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Agenda

- Wage/Hour and “white collar” exemption basics Final Rule overview
- Next steps for employers
- Taking advantage of the change



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Basic Wage/Hour Principles

- Fair Labor Standards Act (FLSA) is federal statute that regulates wage and hour law
- Establishes federal minimum wage (\$7.25)
- Guarantees compensation for all time worked, including overtime at time-and-a-half for all hours over 40 in workweek
- Establishes certain exemptions from minimum wage and/or overtime



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Basic Wage/Hour Principles (cont.)

- Be aware of state and local wage and hour laws:
 - Minimum wage increases have occurred across the country
 - Oregon: \$9.75 within Portland urban growth boundary, with annual increases to maximum of \$14.75 in 2022



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Threshold Questions: FLSA Coverage

- Employer (or joint employer)?
- Enterprise or Individual coverage?
- Automatically covered?



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1. Enterprise Coverage

- Engaged in business/ordinary commercial activities that generate annual business or sales revenues of at least \$500,000



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2. Individual Coverage

- If no enterprise coverage, check individual coverage
- Does work relate to or involve movement of persons or things across state lines (interstate commerce)?
 - Regularly make out-of-state phone calls
 - Interstate mail or email

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2. Individual Coverage, cont.

- Ordering or receiving goods from out of state
- Handling records or credit card transactions
- Travel to other states



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3. Automatic Coverage

- Regardless of dollar volume, FLSA applies to:
 - Hospitals (primarily engaged in offering medical and surgical services)
 - Institutions primarily engaged in the care of older adults and people with disabilities who reside on the premises

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3. Automatic Coverage, cont.

- Schools for children who are mentally or physically disabled or gifted
- Federal, state, local governments
- Preschools, elementary, secondary, higher education/colleges

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Threshold Question: FLSA Coverage

- Bottom line for FLSA coverage
 - Presume coverage under enterprise coverage
 - But even if agency is exempt, individual employees are likely covered



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State v. Federal Law

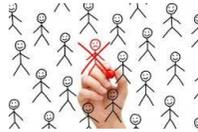
- Most generous law will apply
- Exemptions under state law do not necessarily apply to federal law
- Employers with locations in Oregon may face special challenges
 - No Highly-Compensated Employee exemption
 - Bonuses and commissions may not be able to be used toward salary threshold
 - Salary amount: 2,080 x Oregon minimum wage divide by 52 (currently \$390/week for Portland)

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Certain Employees are "Exempt"

- Limited records need to be kept
- Overtime does not need to be paid
- No worries about what is and is not work time
- No math, no hassle



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Recordkeeping for Non-Exempt Employees

- FLSA requires:
 - Time and day of week when employee's workweek begins
 - Hours worked each day
 - Total hours worked each workweek
 - Regular hourly pay rate
 - Total daily or weekly straight-time earnings
 - State law: more



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"White Collar" Exemptions

- Executive
- Administrative
- Learned Professional
- Creative Professional
- Computer Professional
- Highly-Compensated Employee



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Three Tests to be Exempt

- Must satisfy all three (3-legged stool!)
 - Salary Basis Test: Predetermined, fixed salary not subject to adjustment based on quantity or quality of work performed
 - Salary Level Test
 - Duties Test: Regularly perform duties specified in applicable test



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FLSA "White Collar" Positions That Do Not Have a Salary Level Component

- Doctors
- Lawyers
- Bona Fide Teachers
 - Employed in educational establishment
- Academic Administrators
 - Salary at least equal to entrance salary for teachers in same educational establishment
- Outside Sales
- Computer Professionals (if hourly rate is at least \$27.63)



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Exempt Duties Tests Changed in 2004

- Long test and short test consolidated
- Additional clarification for primary duties, discretion and independent judgment standards
- Job titles don't matter
- No changes in 2016!



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DOL's Changes to "White Collar" Overtime Exemptions:

The Final Rule



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FLSA Salary Threshold Doubled

- Currently \$455/week (\$23,660 annually)
- 2016 Rule: \$913/week = \$47,476 annually
- Bottom line: changes will need to be made for many employees currently earning below minimum wage levels
- Note: no exceptions for part-time workers—salary test must be met by all to maintain exempt status



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Plan Ahead

- Salary threshold goes into effect for workweek that includes December 1, 2016
- December 1 is a Thursday
- Salary threshold may need to be increased prior to December 1



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Plan Ahead: Automatic Escalator Provision

- New rule includes automatic escalator provision
- Threshold updated every 3 years
- First update Jan. 1, 2020



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Plan Ahead: Automatic Escalator Provision, cont.

- Salary calculated based on 40th percentile of non-hourly, full-time employees from lowest Census Region
- Highly-compensated employees: 90th percentile of full-time non-hourly paid employees nationwide



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Delayed Enforcement for Certain Non-Profits (Narrow)

- Providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds
- DOL will not bring enforcement actions until March 17, 2019
- BUT that doesn't mean that employees won't sue in court between 2016 and 2019
- Result: delay meaningless?



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What About Commissions or Bonuses?

- Up to 10% of employee's minimum salary may be paid in form of non-discretionary commissions or bonuses
- Must be paid on a quarterly basis
- If employee does not earn enough to bring weekly wage up to \$913, employer must make up difference
- Failure to do so means that employer will have to pay employee overtime for any week in that quarter in which employee worked more than 40 hours



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Non-Discretionary Bonuses

- Mandatory payments offered to employee as incentive to increase productivity or retention bonus
- Catch-up payment at end of quarter if employee's earnings during any week of quarter did not equal \$913
- No catchup payment? Overtime must be paid for any week employee worked more than 40 hours



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What About Commissions or Bonuses?

- Bonus or commission must be **non-discretionary**
- Employer may select any quarterly system it chooses: calendar, fiscal, etc.
- Once selected, will likely be required to stick to that system
- What happens if employee leaves mid-quarter?



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Next Steps for Employers



- Conduct an audit
 - Identify jobs that will be impacted by change in minimum salary level
 - Ask all workers to keep records of hours worked
 - Evaluate costs of various options
 - Identify jobs that may be misclassified

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Options

1. Give salary increases
2. Reclassify to non-exempt and maintain hours
3. Reclassify and limit overtime possibilities
4. Reclassify and "reduce" pay
5. Pay salary for fluctuating workweek- CAUTION

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Option 1

- Give raises to reach exempt salary threshold
 - Ripple effect if workers slightly above new threshold also expect raises
 - Possibility of two-tier exempt/non-exempt status in same job category



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Option 2

- Reclassify to non-exempt and maintain hours
 - Pay overtime (time and a half) to currently-exempt employees with salary less than minimum threshold whenever those workers work more than 40 hours in workweek
 - May be good option for employees who usually don't work more than 40 hours but who may have occasional spikes in workload

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Example

- Assistant Manager earning \$45K/year
- Works 5 hours of OT on average
- Works 5 hours of OT in Week 1
- Hourly wage = $\$865/45 = \$19.22/hr$
- OT rate \$28.83/hr
- OT wages = $\$144/week = \$7,488/yr$
 - \$2,476 salary raise v. \$7,488 in OT

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Option 3

- Reclassify to non-exempt and limit overtime possibilities
 - Reassign workloads to eliminate overtime
 - Hire part-time workers
 - Cost benefit analysis
 - May have different rates of pay for different job functions (travel, training, on-call time)

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Option 4

- Reclassify and “reduce” pay
 - Change status to non-exempt
 - Calculate amount of overtime and adjust hourly rate to include overtime premium



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Example

- Supervisor earns \$28,600/year and works average of 10 hours/week of overtime
- Hourly rate of \$10.00
- OT rate of \$15.00
- \$550/week = \$28,600 per year
- **Formula:**
 - Weekly salary/(40 + (OT hours x 1.5))

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Option 5 (Be Careful)

- Salaried, non-exempt (a/k/a fluctuating workweek method)
 - **Employee must be paid fixed salary regardless of number of hours worked each week**
 - Understanding between employer and employee that employee will be paid using fluctuating workweek method and how it works – recommend in writing

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Option 5 (Be Careful), cont.

- Workweek must fluctuate (*some weeks >40 hours; some weeks <40*)
- Salary pays employee for all straight “time”
- OT rate is one-half regular rate of pay
- OT rate plus salary = “time” and a half



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Option 5 Fluctuating Workweek Method

- Salary pays employee for all straight “time”
- OT rate is half regular rate of pay
- OT rate plus salary = “time and one half”
- Salary must be large enough so regular rate of pay will never drop below state minimum wage
- Employee must be paid overtime premiums for any hours worked over 40 in workweek at 50% of regular rate of pay for that workweek

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Example

- Supervisor earns \$41,600/year - \$800/week
 - Hours of work vary week to week
- Week 1 – 36 hours: paid \$800
- Week 2 – 43 hours
 - Calculation: $800/43 = \$18.60$ regular rate of pay for week
 - Overtime is one-half regular rate = \$9.30
 - 3 hours overtime = \$27.90
 - Wages in Week 2 = \$827.90
- Requires weekly calculation for weeks in which employee works >40 hours

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Fluctuating Workweek

- Clear mutual understanding!
- No specific frequency or degree of fluctuation specified
- Salary **cannot** be docked for tardiness, short weeks, etc.



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Fluctuating Workweek, cont.

- Not subject to same salary deductions as exempt employees (exhaust sick leave, FMLA, etc.)
- Remember they are still non-exempt

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Evaluate Operational Impact of 2016 Changes

- Cost!
- Two part-time instead of one full-time with OT?
- Evaluate and realign workload?
- Reduce fringe benefits?
- Decrease future raises for other employees?

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Communicating Change to Employees

- Issues
 - Morale – some employees see salary as sign of prestige
 - Wages – employees may have heard they will be entitled to a raise



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Communicating Change to Employees, cont.

- Flexibility – previous occasional absences may no longer be paid
- Impact on PTO – employees may be required to use paid time off for absences that previously just were absorbed into the workday

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Communicating Change to Employees, cont.

- Questions
 - Is this a demotion?
 - Do I have to change the way I work?
 - Will I lose my flexibility?
 - Will I still be able to advance my career?
 - Will I make the same amount of money?



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Communicating Change to Employees, cont.

- Management Training
 - Why is change taking place?
 - Not a reflection of agency's view of employee
 - Manager responsibility for verifying accuracy of time cards
 - Training on new time reporting procedures



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Communicating Change to Employees, cont.

- Lines of communication
 - Create communication plan
 - Give employees a chance to ask questions, voice concerns, open dialogue



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Communicating Change to Employees, cont.

- Someone other than immediate supervisor as point person
- Proactive – check time cards/records to be sure employees are not working "off the clock"



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Reminders



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Take Advantage of the Change!

- Identify jobs that may be misclassified
 - Review job descriptions
 - Are they accurate? Check with supervisors!
 - Revise if necessary
 - Reclassify when regulations become effective

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Opportunity to Make Corrections

- Good time to update job descriptions and correct classification mistakes
- Use change in the regulations as "cover"
- Good to tie reclassification to an event
- Positive spin: more earning potential



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Update Employee Policies

- Check employee policies regarding:
 - Accurately recording and certifying all time worked
 - Reporting payroll mistakes
 - No retaliation for raising pay issues
 - Reporting meal break interruptions



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The End – Thank you!

Any questions?



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