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Back to Basics: The nitty-gritty of the FLSA's overtime requirements

DOL's overtime revision provides 'a handy time' to review employee classification, one expert told HR Dive.

By Katie Clarey

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Editor's note: Katie Clarey is one year into covering HR and continues to educate herself and readers on the building blocks of the field with her series, Back to Basics. If you're new to HR (or just need a little refresher), follow along as she speaks with experts and lays out the basics of federal employment law. She can be reached at kclarey@industrydive.com.

I imagine a pet store fired one of its workers. The worker, whom we'll call Rich, is upset — no more paycheck and no more playtime with the animals. He decides to sit down with an attorney, who probes him about how the pet store paid him. Rich made \$11 an hour and generally worked 40 hours a week, although, now that he's thinking about it, he pulled a couple 60 hour weeks when it came time to sell a litter of puppies or kittens. His paychecks looked the same during those pay periods as they did at any other time.

It looks like the pet store may face some legal trouble. Because Rich makes less than \$455 per week, he's eligible to make overtime according to the Fair Labor Standards Act (FLSA). His salary

makes him nonexempt under both the current standard and the updated standard that takes effect Jan. 1. The current threshold salary is \$455 per week or \$23,660. The U.S. Department of Labor (DOL) issued a revised rule on Sept. 24 that raised the threshold to a weekly salary of \$684 or an annual salary of \$35,568.

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Lauren Daming
Greensfelder, Hemker & Gale Associate

Now that DOL has published the new rule, employers need to review their workforces to ensure they're properly paying everyone eligible for overtime, according to Greensfelder, Hemker & Gale Associate Lauren Daming. "It's a handy time to look at everybody's job descriptions and make sure everybody's classified the right way," Daming told HR Dive in an interview.

Employers that don't make time for a review may find themselves in a position similar to that of the pet store. This situation is the most common consequence employers face when they don't comply with the overtime requirements spelled out in the FLSA, Daming said. "The No. 1 way to avoid that is to make sure people are classified correctly," she said. If employers need any more motivation to get classification right, it's worth noting that once an attorney finds a worker who has been misclassified and denied overtime, he or she may look to see whether the employer paid other employees in a similar matter. Those damages can add up quickly; in a recent survey, employers said wage and hour suits are overwhelmingly their top collective action concerns.

To get it right, Daming said, HR professionals and others involved with worker classification need to understand what overtime is, who qualifies for it and how to pay employees correctly.

Overtime: A simple equation that raises complicated questions

Under the FLSA, workers must be paid time and one half their regular rate for all hours worked over 40 in a workweek, Daming said.

Employers should note that DOL is looking to "clarify and update the regulations governing the regular rate requirements," the agency said in a factsheet published in March. In a notice of proposed rulemaking, DOL said employers would be able to exclude certain items when calculating the regular rate of pay. They would not need to include the cost of wellness programs, unused leave or reimbursed expenses, for example, in this rate. The comment for this proposed rulemaking closed in June.

According to calculations made by DOL's FLSA Overtime Calculator Advisor, our fictitious employee, Rich, should have received \$770 — before taxes and all other deductions — when he worked those 60-hour weeks.

Workers who make more money or carry out different duties than Rich may be exempt from overtime requirements. To determine worker classification under the FLSA (remember, there are state and local wage laws employers need to consider, too), employers need to look at two factors, Daming said.

Consider salary and duties

Section 13(a)(1) of the FLSA lays out several circumstances that would make a worker exempt from overtime pay. To classify workers as exempt, however, employers must consider their salaries and job duties, according to Daming. "You can't forget both of those are important when looking at every person and determining whether they're exempt," she said. "This can be a moving target — this is something employers need to revisit periodically and take a look at every once in a while to make sure they're still classified correctly."

The FLSA provides several exemptions for white collar workers; employers do not need to pay overtime to executive, administrative, professional, computer and outside sales employees, DOL said in a fact sheet. All of these exemptions except the outside sales exemption require employees to make more than \$684 per week (again, that's the new salary threshold). There exists an exemption for highly compensated employees, as well — these workers must make more than \$107,432 annually performing "office or non-manual work."

Blue-collar workers and manual laborers are entitled to overtime under the FLSA, DOL noted: "FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be." The exemptions do not apply to police, fire fighters, paramedics and other first responders, either.

The duties tests differ for each white collar exemption. DOL provides a comparison chart that highlights the specific duties

workers must have to qualify for a certain exemption. To be considered exempt as an executive employee, for example, a worker's "primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof." The worker must manage two or more employees and have the authority to hire or fire others or be able to suggest employment actions with weightiness.

To achieve the administrative exemption, a worker must perform office or non-manual work that relates directly to business operations of his or her employer or the employer's customers. The worker must also have the primary duty of exercising discretion and judgment "with respect to matters of significance."

Train workers on timekeeping

With the salary threshold much higher than before, more than 1.3 million additional people will be eligible for overtime, according to DOL's estimate. Once they determine how workers are classified under the new threshold, employers will need to decide whether to elevate non-exempt workers' pay above the threshold or keep them at their current rates and cough up overtime pay.

You always have to pay overtime. There's no exception.

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If an organization has any workers become eligible for overtime who were exempt before, it will want to provide training on timekeeping. It's also important that workplaces include an

overtime policy in their employee handbooks, Daming said. This provision should outline the rules around overtime — some organizations may require workers to receive permission before working overtime, for example.

If this is the case, employers must communicate to employees and their supervisors that they will be paid overtime for any hours worked over 40 in a workweek. But if they work those hours without permission, they may be disciplined for doing so. "You always have to pay overtime. There's no exception," Daming said. "But you can discipline for not getting approval."

As employers adjust to the new overtime salary threshold and anticipate an update on regular rate, a deep understanding of the FLSA's basics will serve them well in weathering the changes and avoiding the legal ramifications of misclassification. In doing so, they'll keep workers happy by paying them what they're owed.

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