

# Fair Labor Standards Act: 101

Presented by:

Kathy D. Aslinger, Esq. & Ashley N. Trotto, Esq.

Kennerly, Montgomery & Finley, P.C.

# FLSA History and Purpose

- ▶ The FLSA is a federal law enacted in 1938 to ensure a fair wage for a fair day's work.
- ▶ Covers the vast majority of American employees
- ▶ Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments

# Who is subject to the FLSA?

- ▶ Employees may be covered in two ways under the FLSA:
  - ▶ Enterprise: enterprise and all employees are covered
    - ▶ A covered enterprise engages in commercial activities resulting in \$500,000 in annual gross sales/business and has 2 or more employees
  - ▶ Individual: enterprise not covered, but employees are
    - ▶ A covered employee engages in interstate commerce, the production of goods for interstate commerce, or a closely related activity
      - ▶ Interstate commerce includes: (1) making out of state phone calls; (2) receiving/sending interstate mail or email; (3) ordering/receiving goods from out of state suppliers; or (4) handling credit card transactions, performing accounting or bookkeeping for such activities

# FLSA Enforcement

## (Why employers should care)

- ▶ Suits can be brought by individual employees in a private lawsuit or by the Department of Labor
- ▶ Two-year statute of limitations
- ▶ EXPENSIVE:
  - ▶ Suits brought by employees can be brought “collectively”
  - ▶ Attorneys’ fees are mandatory for successful plaintiffs’ counsel

# Pay Requirements:

## Minimum Wage

- ▶ Covered, non-exempt employees must be paid at least the Federal minimum wage (\$7.25) for all hours worked
- ▶ Hours worked may include time spent waiting, on-call, in training or travelling
  - ▶ Waiting: if employee is unable to effectively use time for his/her own purposes and the wait is controlled by the employer = hours worked
  - ▶ On-call: if employee is on employer premises or so close that time cannot be used effectively for his/her own purposes = hours worked
  - ▶ Training: all training = hours worked unless: (1) outside regular work hours; (2) voluntary; (3) not job related; and (4) employee does not perform any productive work.
  - ▶ Travel: travel between job sites during normal work day = hours worked. Travel to and from work is not hours worked.

# Pay Requirements: Overtime

- ▶ Covered, non-exempt employees must receive 1 ½ times their regular rate of pay for all hours worked over 40 in a workweek
- ▶ Regular rate = total earnings in a workweek ÷ total hours worked
  - ▶ Earnings include: commissions, certain bonuses, cost of room, board and other facilities provided for the employee's benefit
  - ▶ Earnings exclude: gifts, discretionary bonuses, reimbursement for expenses, retirement plan contributions

# Exempt vs. Non-Exempt

- ▶ Exempt: employees who meet one of the FLSA exemption tests and are NOT entitled to overtime
- ▶ Non-Exempt: employees who do not meet any of the FLSA exemption tests and ARE entitled to overtime

# FLSA Exemptions

- ▶ Often referred to as “White Collar” exemptions:
  - ▶ Executive Employees
  - ▶ Administrative Employees
  - ▶ Professional Employees
  - ▶ Computer-Related Employees
  - ▶ Outside Sales Employees
  - ▶ Highly Compensated Employees
- ▶ Must meet salary basis test (if applicable) and perform specific duties associated with each category of exempt employees

# FLSA Exemptions: Salary Basis Test

- ▶ With a few narrow exceptions, to be considered exempt under any category, an employee must perform exempt duties and must be paid on a salary basis at not less than \$455 per week
- ▶ Salary basis test: Employee must regularly receive a predetermined amount constituting all or part of the employee's salary, which amount is not subject to reduction because of variations in the quality or quantity of work performed.

# FLSA Exemptions: Salary Basis Test Continued

- ▶ Deductions from salary only permitted in the following circumstances:
  - ▶ in the first and last weeks of employment
  - ▶ in full day increments when an employee is absent for personal reasons,
  - ▶ in full day increments when an employee is absent due to sickness or disability, but only when an employee has exhausted all PTO, if any
  - ▶ In full or partial day increments for any unpaid leave taken under the FMLA
  - ▶ In full day increments for suspensions due to serious misconduct that violates a company policy

# “White Collar” Exemptions: Executive Employees

- ▶ Must be paid on a salary basis no less than \$455\* per week
- ▶ Must have the following duties:
  - ▶ Primary duty must be management of the enterprise or a recognized department or subdivision of the enterprise
  - ▶ Customarily and regularly direct the work of 2 or more full-time employees (or the equivalent)
  - ▶ Authority to hire or fire employees or recommendations as to hiring, firing, advancement, promotion, change of status are given particular weight

# “White Collar” Exemptions: Administrative Employees

- ▶ Must be paid on a salary basis no less than \$455\* per week
- ▶ Must have the following duties:
  - ▶ Primary duties must be office or non-manual work directly related to the management or general business operations of the employer
  - ▶ Exercise discretion and independent judgment in matters of significance
    - ▶ Consider whether employee has authority to: formulate, affect, interpret, or implement management policies or operating practices; carry out major assignments; commit the employer in matters that have significant financial impact; or waive or deviate from established policies and procedures without prior approval
    - ▶ Fact that an employee’s decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

# “White Collar” Exemptions: Professional Employees

- ▶ Must be paid on a salary basis no less than \$455\* per week
- ▶ Must have the following duties:
  - ▶ Performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized instruction (e.g., lawyers, doctors, engineers); or
  - ▶ Performance of work requiring invention, imagination, originality, or talent in a recognized artistic or creative field (e.g., actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists)
- ▶ Teachers, lawyers and doctors are all exempt professionals, regardless of the application of the salary basis test

# “White Collar” Exemptions: Computer-Related Employees

- ▶ Must be paid on a salary basis no less than \$455\* per week or be paid at least \$27.63 per hour
- ▶ Employee’s primary duty must consist of:
  - ▶ Application of systems analysis techniques and procedures, including consultation with users about hardware, software, or system functions;
  - ▶ Design, development, documentation, analysis, creation, testing, or modification of computer systems or programs related to user system design specifications;
  - ▶ Design, documentation, testing creation, or modification of machine operating systems; or
  - ▶ Combination of the above requiring equal skill level

# “White Collar” Exemptions: Outside Sales Employees

- ▶ Salary basis test does not apply to outside sales employees
- ▶ Employee’s primary duty must consist of:
  - ▶ Making sales or obtaining orders or contracts for services for the use of facilities paid by the customer; and
  - ▶ Customarily and regularly working away from the employer’s place of business

# Common Overtime Violations

- ▶ Failure to include all compensation in the regular rate (e.g., production bonuses and shift differentials)
- ▶ Misapplication of the exemption requirements or improper assumption that all salaried employees are exempt
- ▶ Improper deductions
- ▶ Improper treatment of employee as independent contractor
- ▶ Failure to record and pay for all hours worked
- ▶ Confusion between state and federal law requirements

# Proposed FLSA Changes

- ▶ In the last few years, we've had 2 major proposals to revise the salary basis test
- ▶ The \$455 per week (\$23,660 per year) floor was implemented in 2004
- ▶ Obama administration attempted to significantly increase the threshold in 2016
- ▶ Trump administration is currently attempting to increase the threshold (but less significantly)

# Obama Era Proposed Changes

- ▶ On July 6, 2015, the Department of Labor announced a “Notice of Proposed Rulemaking (“NPRM”) which announced proposed changes to the salary requirement of the White Collar Exemptions
- ▶ The featured change was the proposed increase in the minimum weekly salary to the 40th percentile of weekly earnings for full-time salaried workers
- ▶ At the time, the 40th percentile was estimated to be \$970 per week, or \$50,440 per year
  - ▶ Double the current rate

# Obama Era Proposed Changes

- ▶ Perhaps more importantly, for the first time in the FLSA's over 75 year history, the salary levels would be indexed to Bureau of Labor Statistics data and would be updated annually
- ▶ Additional burden on employers to ensure compliance with rules changing on a regular basis

# But Hold On...

- ▶ These proposed changes were expected to take effect in early to mid-2016.
- ▶ However, just days prior to when the rules were expected to take effect, a Texas judge enjoined the DOL from enforcing the rules.
- ▶ Since then, the DOL has been operating under the original rules implemented in 2004.

# Trump Era Proposed Changes

- ▶ On March 7, 2019 the DOL proposed a new overtime rule that would increase the minimum salary threshold for Executive, Administrative, and Professional employees.
- ▶ The proposed salary threshold is \$35,308/year or \$679/week.
- ▶ This is about a \$12,000 increase and splits the difference between the current rule and the Obama-era proposal.
- ▶ This proposal also does away with the annual increase in the Obama-era proposal, but the DOL suggested that updates could occur every four years.

# Trump Era Proposed Changes

- ▶ An important takeaway from this proposal is that employers would have less difficulty with compliance than under the Obama-era proposal because updates would occur only once every four years.
  - ▶ Of course this is still more compliance than what was previously required under the original rule.
- ▶ The proposal also increased the exemption threshold for highly compensated employees from \$100,000 to \$147,000.
  - ▶ This is likely to have little impact because most employees who are compensated in this way fall into other exemptions.

# Increased Salary Requirements

- ▶ What does this mean to employers? Currently, nothing; however, the future impact will be far reaching
- ▶ Keeping in mind these are proposed regulations (the final rule will likely become effective in early to mid-2020)
- ▶ Any substantial increase in salary requirements will have a corresponding impact on employers and their bottom lines
- ▶ DOL estimates 1.3 million workers will no longer be exempt. Because of the difference in standards of living, businesses in the South and in rural areas will feel the salary level increase most acutely

# Silver Lining

- ▶ The silver lining to the expected salary hike is that it should, theoretically, substantially decrease the amount of FLSA litigation due to the decrease in the number of white collar exempt employees
- ▶ Most FLSA litigation revolves around whether the employees' duties are those of a manager or a professional. The salary requirement is almost never litigated because the employee is either paid \$455/week or not
- ▶ By increasing the salary requirement, fewer employees should be treated as exempt by employers

# What to do now?

- ▶ When the DOL finalizes the proposed rule next year, it will likely not provide a long grace period for compliance
- ▶ For instance, in 2004 when the current salary levels were implemented, the DOL gave employers 120 days to comply with the new rules
- ▶ The DOL may provide a similar (if not shorter) compliance period with the upcoming changes
- ▶ Thus, planning should begin now. Employers should work with wage and hour counsel and internal HR to complete a preliminary assessment of all positions they currently treat as exempt to determine if they will be impacted in 2020

# What to do now?

- ▶ Determine how many hours each person actually works
- ▶ Some exempt employees regularly work only 40 hours per week
- ▶ Some previously exempt employees may be working 50 or 60 hours per week. For these employees you must carefully consider how to handle this situation

# What to do now?

▶ Three options:

- 1) Pay your salaried employees the statutory minimum (current proposed amount: \$35,308);
- 2) Convert salaried employees into hourly employees and pay them the same amount annually;
- 3) Convert salaried employees into hourly employees and pay overtime

# What to do now?

## 1. Bump up the employee's salary to \$35,308

- ▶ Makes sense for employees making close to \$35,308 anyway

# What to do now?

- 2. Convert salaried employees into hourly employees and pay them the same amount annually**
  - ▶ Can be done even if the employee generally works a lot of overtime
  - ▶ For example: to figure out the right hourly rate for someone who normally works 50 hours a week, begin with  $X*40 + ((X*1.5)*10) = \text{weekly salary}$ . Solve for X

# What to do now?

- ▶ So if the annual salary = \$26,000

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	\$9.10	\$364.00	10	\$136.50	\$500.50

- ▶ “X” = \$9.10
- ▶  $\$500.50 \times 52/\text{wks} = \$26,026.00$

# What to do now?

- 3. Divide the annual salary into an hourly rate and pay the extra in overtime.**

# What to do now?

- ▶ Using the previous example of an employee who makes \$26,000/year:
  - ▶  $\$26,000/52 \text{ weeks} = \$500/\text{week}$
  - ▶  $\$500/40 \text{ hours} = \$12.50/\text{hour}$
  - ▶ But you still have to calculate the 10 hours of overtime

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	\$12.50	\$500.00	10	\$187.50	\$687.50

Results in over \$9,000 of increased wages

# What to do now?

- ▶ The proposed changes may result in lower average earnings for many employees
- ▶ Using the previous example:

Hours	Wage	Weekly Wage	Overtime Hours	Total Overtime	Total Salary/Week
40	\$9.10	\$364.00	10	\$136.50	\$500.50

- ▶ The above calculation assumes that the employee will always work 10 hours of OT. But, if an employee does not work 50 hours each week, they will be making less than before

# Additional Considerations

- ▶ In addition to pay determinations, employers will need to consider the following issues, among many others:
  - ▶ Time clocks
  - ▶ Rules around email and phone calls
  - ▶ Employers are no longer required to pay for short absences
  - ▶ Unhappy employees

# Conclusions

- ▶ Once an employer has identified which employees it considers exempt employees, it will need to determine whether each employee's current salary meets the increased salary requirement or whether the employee merits a raise to bring salary into compliance with the increased salary requirements
- ▶ For employees who do not meet the increased salary requirements, employers will need to implement plans to change those employees to hourly workers who are entitled to overtime wages
- ▶ Employers should expect employees to be unhappy. Moving from a salary to an hourly wage may be seen by employees as a “demotion”

# Additional Information on the Firm

Kennerly Montgomery is a general practice law firm that has provided legal advice to clients for 100 years. KM attorneys practice in a variety of areas, representing private employers, non-profits, and municipal clients, including local governments, agencies and public utilities.

Kathy Aslinger and Ashley Trotto practice extensively in employment and employee benefits law, which includes advising employers on individual employee issues, employment contracts, employee handbooks, as well as design, documentation, administration, audit, litigation, termination and qualification of employee health and welfare and pension plans for public, tax-exempt and private employers. They represent clients before various agencies regulating employment issues and employee benefits.

## A Little About Your Presenters

As a leader of Kennerly Montgomery's employee benefits practice, **Kathy Aslinger** assists clients in maneuvering through the complex world of employee benefit plan design and implementation, benefit considerations in mergers and acquisitions, audits, fiduciary liability issues, DOL and IRS compliance, HIPAA, COBRA, ERISA and state law obligations, and Affordable Care Act compliance. Kathy has been practicing law for over 20 years and has been with Kennerly Montgomery since 2010. She is a shareholder of the Firm and serves on the Firm's management committee.

As a member of the Firm's employee benefits practice, **Ashley Trotto** aims to condense and simplify the complicated and ultra-technical world of employee benefits into understandable, plain English advice for her clients. Ashley is dedicated to building long-standing, trusted relationships with her clients and understands that a single point of contact for timely resolution of employment-related issues is key. To that end, Ashley also spends her time helping clients navigate the prickly, and often unforgiving, landscape of the FLSA, HIPAA, COBRA, FMLA, ADA, and other employment-related legislation as well as everyday employment issues, like creation and application of employer policies and employee training. Ashley serves on the Board of Directors for the Smoky Mountain Animal Care Foundation and is the energy behind the Firm's on-going kindergarten book project at Christenberry Elementary.

Kathy D. Aslinger: [kaslinger@kmfpc.com](mailto:kaslinger@kmfpc.com)

Ashley N. Trotto: [atrotto@kmfpc.com](mailto:atrotto@kmfpc.com)

KENNERLY, MONTGOMERY & FINLEY, P.C.

550 MAIN STREET, FOURTH FLOOR | KNOXVILLE, TN 37902

P.O. BOX 442 | KNOXVILLE, TN 37901

PH (865) 546-7311 | FX (865) 524-1773 | [WWW.KMFPC.COM](http://WWW.KMFPC.COM)

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