job duties, employees who do not satisfy the salary level will be reclassified as nonexempt and become eligible for overtime pay



## Employer Response to New Overtime Rule

- Employer options:
  - Raise salary above new salary level
  - Reclassify as nonexempt and pay overtime for hours worked over 40 in a work week
  - Reclassify as nonexempt and limit hours to 40 in a work week



## Employer Response to New Overtime Rule

- Changing employees' status from exempt to nonexempt does not require employers to pay such employees an hourly wage
- Nonexempt employees may continue to receive a salary



## Primary Duty Requirement (Duties Test)

- Employee's primary duty must be the performance of exempt work
- Principle duty the employee performs is exempt
- Time alone is not determinative
- Executive, Professional, Administrative
- New overtime rule does not change duties test



## Primary Duty Requirement

- Consider:
  - Amount of time spent performing exempt work
  - Employee's freedom from supervision
  - Importance of exempt duties vs. other duties
  - Relationship between salary and wages paid to other employees for the kind of nonexempt work performed by the employee



## Job Duties Test - Executive

- Salary basis, salary level
- 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**; and
- Has authority to hire or fire other employees or make recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given **particular weight**



## Job Duties Test - Administrative

- Salary basis, salary level
- Primary duty is performance of office or non-manual work directly related to management or general business operations of employer or the employer's customers; and
- Primary duty includes exercise of **discretion** and **independent judgment** related to *matters of significance*



## Job Duties Test - Professional

- Salary basis, salary level
- **Learned** – 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
- **Artistic** – Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor



## Academic Administrative Employees

- Salary basis, salary level
- Employees who perform work related to academic operations and functions in a school
- Must be compensated on salary level of at least \$913/week (effective 12/1/16) OR at least equal to entrance salary for teachers in relevant educational system



## Academic Administrative Employees

- Primary duty is performing administrative functions directly related to academic instruction or training in educational establishment or department thereof
- Exercise of discretion and independent judgment regarding matters of significance





## Academic Administrative Employees

- Superintendent or other head of elementary or secondary school system
- Any assistants responsible for administration of matters such as curriculum, quality and methods of instructing, measuring and testing learning potential and achievement of students, establishing and maintaining academic and grading standards and other aspects of teaching program



## Academic Administrative Employees

- Principal and vice-principals responsible for operation of elementary or secondary school
- Department heads in institutions of higher education
- Academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students regarding degree requirements



## Academic Administrative Employees

- Employees not engaged in academic administrative functions (and not exempt):
  - Building management and maintenance
  - Employees focused on student health
  - Academic staff such as social workers, psychologists, lunch room managers or dieticians



## Job Duties Test – Computer Employees

- Salary basis of \$913 (effective 12/1/16) or more per week **OR** hourly rate of \$27.63 (unchanged by new overtime rule) or more per hour
- Excludes employees engaged in the manufacture or repair of hardware and related equipment
- Excludes employees whose work is highly facilitated by computers



## Job Duties Test – Computer Employees’ Primary Duties

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



## Job Duties Test – Computer Employees

- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; **or**
- A combination of the aforementioned duties, the performance of which requires the same level of skills



## Highly Compensated Employees

- Highly compensated executive, administrative or professional employee (“HCE”) is exempt if:
  - Employee earns at least \$100,000/year
    - *As of December 1, 2016, threshold is \$134,004*
  - Employee customarily and regularly performs at least **one** executive, administrative, or professional duty



## Highly Compensated Employees

- Salary basis
- Special salary level of \$134,004 (including weekly salary of \$913)
- Special duties test – at least one executive, professional or administrative duty



## Teachers

- Bona fide professional employees
- Salary level and salary basis requirements do not apply
- New overtime rule has no impact on teachers

## Teachers

- Primary duty is teaching, tutoring, instructing or lecturing in activity of imparting knowledge; AND
- Employed and engaged in this activity as a teacher in an educational establishment by which employee is employed

## Exempt Teachers

- Regular academic teachers
- Teachers of kindergarten or nursery school pupils
- Teachers of gifted or disabled children
- Teachers engaged in automobile driving instruction
- Home economic teachers
- Vocal or instrumental music instructors



## Classifying Workers as Exempt or Nonexempt

- Individualized inquiry
- Job descriptions and titles not determinative, nor is paying salary rather than hourly rate
- Employer's burden to establish applicability of exemption



## Classifying Workers as Exempt or Nonexempt

- Regularly review job descriptions
- Seek employee's input regarding own job description
- No canned job descriptions



## Record-Keeping Requirements for All Employees

- For both exempt and nonexempt employees, employers must keep records of:
  - Full name and ID number
  - Home address with zip code
  - Date of birth if under age 19
  - Sex and occupation
  - Time of day and day of week work week begins
  - Total wages paid each pay period
  - Date of payment and pay period covered



## Additional Record-Keeping for Nonexempt Employees

- For nonexempt employees, employers must keep records of:
  - Regular hourly rate of pay for any work week in which overtime is due
  - Hours worked each work day and total hours worked each work week
  - Total daily or week straight-time earnings or wages due for hours worked during work day or work week
  - Total premium pay for overtime hours
  - Total additions to, or deductions from, wages paid each pay period



## FLSA Notices

- Employers must post FLSA notice in conspicuous places in every work place





## FLSA Liability

- Employees who file law suits for violations of FLSA may seek:
  - Back pay for any hours worked that were not compensated in accordance with FLSA
  - Liquidated damages equal to amount of back pay unless employer shows good faith
  - Attorney's fees



## FLSA Liability

- DOL may sue on employee's behalf
- Dept of Justice may criminally prosecute persons who willfully violate FLSA



## Statute of Limitations

- FLSA lawsuit must be brought within two years after violation occurs
- Employee or DOL may sue within three years if violations were willful



## Questions?





Jill E. Hall, Partner, Bowles Rice LLP  
Charleston, West Virginia



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