

# NEW OVERTIME REGULATIONS

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Employers' Legal Defense Institute<sup>SM</sup>

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**Kaplin | Stewart**  
Attorneys at Law

*Presented By:*

Kimberly L. Russell, Esquire

Kaplin Stewart Meloff Reiter & Stein, P.C.

910 Harvest Drive, P.O. Box 3037

Blue Bell, PA 19422

Telephone: (610) 941-2541

Email: [krussell@kaplaw.com](mailto:krussell@kaplaw.com)

## OVERVIEW – PRIMARY CHANGE TO FAIR LABOR STANDARDS ACT (FLSA)

- Minimum salary level for overtime exemption increased to **\$55,068.00/year** or **\$1059.00/week**
- Previous levels \$35,568.00/year or \$684.00/week
- Effective date not yet determined – comment period ended November 7, 2023
- Automatic increases every three years

## WHAT DOES THE “MINIMUM SALARY LEVEL” ACTUALLY MEAN?

- If an employee does not earn at least \$55,068.00/year or \$1059.00/week, that employee **IS NOT** exempt from overtime, no matter what other criteria the employee meets

## GUARANTEED OVERTIME PROTECTION

- “Blue Collar” Workers still get overtime
  - Example: Office Manager/“Working” Superintendents
    - May have some management functions, but do they still perform mainly “non-exempt” tasks/manual labor?

## EMPLOYMENT TONGUE TWISTER: EXEMPT vs. NON-EXEMPT

### EXEMPT

- Employees who are **NOT** entitled to overtime, no matter how many hours they work in a week

### NON-EXEMPT

- Employees who **ARE** entitled to overtime pay for hours actually worked over 40 hours per week

## THE BIG “NO-NO”

- SALARY vs. HOURLY
  - Employers **CANNOT** determine whether to pay overtime on the basis of whether an employee is “salary” vs. “hourly”
  - Example – The “salaried” office worker

## EXEMPTION ELIGIBILITY BASICS

- Salary Level Test –
  - Must be paid minimum of \$1059.00/week (\$55,068.00/year)
- Salary Basis Test –
  - Must be paid on a salary (vs. hourly) basis
- Duties Test –
  - Employee must perform certain “exempt” duties, as set forth in exemptions

# EXEMPTIONS FROM OVERTIME

## OVERVIEW

- Executives
- Administrators
- “Learned” Professionals
- Outside Salespeople
- Computer Professionals
- “Highly Compensated” Employees – Revised under new rule



## EXECUTIVE EXEMPTION

- Executive must meet 3 “duties” requirements –
  - Primary Duties Test: “Primary Duty” must be management of the business or a recognized department or subdivision of the business
  - Supervision: Executive must customarily and regularly direct the work of 2 or more other employees
  - Authority to Change Status: Executive must have the authority to hire and fire employees **OR** make suggestions for hiring and firing that are given particular weight
- Test not applicable to 20% owners who manage company – automatically meet the exemption

## ADMINISTRATIVE EXEMPTION

- To qualify for exemption, employee must meet 2 duties tests –
  - Primary Duty 1: “Primary Duty” is the performance of non-manual work directly related to the management or general operations of the business or its customers
  - Primary Duty 2: “Primary Duty” must include the exercise of discretion and independent judgment with respect to matters of significance
- This exemption does not require administrative employees to set management policies; it requires only the performance of management duties

## “LEARNED PROFESSIONAL” EXEMPTION

- Primary duty must be performance of work
  - Requiring knowledge of an advanced type
  - Knowledge must be in a field of science or learning
  - Knowledge must be customarily acquired by a prolonged course of specialized instruction
- Emphasis on need for certification and accreditation

## “OUTSIDE SALES” EXEMPTION

- Primary duty is sales work
- Employee must “customarily and regularly” work outside place of business
- Weekly minimum does not apply; annual minimum applies

## “COMPUTER PROFESSIONAL” EXEMPTION

- Primary duty consists of –
  - Systems analysis
  - Design, development, testing, or modification of new systems, programs, or machine operating systems
- Actually employed as systems analyst, programmer, software engineer
- Minimum salary level requirement of \$1059.00/week (or hourly at \$27.63\*/hour)

**\*Waiting to see if DOL will change this; Same as hourly rate from 2020\***

## “HIGHLY COMPENSATED EMPLOYEE” EXEMPTION

- Employee earns at least \$143,988.00/year (was \$107,432.00/year)
  - Effective date not yet announced
- \$1059.00 per week must be earned as salary (was \$684.00/week)
- “Customarily and regularly” performs at least one exempt responsibility of an exempt executive, administrative or learned professional employee

## “HIGHLY COMPENSATED EMPLOYEE” EXEMPTION

- Primary duty is non-manual or office work
- **NOT** applicable to blue collar workers, no matter how highly compensated

## “HIGHLY COMPENSATED EMPLOYEE” EXEMPTION

- Part of \$143,988.00 minimum salary may include:
  - Commissions
  - Nondiscretionary bonus
  - Other nondiscretionary compensation (i.e. deferred compensation)
- Must still meet \$1059.00/week salary; remainder can be bonuses



## BONUSES AS PART OF MINIMUM SALARY

- Employer can use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of minimum salary requirement
  - i.e. Nondiscretionary bonus based on productivity or increased profitability
  - Payment of bonuses must be made at least annually
  - Effective January 1, 2020; No change proposed yet

## BONUSES AS PART OF MINIMUM SALARY

- Employer can make “catch up” payment at end of year to reach \$55,068.00 minimum salary level and preserve exemption
  - If “catch up” payment not made, must pay overtime
  - Must be made by 1<sup>st</sup> pay of new year, and counts only toward “catch up” year
    - i.e. 2023 “catch up” payment made in first pay of 2024 does not count toward 2024 minimum salary level

## PERMISSIBLE DEDUCTIONS FROM PAY FOR EXEMPT EMPLOYEES

- Full day absences for purely personal reasons (not illness)
  - i.e. – Used all vacation days and take additional days off
- FMLA leave
- Illness or disability, **IF** there is an employer compensation plan in place (i.e. sick leave exhausted)
- Suspensions for major safety violations

## PERMISSIBLE DEDUCTIONS FROM PAY FOR EXEMPT EMPLOYEES

- Full day deductions for violations of a written workplace conduct rule
  - Sexual harassment, substance abuse
  - Does **NOT** include performance or attendance problems

## ADDITIONAL COMPENSATION TO EXEMPT EMPLOYEES

- Can pay discretionary bonus on account of hours worked?
  - Can give money or time off
  - Example – Paid time off after additional hours worked to prepare for audit
  - Employee must still be paid weekly minimum \$1059.00/week
  - Proceed with caution – do not destroy “salary basis” test

## SAFE HARBOR RULE

- Save an exemption where employee's pay was impermissibly docked –
  - Written policy against improper deductions
  - Procedure to report complaints of improper deductions
  - Reimburse employee for improper deduction
  - Make good faith commitment to comply in future

## PENNSYLVANIA EMPLOYERS

### **\*CAUTION\***

- Pennsylvania does not have Highly Compensated exemption

## WHAT DO YOU DO NOW? TIPS FOR EMPLOYERS

- Review salary levels and classifications for all employees
  - Consider salary adjustments for potentially exempt employees
- Review and revise job descriptions with an eye toward duties in exemption tests
- Implement written policy against improper pay deductions



## TIPS FOR EMPLOYERS

- Implement written policy to take prompt, appropriate action to correct improper deductions
- Take advantage of the disciplinary deduction rule
  - Revise handbook to state specifically that suspension without pay is a possible form of discipline for all employees

## TIPS FOR EMPLOYERS

- Review the possible exempt status of employees who earn close to or over \$143,988.00/year (unless PA employee)
- Evaluate overtime costs vs. salary bump
- Utilize year-end “make-up” payments where makes economic sense
  - Especially if you have not tracked employee hours

## TIPS FOR EMPLOYERS

### **DO NOT FORGET – MANAGE OVERTIME!**

- Employees can create huge cost burdens for Employers who simply do not manage overtime

## TIPS FOR EMPLOYERS

- DO NOT allow employees to clock in before start time (or 5 minutes before)
- DO NOT allow employees to linger and not clock out after their shifts end

## TIPS FOR EMPLOYERS

- Make sure that employees clock in and out for meal periods and breaks of 20 minutes or more
  - Not doing so means that employees may get a 2.5 to 5 hour “head start” toward overtime
  - Even if “pay” for lunch – clock in and out!

## TIPS FOR EMPLOYERS

- Supervisor training is key
  - Supervisors are the front line of managing overtime costs
  - Supervisors should watch for “lingering” employees/early arrivals
  - Supervisors must ensure that employees clock in and out – no exceptions

## TIPS FOR EMPLOYERS

- Take advantage of Rule change to adjust classifications/timekeeping practices which may not 100% align with Department of Labor
  - Audits will increase – watch all aspects of overtime rules, not just change to minimum salary threshold

## TIPS FOR EMPLOYERS

### **WATCH OUT FOR REMOTE EMPLOYEES!**

- Pay remote employees based upon state where they work
  - If NJ employer has employee working in PA, no Highly Compensated exemption
  - If PA employer has employee working in NJ, use Highly Compensated exemption



## TIPS FOR EMPLOYERS

- Do not retaliate against employees who raise concerns about overtime and payment issues
- Act quickly! Enforcement actions will increase after new rule becomes effective

## HOW DO YOU GET EXECUTIVE “BUY-IN”?

- Owners of business are held personally liable for amounts owed to employees in wage and hour audits
- Amounts due for overtime because employee was “misclassified” are DOUBLED for liquidated damages
- One disgruntled employee can file a claim, and the Department of Labor will audit 3 years of records, even if the employee was not employed with your company for 3 years
- PUBLICITY – Department of Labor publicizes settlements and lawsuits filed, and you cannot get Department of Labor to agree to confidentiality
  - Department of Labor makes broad statements about what your company “has done,” even if not correct or there is a dispute and you settled to save money/business

## NATIONAL LABOR RELATIONS BOARD ATTACKS HANDBOOKS

- National Labor Relations Act covers non-union employers because Section 7 says employers cannot “chill” the rights of employees to organize
- National Labor Relations Board’s August decision said that many common workplace policies “chill” the rights of employees and are presumptively unlawful
- Standard for “unlawful” is whether employee would find rule “coercive”
- Employers must prove that policies advance legitimate and substantial business interests and employer has no less intrusive way to protect those interests

# NATIONAL LABOR RELATIONS BOARD ATTACKS HANDBOOKS

## **POLICIES NOW POTENTIALLY UNLAWFUL IF NOT REVISED:**

- Prohibiting insubordination
- Restricting employee use of social media
- Restricting criticism of company's management, products, or services
- Restricting conduct deemed harmful to company's business reputation
- Restricting use of cameras or recording equipment in workplace
- Restricting use of company email or other communication resources
- Limiting the recording of meetings
- Limiting use of personal electronic devices to break time only

# NATIONAL LABOR RELATIONS BOARD ATTACKS HANDBOOKS

## WHAT CAN AN EMPLOYER DO NOW?

- Review above rules to see if can make them more narrow
- State reasons for rules
  - Need to protect confidential and proprietary information
  - Need to protect other employees from injury/disclosure of private information
  - Need to ensure proper operations for quality control
- State that policy is not intended to and does not restrict rights of employees under Section 7 of the National Labor Relations Act
- Restrictions do not apply to management/executive employees – can include in employment agreement for those employees

## POSSIBLE HANDBOOK “PROTECTIONS”

- Add statement in introduction to handbook
  - Nothing herein is intended or should be interpreted to violate the National Labor Relations Act, including employee rights under Section 7 of that Act
- Add similar statement in various other policies
  - Cell phone use/use of company’s communication systems
  - Social media policy
- Do not have confidentiality policy which expressly says that employees cannot discuss work policies (e.g. salary)

## POSSIBLE HANDBOOK “PROTECTIONS”

- Possible statements to support policies
  - Employer has evaluated this policy and determined that the policy is needed to protect safe and orderly functioning of worksite and cannot be narrowed further
  - Employer has evaluated this policy and determined that the policy is needed to protect the integrity of Employer’s confidential and proprietary information, including the confidential information of employees and customers, and the policy cannot be narrowed further
  - Employer is required by Federal/State regulators to establish this policy. Employer has evaluated this policy and determined that the policy cannot be narrowed further and still comply with Federal/State law

# PREGNANT WORKERS FAIRNESS ACT

## PREGNANT WORKERS FAIRNESS ACT

- Main impact – pregnancy and ALL related conditions, including nursing, treated like a disability
  - Employers with 15+ employees
  - Must accommodate pregnant workers, and cannot limit to what do for other employees
  - Opens the “entire world” of accommodations to pregnant workers, even if not having “complications” from pregnancy
- Managers, not just HR, must understand obligations
  - Understand need to give breaks, allow sitting if possible, etc.



# PREGNANT WORKERS FAIRNESS ACT

## PREGNANT WORKERS FAIRNESS ACT

- Also PUMP Act – Providing Urgent Material Protections for Nursing Mothers Act
  - Provide paid break time if less than 20 minutes, not completely relieved from duty, or if otherwise pay for breaks
  - Be creative to find spaces for mothers to express milk – not required to be permanent, but must “shield from view” and not restroom
  - Employers with less than 50 employees can seek exemption from paid breaks – BUT PWFA may create obligation to accommodate

# PREGNANT WORKERS FAIRNESS ACT

## PREGNANT WORKERS FAIRNESS ACT

- Examples of possible reasonable accommodations:
  - Job restructuring
  - Part time/modified work schedules
  - Additional breaks
  - Unpaid leave to attend health appointments/recover from childbirth
    - Even if not FMLA employer
  - Assignment to light duty (if available)
  - TELEWORK

## PREGNANT WORKERS FAIRNESS ACT

- Employers should review/update accommodations policy
  - Similar to disability accommodations policy
  - Specifically include reference to pregnancy and related conditions, including nursing
- Be aware of State/Local Laws
  - New Jersey Pregnant Workers Fairness Act
  - Philadelphia Fair Practices Ordinance
  - Paid Sick Leave under NJ/Philadelphia laws can be used for these conditions

# UPDATE ON NONCOMPETE AND INDEPENDENT CONTRACTOR RULES

- What is at issue:
  - Elimination of Noncompete Agreements
  - Substantial restriction on who can be considered an independent contractor
- Status:
  - Comment periods ended
  - Likely see final rules published in early 2024
  - Independent contractor rule particularly “political” – publish before elections?

## NEW EEOC KNOW YOUR RIGHTS POSTER

- Includes updates on Pregnant Workers Fairness Act
- New 2023 FMLA poster, but can still use old posters and combined posters
- Likely will be new FLSA poster after new Overtime regulations
- Place in conspicuous location
- Use to defend discrimination/wage and hour claims

# QUESTIONS



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**Kaplin Stewart**  
*Attorneys at Law*