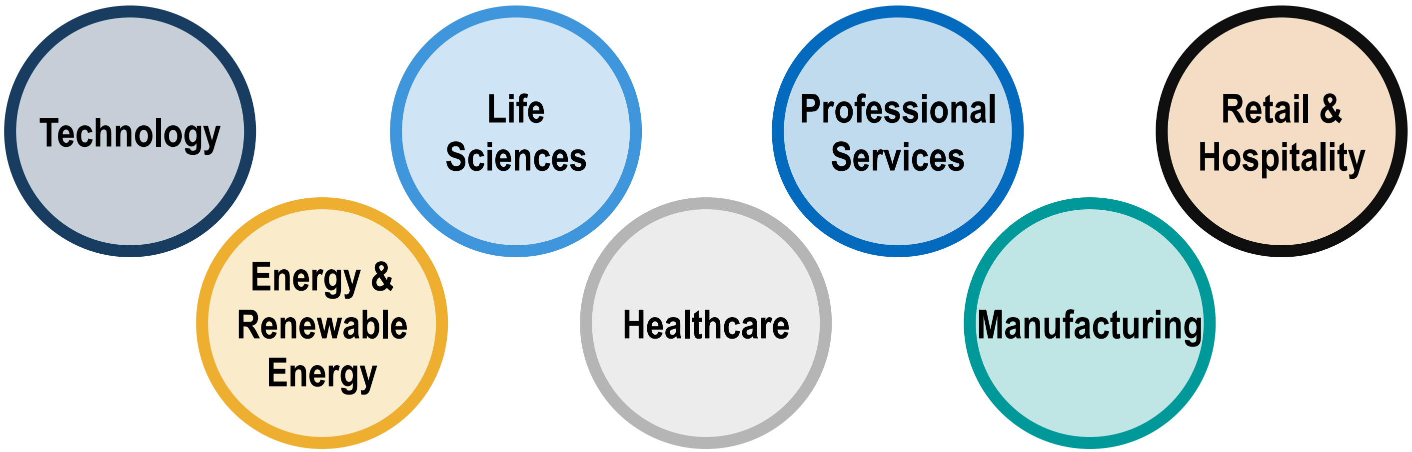
U.S. DOL's Proposed Changes to the Overtime Regulations:

What to Expect and What They Mean for Employers

Webinar with Foley Hoag Partners
Robert A. Fisher
Jonathan A. Keselenko

About Foley Hoag LLP

- **250 attorney firm** founded in **1943** with offices in **Boston**, **New York, Washington, DC** and **Paris**
- Creative solutions and results-oriented advice for clients in diverse industries, including:



- Practice mix comprises a powerful blend of **regional**, **national** and **international expertise** and **clients**
- Foley Hoag's **Labor and Employment Department,** one of the largest in New England, is nationally renowned for its strong traditional labor practice and for representing employers in the full spectrum of employment disputes

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About the Speakers

Robert A. Fisher

Rob is a partner and the Deputy Chair of Foley Hoag's Labor and Employment Department. Rob represents employers in union disputes, discrimination claims, wage and hour disputes, benefits issues and contractual claims. He practices before state and federal courts and before administrative agencies. Rob earned his law degree from Cornell Law School and his undergraduate degree from Georgetown University.

Jonathan A. Keselenko

Jonathan is a partner in Foley Hoag's Labor and Employment Department. Jon represents employers in all types of employment law issues, including wage and hour disputes, union campaigns, non-compete litigation, and he regularly provides employment advice to clients. Jon is the current President of the Wage and Hour Defense Institute of the Litigation Counsel of America. Jon earned his law degree from George Washington University and his undergraduate degree from Oberlin College.

Agenda

- Current White Collar Exemption Rule
- Proposed Changes
- What to Do About Them

Current Regulations

- Duties test
  - Executive
  - Administrative
  - Professional
  - Computer-related occupations
- Salary Basis Test
- Minimum salary level necessary to satisfy exemption
  - $455/week, which equates to $23,660/year
    - Higher in some states (e.g., California)
- Highly compensated employees
  - Shortened “duties” test
  - $100,000/year

Proposed Changes

- Minimum salary level necessary to satisfy exemption
  - Would rise to \$970/week in 2016, which equates to \$50,440/year
    - 40th percentile of weekly earnings for full-time salaried employees
  - If don’t satisfy this salary floor, must be eligible for overtime
    - Higher than California rate
  - DOL’s rationale: weeds out misclassification
  - No different rule for part-time employees
- Highly compensated employees
  - Would rise to \$122,148/year in 2016
    - 90th percentile of weekly earnings for full-time salaried employees
  - Limited ability to make catch-up pay
- Annual indexing based on inflation

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Not in the Current Draft…Now

- Changes to the “duties” test
  - It had been widely speculated that DOL would adopt the California 50+% rule
  - DOL left the door open to inclusion in later draft, but not likely
- Inclusion of non-discretionary bonuses to satisfy minimum salary
  - DOL is considering allowing them, if paid monthly or more frequently
  - No more than 10% of salary
  - Different than catch-up pay for highly compensated employees
- Proposed rule change does not affect outside salespersons
- Or certain white collar professions such as lawyers, doctors, and teachers
- Separately, asked for comment on use of handheld devices

Procedure and Timetable

- Notice of Proposed Rulemaking issued: June 30
- Published in Federal Register: July 6
- 60 Day Comment Period Ends: September 4
  - Employer groups and Republican senators have requested extension
  - Already more than 1,000 comments filed on-line
  - Where to submit comments: www.regulations.gov
- DOL reviews/considers revisions: unknown timeframe
- Final rule issued: unknown – some time in 2016?
  - Legal challenges possible

The Impact of the Proposed Rule

- The DOL estimates that 4.68 million employees will be affected by the proposed rule
- Key industries expected to be impacted:
  - Education and health services
  - Financial services
  - Retail
  - Professional and business services
  - Hospitality
- Cost of adjusting exemption status for impacted employees is estimated to be $160 million in year one
- Cost of monitoring hours to minimize overtime costs are estimated to be $178.1 million in year one

What To Do To Prepare for The Rule

- Identify positions/employees at risk
- Rule change does not mean that employee will necessarily get significant pay increase
- Ultimately, employer will have to decide whether it is cheaper to keep as exempt and increase salary or change to non-exempt and pay overtime
- If you keep exempt, you will need to keep track of annual increases in the salary threshold to ensure employee remains exempt

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Impact of Changing Employee from Exempt to Nonexempt

- Obviously will have to pay overtime as necessary
- Less obviously:
  - Have to maintain records of hours worked
  - Consider and possibly limit off hours work
  - Control overtime expenses
  - If manager, how does hourly rate compare to subordinates
- Employer will need to have a good communication plan in place
  - Why is the change being made
  - Explain that new hourly rate will not result in decrease in annual income
  - Address cultural issues

Other Practical Tips

- Many employers held off assessing exempt status because of anticipated rule changes
- Use change in rule as opportunity to review “duties” test, not just salary
- Also consider whether job description matches up with actual responsibilities
- Application of duties test remains fertile ground for litigation
- Consider impact of increase in minimum salary on company job grades and ranges; don’t want increase to lead to across the board increases at all levels

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