



# TIGHT AROUND THE “WHITE” COLLAR EXEMPTIONS THE NEW OVERTIME RULES ARE HERE!

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# HOW DID WE GET HERE?

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- September 8, 2023, DOL published a proposed rule updating the overtime regulations:
  - *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.*
- Notice of Proposed Rulemaking (NPRM) – comment period through November 7, 2023, (DOL refused requests to extend comment period).
  - 33,000 comments.
- March 1, 2024, DOL sent rule to the White House Office of Management and Budget (OMB) for final review.
- April 23, 2024, DOL announced final rule to take effect July 1, 2024.



# STARTING AT THE BEGINNING...

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OVERTIME - THE FUNDAMENTALS

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# STARTING AT THE BEGINNING...WAGE AND HOUR LAW

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**The Fair Labor Standards Act (FLSA) is the federal law that governs wage and hour. The FLSA has four basic requirements:**

- Employees must be paid at least federal **minimum wage** (\$7.25) for all hours worked;
- Employees must be paid an **overtime premium** (at time and one-half the regular rate of pay) for all hours worked over 40 hours in a workweek;
- Recordkeeping; and
- Child labor provisions.

# STARTING AT THE BEGINNING...WAGE AND HOUR LAW

CONTINUED

**The Fair Labor Standards Act (FLSA) is the federal law that governs wage and hour. The FLSA has four basic requirements:**

- Employees must be paid at least for a **minimum wage** (\$7.25) for all hours worked;
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- Recordkeeping; and
- Child labor provisions.



**“EXEMPT”**

# STARTING AT THE BEGINNING...WAGE AND HOUR LAW

CONTINUED

**Non-exempt employees** = eligible for overtime

**Exempt employees** = ineligible for overtime

**SO WHICH EMPLOYEES ARE “EXEMPT”?**

- **“White Collar Exemptions:”**
  - Executive, Administrative, and Professional (EAP);
  - Highly Compensated Employees (HCE);
  - Outside salesperson (no salary threshold); and
  - Highly skilled computer employees.



# STARTING AT THE BEGINNING...WAGE AND HOUR LAW

CONTINUED

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**Non-exempt employees** = eligible for overtime

**Exempt employees** = ineligible for overtime

**SO WHICH EMPLOYEES ARE “EXEMPT”?**

- **For most employees whether they are exempt or non-exempt depends on:**
  - How they are paid;
  - How much they are paid; and
  - What kind of work they do.

# STARTING AT THE BEGINNING...WAGE AND HOUR LAW

CONTINUED

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**Remember, exemption depends on three things:**

1. How employees are paid.
2. How much they are paid.
3. What kind of work do they do.



# STARTING AT THE BEGINNING...WAGE AND HOUR LAW

CONTINUED

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## Remember, exemption depends on three things:

1. How employees are paid...**SALARY BASIS:**
  - Employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed; and
  - No partial day deductions.
2. How much they are paid...**SALARY LEVEL/THRESHOLD:**
  - Before the rule change, this was \$684/week or \$35,568 per year.
3. What *kind of work* do they do...**JOB DUTIES TEST.**

# EXECUTIVE DUTIES

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- Primary duty is the management of the enterprise or 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 whose suggestions and recommendations as to hiring, firing, advancement, promotion, or other change of status of other employees are given particular weight.

# ADMINISTRATIVE DUTIES

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- 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

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- **Learned professionals** – 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.
- **Creative professionals** – Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

# WHAT CHANGED ON JULY 1, 2024?

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Previously, to qualify for exemption, employees were paid on a salary basis at not less than **\$684 per week (\$35,568.00 annually)**.



**Now it is \$844 per week (\$43,888 annually)**

- DOL did not propose changes to how bonuses are counted toward salary-level requirements:
  - Can satisfy up to 10 percent of salary level (\$84.40 per week) through payment of nondiscretionary bonuses or incentive pay (including commissions).



# NEW HCE SALARY THRESHOLD

To currently qualify for an exemption as a highly compensated employee (HCE), the employee must be paid not less than **\$107,432 annually**.



**\$132,964 annually.**

- Must be paid the salary minimum of \$844 per week.
- No changes to the paired down job duties requirement for HCE, i.e., must customarily and regularly perform at least one of the exempt duties or responsibilities of an EAP employee.

# WHAT CHANGES ON JANUARY 1, 2025?

To currently qualify for exemption, employees be paid on a salary basis at not less than **\$844 per week (\$43,888 annually)**.



**\$1,128 per week (\$58,656 annually)**

- HCE threshold goes up on January 1, 2025, to \$151,164 per year, including at least \$1,128 per week.
- Increases again on July 1, 2027, and every three years thereafter.

# WHAT DOES THIS MEAN?

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Any of your salaried "exempt" employees (i.e., currently ineligible for overtime pay) that make less than \$844 per week or \$43,888 annually **will be re-classified as non-exempt and entitled to overtime** when the Final Rule goes into effect.

- Also required to comply with the DOL's **record-keeping** requirements for non-exempt employees:
  - Hours worked each day;
  - Total hours worked each week;
  - Daily/weekly straight-time earnings for the work-week; and
  - Overtime earnings for the workweek.

# DO IMPACTED EMPLOYEES NEED TO BECOME HOURLY EMPLOYEES?

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- NO. Hourly is not the same as “non-exempt.”
  - When properly done, non-exempt employees can be paid a salary.
- Employers can pay a non-exempt employee any way they want (e.g. hourly, piece rate, salary, commission) as long as:
  - The employee receives at least the equivalent of minimum wage for every hour worked in the workweek; and
  - The employee receives overtime pay for any hour worked in excess of 40 in the workweek.

# WHAT TO DO NOW

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# GET INTO COMPLIANCE – IF YOU AREN'T ALREADY:

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July 1, 2024,  
first date

January 1,  
2025, second  
date

# IMPORTANT CONSIDERATIONS

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- Which employees will possibly be re-classified?
- How many work hours is the organization currently receiving for the compensation?
  - “Hidden overtime” – even if the position is scheduled for less than 40 hours/week, are you confident the employee is performing no duties outside working hours (e.g., answering emails, reading work materials, etc.)?
- Time-tracking mechanism.

# IMPORTANT CONSIDERATIONS

CONTINUED

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- Any currently “exempt” positions where you will now have both “exempt” and “non-exempt” employees?
  - Are you going to make partial day deductions (i.e. for tardiness or leaving early) for the non-exempt employees (can’t for the exempt employees without threatening exemption)?
  - Will there be a morale or other issues if some of the employees in the same job position have to keep track of hours while others do not?

# IMPORTANT CONSIDERATIONS

CONTINUED

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- Issues with morale and perception:
  - Employees will often see reclassification as a “demotion;”
  - Many employees prefer being overtime-exempt;
    - It means they don’t have to track their hours – and have more flexibility over when and where they work.
  - May resist keeping time records or accumulate “hidden” overtime; and
  - Plan for how this re-classification will be communicated to affected employees.

# IMPORTANT CONSIDERATIONS

CONTINUED

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- Training newly classified non-exempt employees on:
  - Timekeeping records and procedures;
  - Complying with meal/rest break requirements;
  - Restrictions on working outside normal work hours, travel time, and other compensable time issues; and
  - Deductions for partial-day absences.
- Do policies need to be updated or re-written?
  - Are you going to limit the non-exempt duties to “off-duty” work? Do you need policy changes (e.g. email curfew)?



# IMPORTANT CONSIDERATIONS

CONTINUED

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- For HCE...
  - DOL estimates that 248,900 employees who are currently exempt under the HCE test would be affected by the proposed increase in the HCE total annual compensation level.
  - If these employees are not paid at or above the new HCE level, the exemption status of these employees would turn on the standard duties test rather than the minimal duties test that applies to employees earning at or above the HCE threshold.

# POSSIBLE LEGAL CHALLENGES?

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# PENDING LITIGATION

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- *State of Texas v. United States Dep't of Labor et al.* (E.D. Texas June 2, 2024)
- Texas moved for a preliminary injunction, asking the U.S. District Court for the Eastern District of Texas to either temporarily prevent the DOL from enforcing the increased salary thresholds or to postpone the July 1, 2024, effective date while the case makes its way through the court system.
- The court held a hearing on that motion for preliminary injunction on June 24, 2024.
- Ruled on June 28, 2024, granting part of Texas' motion for a preliminary injunction, finding as part of its ruling that Texas is likely to succeed on the merits of its case challenging the DOL's ability to enact the new salary threshold rule. However, the court issued the injunction to only the State of Texas, and not to other employers. This means that July 1st remains the effective date for any employer who is not in the State of Texas.



# ANOTHER CASE WENT THE OTHER WAY:

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- *Flint Avenue, LLC v. U.S. Department of Labor*, Judge Sam Cummings held that plaintiff Flint Avenue failed to demonstrate irreparable harm resulting from the rule – the first part of which took effect July 1 – that would justify an injunction.
- However, Cummings also said he would consider the merits of the company's claims challenging the rule's other provisions, including DOL's proposal to again raise the threshold for overtime pay eligibility in January 2025.

# WAITING ON YET ANOTHER CHALLENGE:

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- We are still awaiting the outcome of a third, separate case in which a coalition of business groups led by the Plano Chamber of Commerce (that includes the American Hotel and Lodging Association and the Restaurant Law Center) claimed that the overtime rule violates the FLSA as well as the Administrative Procedure Act. The plaintiffs seek injunctive and other relief, and they have asked that the Court vacate the Final Rule.
- The group filed the lawsuit in the U.S. District Court for the Eastern District of Texas – the same court that blocked a previous overtime rule from the Obama administration in 2017. “Plaintiffs are back before this Court because the Department has done it again,” they said.

# IMPACT OF *CHEVRON* DEFERENCE DEFEAT

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- On June 28, the Supreme Court handed down *Loper Bright Enterprises v. Raimondo*, which overturned the prior Supreme Court precedent, articulated in *Chevron v. Natural Resource Defense Council, Inc.* and known as “the *Chevron* doctrine.” Under the *Chevron* doctrine, agency interpretations of Acts of Congress were owed deference wherever the law was unclear. *Chevron* gave substantial authority to agencies to implement and interpret laws.
- Now, judges have the authority to determine the best interpretation of an ambiguous statute rather than deferring to the agency.
- Agencies will have to persuade the court that their interpretation is correct rather than the court just presuming that it is.
- Might this result in MORE litigation challenging the DOL Final Rule?



# CHALLENGES IN THE RESTAURANT INDUSTRY

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# IS “PRIMARY DUTY” EXEMPT WORK?

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- *McDougall v. Boiling Crab Vegas, LLC* (D. Nev. 2023)
- Plaintiffs, who were “Daily Shift Leads” or DSLs, alleged that they were misclassified as exempt.
- Primary responsibility was to supervise the restaurant floor by ensuring the FOH was adequately staffed, operating efficiently, and that customers were served properly and items were accounted for accurately.
- Opened the restaurant, checked inventory levels, set up the cash till, performed walk-throughs, checked-in other FOH staff, conducted pre-shift staff meetings, assigned servers to sections, designated break times, delegated tasks, and re-assigned FOH staff to accommodate demand.
- Comped and voided items from guest checks, ensured tables were seated, served, and bussed properly, handled guest incidents and complaints, and ensured guest checks and tips were processed according to Defendant's policies.



# IS “PRIMARY DUTY” EXEMPT WORK?

CONTINUED

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- Corrected FOH errors and provided real-time feedback and informal training to FOH staff when FOH staff made mistakes.
- Covered FOH shifts when the restaurant was very busy.
- Interviewed employee applicants. Participated in hiring interviews, were able to ask questions during interviews, and provided their input on candidates to managers. Managers sometimes took DSL input and advice into consideration when making decisions on a particular job interviewee. At times, DSLs were also able to vote on candidates as part of the interview process.
- Provided input on personnel matters to the FOH managers.
- Had the authority to sign counseling forms as managers.

# EMPLOYER WON – NO OT LIABILITY:

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- HELD: Management was the DSL's "primary duty" because:
  - The DSLs' duties/tasks (as set forth in the manual) were nearly all managerial in nature. These tasks included: assigning employees to sections, assigning break time, adjusting employee time, completing write-ups and counseling forms (performance evaluations), interviewing employees, allocating tips among employees, checking-in employees at the beginning of the shift, and disarming the restaurant at the beginning of the shift as well as closing and arming the restaurant at the end of the shift.
  - DSLs actually performed these management tasks.
  - DSLs were involved with the interviewing, hiring, and disciplining of the FOH line workers. For example, DSLs had the authority to sign, as a manager, a "counseling form" to FOH staff and these forms could serve as a basis for disciplinary action against a line worker. DSLs would also sit in on interviews of employee applicants and provide their input on the applicant to managers.

# A DIFFERENT RESULT:

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- *Crayton v. Sailormen, Inc.*, (S.D. Ga. 2023)
- Plaintiff was an area manager, responsible for sales, operations, profitability, and people management for the Popeyes restaurants in Brunswick, Georgia.
- Duties include ensuring the restaurants are staffed with qualified shift supervisors and crew, developing and executing plans to achieve sales goals, developing plans to control expenses and achieve budget for restaurant operating profit, hiring, terminating, and conducting performance reviews of restaurant general managers, and ensuring reviews for assistant managers, shift supervisors, and crew are completed.
- While working as area manager, plaintiff interviewed “hundreds” of job applicants for upper-management positions, hired “hundreds” of people, fired “hundreds” of people, and trained “hundreds if not thousands” of people.
- Plaintiff also performed some of the same duties as crew members. Says she spent about 20 percent of her time on management, the remainder on crew duties.

# A DIFFERENT RESULT:

CONTINUED

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- Court examined four factors: (1) the relative importance of the exempt duties as compared with other types of duties; (2) the amount of time spent performing exempt work; (3) the employee's relative freedom from direct supervision; and (4) the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.
- The second and fourth factors – amount of time spent and the employee's salary compared to wages paid to other employees – weighed against finding that plaintiff's “primary duty” was management, while the first and third factors – relevant importance of exempt duties and freedom from direct supervision – weighed in favor of such a finding.
- Court ultimately denied summary judgment to employer.

# Q&A DISCUSSION

PRESENTER

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