

New Overtime Rule Will Cause Pay Continuity and Predictability Issues for Employees and Employers



By: Karen S. Elliott, Esq.

Partner, Eckert Seamans Cherin & Mellott, LLC

Unless Congressional or legal action lowers the new salary level requirement or delays implementation, the new overtime rule will take effect on December 1, 2016. The minimum salary level will increase from \$23,660 to \$47,476 for employees who otherwise qualify as being exempt from overtime requirements under the executive, administrative and professional pay exemptions.

While the employees' job duties remain the same, without the required salary increase they must be reclassified and paid as nonexempt. Newly categorized nonexempt workers will receive the benefit of overtime pay, but they lose pay continuity and predictability.

Traditional Pay Method. The easiest overtime calculation pays an hourly rate of pay plus a time and one-half overtime premium for all hours worked over 40. A salary of \$40,040 a year for a *consistent* 50-hour workweek converts to an hourly rate of \$14.00/hour to accommodate for the 10 hours of overtime. This method fails to provide pay parity though for formerly exempt employees who work *varying* hours and previously relied on a predictable paycheck for monthly expenses.

Less known pay alternatives, while administratively more cumbersome, may provide some relief.

A general idea of these options follows. All of them require payment of at least the applicable minimum wage (higher in some states than the federal amount).

Guaranteed Pay Plan. The Fair Labor Standards Act ("FLSA") has only one option that allows a guaranteed salary with built-in overtime. Often called the Belo pay plan, key elements include having an agreement, work hours that fluctuate a specified amount both above and below 40 hours in a week due to the nature of the work involved, but not to exceed 60 hours a week, and no payment of additional compensation such as non-discretionary bonuses. Above the agreed maximum hours, the employer must pay 1.5 times the regular rate of pay. Discretionary bonuses may still be paid.

Prepayment of Overtime. The Department of Labor ("DOL") also allows employers to prepay overtime in advance of when it is earned. For this plan, the employer and employee agree that in any week in which the employee works less than a 40-hour workweek, the employer advances the employee the difference between the amount he would have earned for 40 hours of work and the number of hours actually worked. Employers must keep a record of the running account.

This must be a true loan and not a back door Belo plan. When the employment relationship ends, the employer must make some attempt to obtain repayment of any amount overpaid. Each state's laws should be referenced for legality as well.

Payment of a Salary for Fixed or Fluctuating Hours Up to an Agreed Limit. Nonexempt employees paid a salary may agree that the salary covers a specified number of weekly hours, and either that the salary is earned upon working all "fixed" number of hours, or upon working any or all "fluctuating" hours up to the agreed cap.

The number of weekly hours may be set below or above 40. Under both the "fixed" and "fluctuating" methods, the employer must pay the employee overtime for hours worked over 40 up to the agreed cap in an amount equal to .5 times the employee's regular rate, calculated for that week. (The amount is .5 rather than 1.5 because the 1.0 has been paid as salary.) If the employee works over the agreed hours cap, the employee receives 1.5 times the regular rate of pay for each extra hour. Under both methods, the employee must still track hours worked and the hours reported must in reality account for worked time.

Under the fixed hour method employers may make pay deductions for hours not worked up to the

fixed amount (making it similar to the “hourly rate of pay” method). On a fixed hour agreement, an employee working all 43 hours for a \$600/week salary would earn \$600 + (\$6.98 x 3) for \$620.94 for the week. Employers cannot guarantee this amount of pay, otherwise it becomes an illegal guaranteed pay plan.

If using the fluctuating method, employers *must* pay the agreed salary for few or all of the hours worked up to the agreed cap (similar to exempt requirements). The employee’s salary remains constant, but the overtime rate fluctuates **Salary for Fluctuating Hours with No Maximum Cap**. Often called the “fluctuating workweek” method of pay, this pay arrangement has no cap on hours and specific rules apply as set forth in the Department of Labor’s regulatory guidance (29 CFR 788.114). While a long-accepted pay method, it has recently come under attack, and is an impermissible pay method in at least Alaska, California, New Mexico and Pennsylvania.

Employers choosing a “non-traditional” overtime pay plan should obtain the employees’ written agreement regarding the pay plan terms, and always keep an accurate record of all hours worked.

ABOUT KAREN ELLIOTT

Karen Elliott is a Richmond-based attorney with the law firm of Eckert Seamans Cherin & Mellott who focuses her practice on labor and employment law and commercial litigation matters. She strives to provide practical legal advice to help employers craft reasonable business solutions for their human resource challenges. Her clients span all sizes, from start-ups to the Fortune 500, in industries ranging from nursing homes, physician practices, and health and rehab centers to construction, travel and entertainment, fast food, and retail.

As a labor and employment lawyer, Karen helps clients navigate the alphabet soup of the 40 or more employment laws from the ADA, FMLA, GINA, OSHA to USERRA, and the myriad federal agencies such as DOL, EEOC, and NLRB. Because Karen is a trial lawyer, she understands the complexities involved in going to court, and helps clients work to resolve issues before they become legal issues. But as an experienced trial lawyer, she knows how to navigate agency investigations as well as courtroom drama. Karen empathizes with businesses facing difficult employment issues. She has firsthand experience from when she had to act on her own legal advice while serving as president of a not-for-profit when its business office staff walked out. She understands that the legal answer is not always the practical business solution.

Karen dedicates time each day to honing her legal skills and keeping up with the fast-changing area of labor, employment, and benefits law. She has been recognized with an AV preeminent peer rating from Martindale Hubbell. This is its highest level rating for professional excellence for both ethical standards and legal experience. She is also proud to claim similar recognition from *Best Lawyers*, *Super Lawyers*, and *Virginia Business* magazine’s “Legal Elite.”

ABOUT ECKERT SEAMANS

Eckert Seamans Cherin & Mellott LLC has nearly 375 attorneys located in 14 offices throughout the United States, including Pittsburgh, Harrisburg, and Philadelphia, Pennsylvania; Boston, Massachusetts; Washington, D.C.; Richmond, Virginia; Wilmington, Delaware; Newark and Princeton, New Jersey; White Plains, New York; Providence, Rhode Island; Troy, Michigan; Charleston, West Virginia; and Hartford, Connecticut. The firm provides a broad range of legal services in the areas of litigation, including mass tort and products liability litigation, corporate and business law, intellectual property law, labor and employment relations, aviation law, bankruptcy and creditors' rights, employee benefits, environmental law, construction law, public finance, real estate, tax and estate law, and trucking and transportation law.

Eckert Seamans’ practice reflects virtually every industry and segment of the country’s business. Clients include Fortune 500 companies, financial institutions, newspapers and other media, hotels, health care organizations, airlines, and railroads. The firm also represents numerous federal, state, and local governmental and educational entities. In order to provide access to legal resources that enhance our ability to serve clients’ needs around the world, Eckert Seamans is a member firm of SCG Legal, a global network of over 145 independent law firms located in 82 countries.

Karen S. Elliott, Esq. ? (804) 788-7762 ? kelliott@eckertseamans.com