

Show Me the \$\$\$: What You Need to
Know to Survive the New FLSA
Overtime Regs and other Employment
Law Updates

Presented by:

Clare M. Gallagher

Show Me the \$\$\$ --

- Topics:
 - *New FLSA Overtime Regulations*
 - *Break time*
 - *Recent Ruling on Restrictive Covenants*
 - *Intending to be legally bound . . .*
 - *New OSHA Rule, update . . .*

FLSA Overtime Regulations

- Regulations issued May 18, 2016.
- Effective on December 1, 2016.
- What's Changing:
 - Minimum salary level for exemptions.
 - Salary can now include up to 10% nondiscretionary bonus, incentive and/or commission payments if paid at least quarterly.
 - Salary threshold levels will be adjusted automatically, on an indexed basis (every three (3) years; first adjustment 1/1/2020).

FLSA: What is the \$\$\$ Threshold?

- “Exemption” from overtime depends on:
 1. How an employee is paid – salary basis; not subject to reduction based on quality or quantity of work (i.e., no docking for a missed day of work).
 2. How much an employee is paid – salary level/threshold
Currently: \$455 ➡ \$913/week
 \$23,660 ➡ \$47,476/annually
 \$100,000 ➡ \$134,004 “HCE”
 3. Duties Test: What kind of work does the employee perform – employee’s primary job duties involve those defined in the exemptions (“duties test” did not change in the new regulations, but check state law for state tests).

FLSA Overtime Exemption Categories

- Exemptions (updated with the standard duties tests in 2004):
 - Executive
 - Administrative
 - Professional
 - Computer
 - Outside Sales
 - Highly Compensated Employee (“HCE”)
- Caution: Check to see if state regulations follow the standard duties test for the above exemptions or if they follow the prior long duties standards.

FLSA Overtime Audit and Analysis

- What can you do now to prepare?
 - Don't wait; Conduct an Audit of Employees' Duties.
 - Identify employees who will need to be reclassified; determine the number of hours they work, and do the math.
 - Utilize the time now to monitor the number of hours that your employees are working.
 - Determine if the hours collected in your audit reflect normal operations or some variation (i.e., high vacation usage translating into an unusual amount of extra hours).
 - Check your time-keeping methods.
 - Craft a unified message to employees.
 - Develop a plan to ensure compliance.

FLSA Overtime \$\$\$ Options

- Options:
 - Increase employees' salaries to meet the new salary threshold test of \$913/week (\$47,476 annually).
 - Pay current salaries, with overtime after 40 hours.
 - Reduce salaries and pay the required overtime to equal current earnings.
 - Reorganize workloads, adjust schedules or spread work hours to minimize the cost on your organization.
 - Discontinue the allowance of overtime hours.
 - Use some combination of these options within your workforce.
 - Consider the potential cost of each option.

FLSA Overtime Implementation

□ Considerations:

- If employee regularly works overtime but earns less than \$47,476, it may be most cost effective to increase salary.
- If employee rarely works overtime, consider maintaining the employee's current salary and pay overtime.
- SNEs – salaried non-exempt employees: Maintain the employee as salaried and pay overtime for those hours worked over 40 in a week. Be careful: No fluctuating workweek calculation in PA.
- Make sure that the employee meets the duties test for executive, administrative or professional exemption.
- Guidance for Specialized Employees – Nonprofits and Higher Education Institutions.

FLSA Overtime Implementation

- Additional Considerations:
 - Morale Issues.
 - Recordkeeping (must be complete and accurate).
 - Logistics:
 - Consider the rollup costs of changing salaries.
 - Impact on benefits that are designed along the salaried/hourly structure.
 - Adjusting base salary up/down will impact benefit levels. Review benefit plan language.
 - Telecommuting (biggest challenge for nonexempt employees moving forward).
 - Unexpected Pay Disparities.
 - Final Audit: Impact Across the Workforce.

Babcock v. Butler County

- When are meal periods compensable under the FLSA?
- The facts:
 - Prison guards received an hour-long meal break, 15 minutes of which were unpaid.
 - Required to remain on premises (unless they received permission from warden), in uniform and prepared to respond to emergencies.
 - Prohibited from running errands, sleeping, smoking, or otherwise leaving building without permission of a supervisor.

Babcock v. Butler Cty., 806 F.3d 153 (3d Cir. Nov. 24, 2015).

Babcock v. Butler County (cont.)

“The employee must be completely relieved from duty for the purposes of eating regular meals ... The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.” Dept. of Labor Regulation, 29 C.F.R. § 785.19(a).

vs.

“Whether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case.” Supreme Court case, *Armour & Co. v. Wantock*, 323 U.S. 126 (1944).

Babcock v. Butler County (cont.)

- “Predominant benefit test”
 - Did the meal break, with all of its restrictions, predominantly benefit the prison? In other words, was the entire meal period compensable time?
 - Under the totality of the circumstances, **no**.
- Takeaway:
 - Review any restrictions placed on employees during unpaid breaks.
- Reminder:
 - The FLSA requires that rest periods of less than 20 minutes be counted as “hours worked” for overtime or minimum wage purposes.

Socko v. Mid-Atlantic Systems of CPA, Inc.

- Restrictive covenants:
 - What consideration is sufficient when an existing employee enters into a restrictive covenant?
 - Under PA common law, need more than mere continuation of employment.
- Uniform Written Obligations Act (UWOA)
 - Magic language – “intending to be legally bound”
 - Can the magic language alone save a non-competition agreement entered into after employment has commenced?
 - **No.** “New and valuable consideration” is required.

Socko v. Mid-Atlantic Systems of CPA, Inc., 126 A.3d 1266
(PA Supreme Ct. Nov. 18, 2015).

Socko v. Mid-Atlantic Systems of CPA, Inc.

- What is “new and valuable consideration”?
 - Salary increase
 - Other favorable change in compensation – bonuses, stock options, enhanced benefits
 - One-time payment
 - Promotion
 - Change from part-time to full-time
 - Etc.

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OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illness

- 81 Fed. Reg. 29624.
- New anti-discrimination and anti-retaliation provisions were scheduled to take effect Aug. 10th.
- Pushed back to Nov. 1st (pending lawsuit to block parts of the Rule).
- Electronic reporting provisions begin in 2017.
- Reporting: employers are required to post workplace recordable injury and illness information electronically – OSHA's "wall of shame."

OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illness

- Impact of the new anti-discrimination and anti-retaliation provisions?
 - Employers must establish “a reasonable procedure” for employees to report work-related injuries and illnesses promptly and accurately.
 - Procedure cannot deter or discourage a reasonable employee from accurately reporting an injury or illness.
 - Prohibits retaliation for reporting an injury or illness.

OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illness

- OSHA's Interpretation of Violations:
 - Mandatory, post accident drug testing – discriminates against employees on the basis of injury or illness reporting.
 - Incentive Programs – in which employees are denied a benefit on the basis of any injury or illness report (i.e., if a shift loses a safety bonus due to a single employee being injured).

OSHA's Final Rule on Electronic Tracking of Workplace Injuries and Illness

- OSHA's Q&A: May an employer require post-incident drug testing for an employee who reports a workplace injury or illness?
 - The rule does not prohibit drug testing of employees. It only prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and this rule would not prohibit such testing.



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Questions?

Clare M. Gallagher

(412) 566.2069

cgallagher@eckertseamans.com

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