
TABLE of EXPERTS

FEDERAL REGULATIONS FINAL RULE: OVERTIME!

The U.S. Department of Labor finalized new regulations that will have a significant impact on businesses of all sizes and across all industries. In summary, it raises the minimum threshold when a company is required to pay overtime. The effective date of the final rule is December 1, 2016. How will local business executives understand and navigate these changes? What decisions need to be made before December? We asked experts in the field to walk us through these changes.

What changes were made to the Fair Labor Standards Act by the US Department of Labor's new Final Rule?

Monica R. Skanes: The Final Rule is a significant increase to the minimum salary level that is generally required to fit within one of the white collar exemptions under the FLSA, which is the administrative, executive, or professional exemptions. And the increase is from \$455 per week, or \$23,600 annually, to \$913 per week, or \$47,476 annually. The Final Rule also increases the minimum salary level required for another one of the exemptions, the highly compensated exemption. And the increase is from \$100,000 to \$134,004. The rule also includes some automatic updates to the salary levels, which will begin every three years and continue every three years after that. These provisions all take effect in December of 2016, so there's a little bit of time for employers to prepare for these changes.

Guy, what should employers be doing now to prepare for those changes?

Guy Maddalone: First thing that they need to do is probably develop a list of all their employees that they currently have active, and put down their current salary levels on an annual basis. Additionally, maybe add a column for the exemption classes that were just mentioned, and then see who might be underneath that threshold of the \$47,000. Those are the people that they want to zero in on and decide whether or not it's time to evaluate giving them a merit raise that would get them over the dollar amount in order to give them that -- in keeping that exemption. Or if they perhaps maybe want to monitor some of their time that they've been working and ask them to start maybe punching in and punching out and make some sort of determination that this could be someone that might be better suited on a hourly basis.

Katie Doran: I think what's important to remember is, while the salary threshold has increased, the

description of the duties that are required for an employee to be considered an exempt employee and not subject to the overtime rules has not changed. Look at their duties and determine whether they actually qualify under of administrative or professional exemptions. Are their duties in line with that? If not, then they're not exempt employees and you should have been paying them for any overtime that they worked anyway.

What is the duties test?

Doran: There's three exemptions for the duties test: There's the executive exemption where the primary duty must be managing the enterprise or managing a department or subdivision, and they must regularly direct the work of at least two or more other full-time employees, and they must have the authority to hire or fire employees. Or the administrative exemption, which would be the performance of office or non-manual work directly related to the management or general business operations of the employer. Or there's the professional exemption. To qualify for a learned professional exemption, the primary duty must be the performance of work requiring an advanced knowledge. It must be acquired by a prolonged course of specialized intellectual instruction. There's also the creative professional employee exemption, which is the performance of work requiring invention, imagination, originality, or talent. Then there's the computer employee exemption, too. So if the employee's duties aren't falling into those categories, they weren't exempt no matter what their salary level was, with an exception.

If an employee previously met that exemption but will not meet the new one of \$134,004, is the employer required to increase the employee's salary in order to continue to treat the employee as exempt?

Skanes: No. An employer may be able to fit that employee within a different exemption that they

previously didn't consider because that employee was making \$100,000. So they were able to meet the relaxed duties test and didn't previously have to consider some of the other exemptions that were just mentioned.

What advice would you give employers about implementing these changes?

Maddalone: We've been telling our current clients that, again, look at it now, see where the impacts are, begin to evaluate. Perhaps one of the initial things that they'll want to do is take a look at their employee handbook and see what their policies are around things such as meal time, lunch breaks, overtime. Does overtime need to be approved or not, what's the procedure on getting that overtime approved? Do they have any policies around things such as working out of the office? In today's day and age of having e-mail on personal devices, are those now items that they should be paying for? So doing a checkup on the employee handbook and those employment policies are probably one of the things to do in tangent with evaluating who falls underneath that current -- or that new \$47,476 level per year, and then to try to make decisions whether or not that person should get a merit raise, or perhaps bring them back down to an hourly basis. One of the key things, too, is to talk to people about. In the event that you do decide to bring somebody down to an hourly basis, that it's not something that they should look down upon.

What are the potential penalties for employers who fail to comply?

Skanes: Employers who violate the FLSA can be responsible for paying back wages that are owed to employees. And they could additionally be subject to paying liquidated damages, civil monetary penalties, and attorneys fees. There are also potential criminal consequences for willful violation, which could include imprisonment for repeat offenders in extreme cases, although that's not one of the most

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common penalties obviously, but it is out there.

What kind of tools and resources are available to help employers navigate all of this?

Doran: If you go to the US Department of Labor website, there are a lot of resources there. There's frequently asked questions there. There's an avenue for asking your own questions, so you can get questions answered there. But another resource would be speaking to your attorney, your accountant, your payroll service.

Maddalone: You need to fact-check it with your legal counsel and then certainly get the right strategy from your CPA advisors. And then from a practical perspective, things that a payroll provider can provide is that employee handbook piece, the updates of that, a payroll audit to help evaluate who may or may not be within the right exemption classes and what their hourly rates are above minimum wages and overtime being paid.

Is December a hard deadline? Would you encourage employers to actually abide by these new rules starting now rather than wait until December?

Maddalone: I think the business owner employing 65 people locally here, I would wait until I need to make those moves from a financial perspective. However, if an employee has a review coming up and you're thinking about giving them a merit raise that's going to allow them to keep that exemption, then it might be the appropriate time to do that then.

What is the standard salary level required for



DONNA ABBOTT-VLAHOS

part-time workers to qualify for a white collar exemption?

Skanes: Part-time workers also have to meet the \$913 per week or the \$47,476 per year. The Department of Labor has affirmatively stated that there is not a different standard salary level for part-time workers, so it could be a challenge for some employers.

If you're paid biweekly and it averages out to the standard exemption, but one week you work 45

hours and one week you work 35, is that okay, or does it have to be in the Monday through Friday workweek?

Skanes: Well, it goes workweek by workweek. It doesn't necessarily have to be a Monday through Friday workweek. They have some flexibility in that. But they have to abide by that. So once you pick a workweek for an employee, then that's the employee's workweek. You have to count the 40 hours within that workweek.

MEET THE PANELISTS



KATIE DORAN

Teal, Becker & Chiamonte, CPAs, P.C.

Katie's career in public accounting began at Teal, Becker & Chiamonte, CPAs, P.C. (TBC) when she accepted a college internship over 30 years ago. After her college graduation, she began full time employment at TBC and continued to build her career at the Firm ever since. She became the first female partner in 1992. Katie specializes in the management of audit and attest engagements of not-for-profit organizations, governmental units and commercial entities. Her experience also includes tax and management advisory services for a diverse client base. Katie's knowledge of the U.S. Department of Labor's new regulations allows her to advise clients on how to come into compliance with the new DOL overtime rule and determine the overall impact on their bottom line. Katie is the chair for the New York State Board of Public Accountancy and a board member of the United Way of the Greater Capital Region.



GUY MADDALONE

GTM Payroll Services

Guy Maddalone, founder and CEO of GTM Payroll Services, has nearly 30 years of experience in human capital management. Over the years, Guy has helped thousands of clients — local businesses and domestic employers — with workforce management, payroll, human resources, and insurance. Founded in 1991, GTM has grown to more than 60 employees. Today, the company processes more than \$1 billion in payroll every year for more than 30,000 employees. GTM has been featured multiple times by The Business Review as one of the best places to work in the Capital Region and made the INC 5000 list eight times as one of the fastest-growing U.S. companies. Guy is a graduate of the highly acclaimed MIT program Birthing of Giants, past president of the Albany Chapter of the Young Entrepreneur's Organization, and an angel investor with the Eastern New York Angels. Guy is also a graduate of Siena College with a degree in accounting.



MONICA R. SKANES

Whiteman Osterman & Hanna

Ms. Skanes joined Whiteman Osterman & Hanna in 2011 and is an Associate with the firm's Education, Labor and Employment, and Litigation, Arbitration and Mediation Practices. Ms. Skanes regularly counsels public and private sector employers on a wide range of legal issues. Ms. Skanes graduated summa cum laude from Albany Law School in 2011, and magna cum laude from Ithaca College in 2008. During law school, Ms. Skanes was a judicial intern for Hon. Thomas J. McAvoy at the United States District Court for the Northern District of New York, and a law clerk for New York State United Teachers. Ms. Skanes is admitted to practice in New York State, and serves as President of the Capital District Chapter of the Labor Employment Relations Association, and as a Co-Chair of the Communications Committee for the Labor and Employment Law Section of the New York State Bar Association.

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Skanes: One thing to mention, though, is that there is some flexibility with public-sector employees, that in certain circumstances, you can potentially use comp time if you're a public-sector employer.

Are state and local governments subject to the Final Rule?

Skanes: They are. New York Law, the labor laws, do not apply to the public-sector employers. But the FLSA does apply to public-sector employers.

Are there any professions that aren't subject to the standard salary level requirement?

Doran: Yes. Physicians, attorneys, and teachers if they're working in an educational institution.

If an employee was properly designated as exempt under prior rules but no longer meets the standard salary level required for the exemption, is an employer required to raise that employee's salary?

Skanes: No. Nothing requires the employer to choose that option, to bump it up. However, if they are choosing to continue to designate that employee as exempt, then they will be required to meet the \$913 per week.

Maddalone: Just to dovetail on that, too, one of the other considerations is kind of like this compression wage factor. You know, how much perhaps other people that are doing similar work might be being paid. So let's say in this example, seasoned people who have been there for a little while doing similar work were being paid \$50,000 a year, and you're looking at this group that's \$45,000. If you move them up to the \$47,000, what happens to the \$50,000? So it's something that should also be under consideration on what other impacts this may have from a culture basis.

tion. You have to look at the actual duties an employee is doing.

If an employer re-designates an employee from exempt to non-exempt, what specific requirements will the employer need to comply with?

Doran: The biggest change for them is now you've got to keep track of that employee's hours. It doesn't necessarily mean they're going to punch a time clock. But whether it's a time sheet on a computer or some sort of mechanism, you need to have a mechanism to keep track of those hours so that, if that person works more than 40 hours in a week, they'll be compensated for the overtime.

Maddalone: That has to actually be supervised, that process of punching in. Is that actually the time that they were punching in and punching out? And then that has to go from the supervisor, formerly exempt person, to a new person who then can approve it and then bring it into the payroll process. So that is also a culture change.

Would you say that is one of the biggest challenges with the new rule?

Doran: That probably is one of the biggest challenges, the change in the culture and keeping track of the hours. Or someone who previously had been considered exempt and now doesn't have the salary or -- the duties may still qualify them to fall into that exempt category but their salary level isn't there.

Maddalone: Many of our small business clients, one of the biggest challenges besides timekeeping is going to be the financial burden that this is going to place on them. They've been running their business and competing against -- let's say in the retail space -- national chains who have more efficient ways of delivering

hours, but you have to designate an assigned work-week for the employees. You have to separate hours that are worked on straight time and hours that are worked on overtime. It's just that figuring out all those details will take a little bit of time, and that's why we're recommending for folks to get started sooner rather than waiting until the last minute to get all this stuff done.

Can an employer count bonuses and incentive payments toward the standard salary level required to meet the exemptions?

Skanes: There are very limited circumstances when you can count the bonus or incentive payments. First of all, they need to be non-discretionary bonuses. You can only use the non-discretionary bonuses and incentive payments to satisfy up to 10 percent of the salary level. And you can only use them to satisfy the salary level for employees who pass the administrative, professional or executive duties test. You can use the bonus payments to get up to the \$134,004 salary level. The other requirement, if you're going to use these non-discretionary bonuses and incentive payments toward the 10 percent of the salary level, is that they need to be made on a quarterly or more frequent basis. So it can't be a one-time bonus payment at the end of the year. Employers can use the non-discretionary bonuses and incentive payments in some respects for the highly compensated employees. But they would need to be making at least the \$913 per week salary in order to make the exemption, not counting those bonuses as part of that \$913.

Maddalone: I looked at that and it said, in the event that they don't earn that pay, you must still give it to them regardless, because that's the only way they're going to still qualify for the exemption. So much for the incentive thing.

Doran: Because it's got to be non-discretionary. And the quarterly payment doesn't necessarily have to be a calendar quarter. It can be whatever quarter the employer designates. It's got to be consistent.

Is this something you would recommend or not recommend employers use as a way to meet that exemption?

Doran: I think to implement a program of non-discretionary bonuses to meet these new rules would be very difficult and I would not recommend that.

Skanes: If you are going to try to count the bonus and incentive payments for meeting one of the exemptions, you want to make sure that they're meeting the duties test and the salary basis test as well, because it is a new area of the law. It may be something that the Department of Labor is paying attention to closely.

Can you talk about the tax effect of these changes?

Doran: What employers have to remember, if they're going to change employees' salaries, they're going to be paying payroll taxes on the changed salaries too. Or even if they're not giving their employees a raise, if they now are required to pay overtime at time and-a-half to employees who don't meet the exemption who are working more than 40 hours a week, they'll be paying payroll taxes on that additional time and-a-half also. When a business owner is looking at the financial impact on her business, she's got to remember it's not just the wages. It's not just the gross pay. It's the payroll taxes on top of that.

Maddalone: Perhaps it's a seasonal business. And all of a sudden you have to accelerate some of that cash in order to pay for it, versus maybe paying at the tail

“One of the biggest challenges besides timekeeping is going to be the financial burden that this is going to place on them. They've been running their business and competing against ... national chains who have more efficient ways of delivering the service.”

GUY MADDALONE, founder and CEO of GTM Payroll Services, on the biggest challenge for small business clients

Do you get a sense that employers are more likely to change an employee's status to non-exempt rather than raise salaries across the board?

Maddalone: What we sense in our client load is they seem to want to take maybe the easier way of less onus on timekeeping in treating these current people in this group the way they have been. And they are really considering moving them above the \$47,000 level just so they don't have to have the timekeeping systems in place, or a culture of punching in and punching out on this group of folks.

Are there any scenarios where a job title could affect an employee's status?

Skanes: The Department of Labor has made clear that a title alone is not going to get you an exemp-

the service. And they're employing a lot of people now who are either going to get additional overtime dollars or increase their salary level that they didn't account for. And perhaps the margin doesn't support it, and as a result, they could be potentially looking at some sort of automation of certain processes. Like the food business, say Panera, a national chain, has gone to digital ordering. They might be looking at automating that process. Or they might look at how they might have to reduce staff in order to meet the new requirements in order to keep their food prices where they're at and keep a margin that is still reasonable to the owners of the company.

Skanes: There are a number of requirements under the federal laws regarding the record-keeping requirements. It's not only just keeping track of the

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end of the season, if you will.

How has the compliance and regulatory environment been changing with regards to business and human resource management?

Maddalone: It seems that it gets harder and harder for small businesses to understand all of the complexity and the high frequency of these types of changes that are coming down. It's the understanding of all of the different items that are being asked of them to do as far as wage an hour and labor standards and additional documentation. Certainly the Affordable Care Act has put a lot of stress on businesses from not only a compliance perspective but also a reporting perspective. More and more of these perhaps maybe road blocks or hurdles that are coming our way are making it a more difficult environment to do business in. It's not just New York State alone, but many of these federal regulations. And then you couple it up with what New York State's done, it's making it even more difficult.

Doran: Some clients may say, well, you know what, I have this employee, but he says he doesn't worry about it. Don't worry about paying me overtime because I'll make it up next week. We tell our clients do it the right way because, more often than not, it will cause a larger problem down the road if you're not paying the employee what you should.

Maddalone: It's always these nice great relationships between the employer and employee, and don't worry about it, and it's okay, and whether he's being paid overtime or being paid cash for work that's been done. It always comes up upon termination when the relationship sours. Then there's a dispute and they'll contact their legal folks or they'll walk down to unemployment and ask for their employment benefits, and this will come out and trigger audits and firefighting and perhaps maybe some sort of a civil suit.

Skanes: The other thing that's important to note is that the US Department of Labor and the New York State Department of Labor could come in and decide they want to do an audit or something, even if an employee is happy with that they're doing. There are many avenues where you could face a troublesome situation over these laws. It's not exclusively an employee bringing a suit on their own, but you could have one of these agencies come in and decide to go through their files based on an anonymous complaint or something.

What advice would you give employers that have an employee that continues to work overtime, after being told the job is strictly nine to five?

Maddalone: One thing we've counseled our clients on is that, number one, you have to pay them even if the work isn't authorized. But then you can



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go through your disciplinary action and bring your policy that you have in writing up to an employee, suspending an employee, or whatever it is that your policy might say to make sure that they aren't working unauthorized time.

Doran: An employer may need to look at that and say, heck, if I have somebody who's punched in from nine to five and sitting around doing nothing, playing games on a computer, and somebody else who's working overtime to get the job done while I don't really want that person working overtime, you need to redistribute the workload. So that the employee who's bringing work home doesn't feel compelled to because some of the workload has been shifted to the employee who's not been filling up her day.

What are the takeaways that employers must know moving forward about this rule.

Doran: Take a look at their employees and determine how are these employees classified. Do they have the duties to be considered an exempt employee or not? That's the first cutoff there. Then, those who have the duties, do they meet the wage requirement to be considered an exempt employee? If not, the business owner has a decision to make. What do I do about that? Is it likely that this employee is ordinarily working more than 40 hours a week? Should I figure out whether it makes more sense to increase the salary or to pay that person time and-a-half overtime when they were working more than 40 hours a week? So

there's a decision tree I think.

Maddalone: First and foremost is the timekeeping system. Make sure they have something in there that's going to track all the hours that are being worked, from the time they start to the time they end, perhaps maybe some after-hour work that they're doing, and then how well does that integrate within their current payroll processing system. The human resource aspect as far as evaluating job descriptions and whether those are current. And then inside the handbook, taking a look at the personnel policies of overtime. When is overtime appropriate and how do you get overtime approved. What are the meal and rest periods and how do you make sure those are being complied with. And then what is the policy of this mobility of workforce today around paying people for working as they're sitting in the airport or traveling on work or perhaps just checking e-mails in the evening. Then lastly, they should definitely be doing a payroll audit of "Who do I have? "How much are they making?" "Do I have people properly classified as exempt or non-exempt, regardless of wage amount?" And then making that business decision whether or not they should be hourly or give them a merit raise to be salaried.

Skanes: We would recommend that you consult with counsel or with any advisors you might have to get advice on all of these topics and make sure you're complying not only with the federal law but with state law as well. ■

Thank you to our participants



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