

FLSA AND THE REGULATIONS

By Liz Mayo and Alissa Martin

WorldatWork recently published data showing that, with the first update occurring on January 1, 2020, the change in the 40th percentile of salaries could be raised as high as almost \$71,000. While the U.S. Department of Labor's (DOL) final rule estimated the threshold will be raised in three years to around \$51,000, it misses a major fact. Once employers reclassify by December 1, 2016, employees who are exempt today become nonexempt and will not be counted in future calculations because they will lose their salary status and become hourly workers. This will cause the 40th percentile of exempt employees to ratchet upward faster than the DOL's current estimates of projected increases.

Unless the DOL changes these rules, this means employers will need to decide if they will increase salaries to \$47,476 to maintain exemption status in 2016 and up to \$71,000 by 2020, limit workers to 40 hours per week, or pay time-and-a-half for overtime.

As the nonexempt employee population grows, it's imperative that companies understand all of the rules on how to calculate overtime. We've detailed below a few of the main areas of risk.

What is compensable time? We all know we have to pay for hours at work but what about unauthorized working time?

Employees must be paid for work "suffered or permitted" by the employer even if the employer does not specifically authorize the work. If the employer knows or has reason to believe that the employee is continuing to work, the time is considered hours worked. See [Regulation 29 CFR 785.11](#).

Must companies pay for the time spent at training and seminars?

Attendance at lectures, meetings, training programs and similar activities is viewed as working time unless all of the following criteria are met:

- Attendance is outside of the employee's regular working hours
- Attendance is in fact voluntary
- The course, lecture, or meeting is not directly related to the employee's job
- The employee does not perform any productive work during such attendance.

Is overnight travel compensable time?

- Travel time during an employee's normal working hours is compensable
- Travel time on Saturdays, Sundays and holidays that corresponds to an employee's normal working hours is compensable

The primary risk in miscalculating overtime is "off-the-clock" work.

Employees who start work before clocking in or who continue to work after clocking out create compensable time. This includes working at home or during meal periods. Whether an employer knows this is happening or not, the company is obligated to pay for these hours. Particularly troubling is the ability to answer emails from smartphones. If they are work emails, this is compensable.

To avoid these pitfalls, you can ensure your company has a complete understanding of everything that an employee does:

- From the moment he or she arrives at work until that employee is on the clock
- From the moment the employee is off the clock until he or she leaves premises
- Related to work away from the work site

Finally, prior to the December effective date, employers may need to:

- Re-evaluate the exempt status of current employees
- Evaluate job descriptions to ensure they comply with any revisions
- Revise overtime policies
- Review the organization's policies regarding "off-the-clock" or after-hours work, such as reading/responding to emails
- Review payroll and/or time and attendance systems to ensure it can accurately track hours and calculate overtime

Longnecker & Associates is here to help if you are uncertain about the impact to your workforce, if you would like some cost modeling performed, or if you don't have the capacity to update the many documents and procedures needed to be put in place before the end of the year.

