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## How Do The New Overtime Regulations Impact you

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Region 4 PARENT TECHNICAL ASSISTANCE CENTER

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### Goals For Today

- Refresh on existing rules regarding exemptions
- Explain the requirements under the new FLSA overtime regulations
- Consider whether they apply to you
- Identify options

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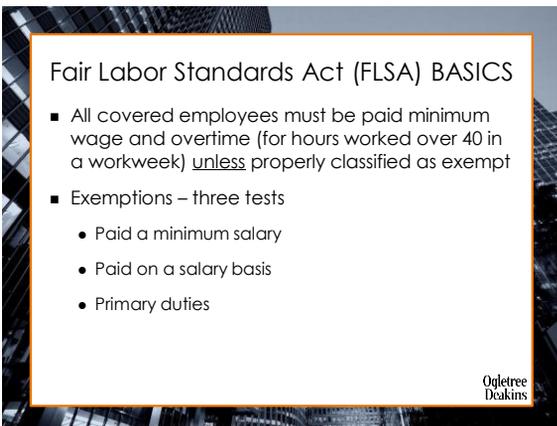
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### Fair Labor Standards Act (FLSA) BASICS

- All covered employees must be paid minimum wage and overtime (for hours worked over 40 in a workweek) unless properly classified as exempt
- Exemptions – three tests
  - Paid a minimum salary
  - Paid on a salary basis
  - Primary duties

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**FLSA Basics**

**Primary White Collar Exemptions**

- Executive
  - Supervise and direct the work of 2 or more FTEs
  - Primary duty is managing the enterprise/department
  - Authority to hire/fire or recommend
- Administrative
  - Office or nonmanual work directly related to management or general business operations
  - Primary duty includes exercise of discretion and independent judgment with respect to matters of significance

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**FLSA Basics**

**Primary White Collar Exemptions (cont.)**

- Professional
  - Primary duty – performing work requiring advance knowledge, predominantly intellectual, consistent exercise of discretion and judgment
  - Advanced knowledge in field of science or learning – acquired by prolonged course of specialized intellectual instruction
- Other less common exemptions
  - Highly Compensated employee (over \$134,004 as of December 1, 2016)
  - Outside Sales
  - Computer Employee

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**FLSA Basics**

**The Salary Basis Test**

- Paid on a "salary basis" means—
  - Employee must receive the same predetermined salary every week;
  - With very limited exceptions, the predetermined amount may not be reduced because of variations in the quality or quantity of work performed;
  - Do not have to pay if no work performed during the entire work week.

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### President's March 13, 2014 Memorandum

"Modernize and Streamline" white-collar overtime exemptions

- Update existing protections
- Address the "changing nature of the workplace"
- Simplify the regulations



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### DOL's New Final Regulations: 29 C.F.R. Part 541

- New Minimum Salary Threshold: \$913/week
- \$1,826 biweekly, \$3,956 monthly, \$47,476 annually
- 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South
- December 1, 2016—Effective Date
- This is less than four months away!
- Congressional legislative efforts to stop the regulations – don't count on it!

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### Automatic Adjustment Provision

- Salary threshold will be automatically adjusted every 3 years
- January 1, 2020 is first adjustment effective date
- Projected salary level effective January 1, 2020, is \$984 per week (\$51,168 annually)
- Adjusted salary thresholds will be published 150 days before their effective date

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IF MINIMUM SALARY TEST NOT MET  
EMPLOYEE CANNOT BE CLASSIFIED AS  
EXEMPT



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Expected Impact

- Administration: Estimated 5 million more employees "eligible for overtime"
- Likely increase in litigation
  - More cases
  - Higher stakes

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But Does The FLSA Even Apply?

- Enterprise Coverage: an organization engages in interstate commerce exceeding \$500,000
- Even if the organization is not covered, individuals may be covered if job duties involve interstate commerce.
  - "Performing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence)" between states.

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### Who Is Involved In Interstate Commerce?

- Almost Everyone nowadays:
  - Purchasing from another using the internet
  - Interstate phone calls, mail, email
  - Handling credit card transactions across state lines
  - Business travel to another state
  - internet use, and specifically use of Facebook (for business purposes)
- Connection to interstate commerce must be 'regular and recurring'

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### "Regular and Recurring Interstate Commerce" applies

<ul style="list-style-type: none"> <li>■ Two to four trips out-of-state per month</li> <li>■ Mailing monthly news letters out of state was enough</li> <li>■ Ordering cleaning supplies and equipment six times a year from out-of-state vendors was enough</li> <li>■ Exotic dancers using internet music streaming service</li> </ul>	<p>No (FLSA May Not Apply)</p> <ul style="list-style-type: none"> <li>■ Four trips in nineteen months</li> <li>■ Employees relaying phone messages to residents in a home for the mentally ill</li> </ul>
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### Are Your Jobs Covered?

<p><b>Office Manager/ Program Assistant</b></p> <ul style="list-style-type: none"> <li>■ Ordering supplies?</li> <li>■ Taking interstate calls?</li> <li>■ Sending interstate mail?</li> <li>■ Participating on professional development out of state?           <ul style="list-style-type: none"> <li>● What portion of time is spent on these tasks?</li> </ul> </li> </ul>	<p><b>Information &amp; Referral Parent Mentors Direct Service Staff</b></p> <ul style="list-style-type: none"> <li>■ Calls and emails from other states?</li> <li>■ Locating resources from other states?</li> <li>■ Conferences?</li> <li>● But are these things regular and recurring?</li> </ul>
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### Are Your Jobs Covered? (cont.)

<p><b>Trainers</b></p> <ul style="list-style-type: none"> <li>■ Presenting webinars?</li> <li>■ Arranging speakers?</li> <li>■ Attending conferences?</li> </ul> <p><b>Executive/Program Director</b></p> <ul style="list-style-type: none"> <li>■ Technical assistance from out of state?</li> <li>■ Coordination with other centers?</li> <li>■ Working with Vendors?</li> <li>■ Professional Development</li> </ul>	<p><b>Accounting/Finance</b></p> <ul style="list-style-type: none"> <li>■ Interacting with out of state vendors?</li> <li>■ Professional Development?</li> </ul> <p style="color: orange; text-align: center;"><b>Are these things regular and recurring?</b></p>
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### Don't Forget State Law!

- Many states have their own wage and hour laws that run parallel to the federal law.
- You must comply with both
  - Some state laws are more restrictive on employers
- For example, states may have their own:
  - Minimum wage/salary
  - Definitions of duties for exemption
  - Regulations regarding alternatives, like fluctuating work week or salaried non-exempt

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### Action Steps!

1. Consider whether FLSA/state law applies to the employee (probably yes)
2. Consider whether job duties qualify for exemption under FLSA (see hand out)
  - Good time to clean-up exemption issues
  - Review duties on paper
  - Review duties in practice

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**Action Steps! (cont.)**

3. Consider whether job duties qualify for exemption under state law (varies by state)
4. Determine whether salary meets the minimum
  - If no, decide whether to move forward as exempt or non-exempt

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**If Employees No Longer Qualify As Exempt: Options**

1. Raise salaries to the minimum and keep exemption
2. Restructure certain positions – some exempt/some nonexempt
3. Convert at-risk positions to non-exempt and pay (or limit) overtime
  - You can discipline for working unauthorized overtime, but generally must pay for the time worked
  - Consider "salaried, non-exempt" or fluctuating work week structures.

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**Salaried Non-Exempt And Fluctuating Workweek**

- Non-exempt employees can continue to be paid a salary, but will also need to be paid overtime for hours over 40 in a week.
  - This might ease the perceived "demotion" of being moved to hourly
  - Can ease the administrative/payroll burden

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### Salaried Non-Exempt and Fluctuating Workweek (cont.)

- "Salaried Non-exempt" employee receives a set weekly salary for their regular hours worked, but must receive time and a half for overtime
  - Helpful for workers who rarely work overtime
  - Can ease administrative burden
  - Put this arrangement in writing
  - Need to track the employee's hours, if not already
    - Note: if the employee works a consistent schedule, you can track hours by telling the employee to report only if they deviate from the set schedule. If no deviations, that means the employee worked the set schedule

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### Fluctuating Workweek

- Fluctuating Workweek: applies to employees who work varying hours.
  - Pay a fixed weekly salary for all hours worked, then pay only "half time" for hours over 40 (because employee has already been paid the straight time in salary)
  - Cannot reduce salary when employee works less
  - Must be agreed in writing in advance

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### How to Decide?

- Conduct financial modeling of potential impact for proposed salary increases/reclassifications
  - Consider weekly hours regularly worked in jobs to be reclassified
  - Consider budget cycle/process
- Consider and plan for potential impact on operations and corporate culture
  - Will exempt employees end up with even greater work loads?
  - Will you need to hire more employees to avoid overtime?
  - Think about maintaining exemptions under duties test when restructuring job duties

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**How To Implement Changes?**

- Plan and prepare communications to employees regarding changes
  - Many employees view shift to "hourly" as a demotion; emphasize that company values them the same way
  - Emphasize that hourly does not necessarily mean no flexibility in schedule
  - Emphasize change is due to government action and not agency practices
  - Change applies prospectively
  - Secure acknowledgement of changes and policies
    - See sample acknowledgement

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**How to Implement Changes? (cont.)**

- Evaluate timekeeping policies, procedures and systems/software
  - Employees may not have had to track time before
  - See sample policy
- Train employees and supervisors
  - Increased communication regarding work flow, hours
  - Need to track and manage overtime
- Enforcement

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**Rules for Non-Exempt Employees (cont.)**

- Must be paid for all "hours worked"
  - On-call
  - Travel time
  - Remote work – laptops, smartphones
- Must pay overtime even where unauthorized – if employer knew or had reason to know the employee was working
  - You can discipline for working unauthorized overtime
- Must retain accurate time-records
- Cannot use "comp time" in the private sector

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Rules for Non-Exempt Employees (cont.)

- Avoiding off-the-clock violations:
  - Lawful policies, training, records
    - Record all hours
    - Pre-approval to work overtime
    - Subject to discipline
  - Unlawful practices
    - After hours communication?
    - Workload doesn't match recorded time?
    - Employee pressure?
    - Supervisor/manager incentives?
  - Complaint/correction procedure

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Any Questions?



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Thank You!

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