



DOL OVERTIME RULE WEBINAR

June 5, 2024

Antitrust Policy

It is **AHLA's** policy to comply fully and strictly with all applicable antitrust laws. Our aim is to conduct ourselves in such a way as to avoid any potential for antitrust exposure. Compliance with this policy is a requirement for participation, and responsibility for compliance rests with each participant.

Toward this end, participants should not discuss certain subjects, including:

- Prices, price trends, including employee compensation
- Discounts or rebates
- Inventory levels, capacities and the like

Let us also keep top-of-mind our ongoing obligations of confidentiality, and to identify and address any conflicts of interest as may arise.

MEET OUR PRESENTER



Jim Paretti
Shareholder
Littler Mendelson

A LITTler PRESENTATION

The New FLSA Overtime Salary Threshold

Are You Ready?

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The EAP or “White Collar” Exemptions

Since it was enacted in 1938, the FLSA has included exemptions from the minimum wage and overtime provisions for individuals employed in a bona fide:

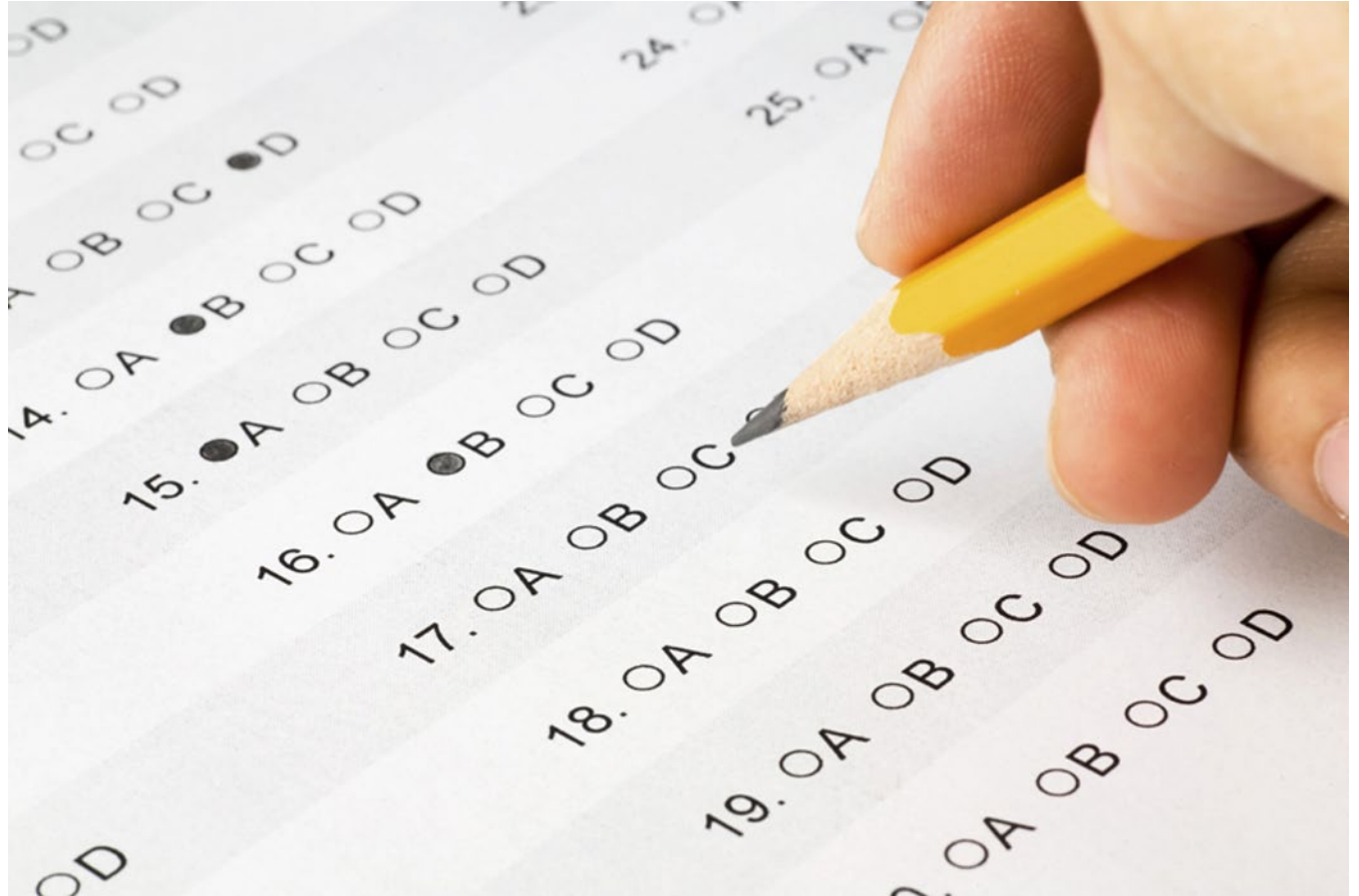
- **E**xecutive,
- **A**dministrative, or
- **P**rofessional

capacity, “as such terms are defined and delimited from time to time by regulations of the Secretary.”



Three Tests for Exemption

- Salary Basis
- Duties
- Salary Level



Salary Basis Test

Distinct from salary **level** test.

Exempt employees must be paid their full salary in any week during which they perform any work

- Predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Limited exceptions

Salary basis test not impacted by Final Rule

Duties Test

Executive: Employee's (1) primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise; (2) must regulatory direct the work of two FTEs; (3) must have the authority to hire and fire or at least "particular weight."

Administrative: Employee's (1) primary duty must be the performance of office or non-manual work (2) directly related to the management or general business operations of the employer or the employer's customers; and (3) include the exercise of discretion and independent judgment with respect to matters of significance.

Professional: Employees' (1) primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment; (2) advanced knowledge must be in a field of science or learning; and (3) advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Duties Test not impacted by Final Rule

Salary Level Test

- Provided “a ready method of screening out the **obviously nonexempt** employees, making an analysis of duties in such cases unnecessary.”

Harry Weiss, Report and Recommendations on Proposed Revisions of Regulations (1949)

- Assisted in demarcating bona fide EAP employees “without disqualifying any substantial number of such employees.”

Harry S. Kantor, Report and Recommendations on Proposed Revisions of Regulations (1958)
(acknowledging salary level “may result in loss of exemption for a few employees who might otherwise qualify for exemption”)

Regulatory History – Salary Level

In 2004, DOL:

- Eliminated the “long” and “short” tests
- Adopted one standard duties test for each EAP exemption, with a salary level of \$455/week (\$23,660/year)
- Adopted a streamlined test for “highly compensated employees” (“HCE”) paid at least \$100,000/year

How Did DOL Pick the 2004 Salary Level of \$455/Week?

- Approximately 20th percentile of weekly earnings of full-time salaried workers:
 - in the lowest-wage Census Region (the South); and
 - in the retail industry nationally
- Comparable to what the salary level for the “long test” would have been in 2004 had it been updated
 - continued function of screening out “obviously nonexempt” employees

2016 Final Rule

- Increased salary level for EAP exemptions to \$913/week (\$47,476/year)
 - **40th** percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South)
- Increased salary level for HCE test to \$134,004/year
- Allowed certain bonuses and commissions to count towards 10% of the minimum salary level
- Provided for automatic increases every three years

Challenge to 2016 Final rule

- Rule was scheduled to take effect December 1, 2016
- Preliminary injunction issued November 22, 2016
- Permanent injunction granted August 31, 2017
- DOL appealed to the Fifth Circuit
 - Fifth Circuit stayed the appeal pending further rulemaking
 - Subsequently dismissed

Why Did Court Invalidate the \$913/Week Salary Level?

“[T]he Department exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it **supplants the duties test.**”

“Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption.”

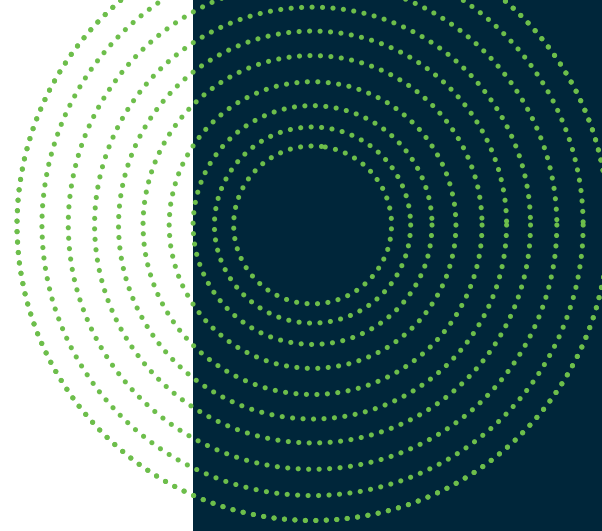
Nevada v. U.S. Dep’t of Labor,
218 F. Supp.3d 520 (E.D. Tex. 2016)

2019 Final Rule

- Rescinded 2016 Final Rule
- Increased salary level for EAP exemptions to \$684/week (\$35,568/year)
- Increased salary level for HCE test to \$107,432/year
- Up to 10% of salary may be satisfied with **non-discretionary bonuses, commissions and other incentive pay (productivity, profitability bonuses)** that are paid annually or more frequently
- No automatic increases

How Did DOL Pick the 2019 Salary Level of \$684/Week?

- 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally
 - **Same as 2004 method**
- Raised HCE level from \$100,000 to \$107,432
 - 80th percentile of annual earnings of full-time salaried workers nationwide



New Rule

Final Rule Announced April 23, 2024

- Increases salary level for EAP exemptions:
 - July 1, 2024: **\$844/week** (\$43,888/year)
 - January 1, 2025: **\$1,128/week** (\$58,656/year)
- Increases salary level for HCE test:
 - July 1, 2024: **\$132,964/year**
 - January 1, 2025: **\$151,164/year**

Final Rule Announced April 23, 2024

- Automatic increases every 3 years
 - Beginning July 1, 2027
 - Test used to set January 1, 2025 salary levels
 - To be announced at least 150 days in advance
 - Based on most recent four quarters of earnings data
- Employers may satisfy up to 10 percent of the standard salary requirement (\$68.40 per week) with nondiscretionary bonuses, incentive payments, and commissions (same as current law).
- Severability clause

Proposed Regulations Not Included in Final Rule

Final rule does not change salary level for:

- Employees in territories subject to the federal minimum wage (including Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands): remains \$455/week
- Employees in American Samoa: remains \$380/week
- Employees in motion picture producing industry: remains \$1,043 per week

How Did DOL Pick These Salary Levels?

- **July 1, 2024:**

- EAP Salary Level: 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South) and in the retail industry nationally
- HCE Salary Level: 80th percentile of full-time salaried workers nationally
- **Same as 2004 & 2019 methods**

How Did DOL Pick These Salary Levels?

- **January 1, 2025:**
 - EAP Salary Level: **35th** percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region
 - HCE Salary Level: 85th percentile of full-time salaried workers nationally

New Rationale for Salary Level Test

“[T]he Department has long recognized that the salary level test is a useful criterion for helping identify bona fide EAP employees and provides a practical guide for employers and employees.”

(DOL 4/23/24)

New Rationale for Salary Level Test

“Key provisions of the final rule include ...
Giving more workers pay or valuable time
back with their family.”

(DOL Press Release 4/23/24)

Severability Clause

“The Department intends for the **initial update** of the standard salary level and the HCE total annual compensation requirement, using current earnings data applied to the 2019 rule methodologies, to be **severable** from **future** triennial updates ... as well as from the [January 1, 2025] revision to the methodologies for the standard salary level and the HCE total annual compensation threshold.”

Bonuses/Example

- **Facts:** Employee A meets the duties test for an executive employee. Employee A receives a **salary of \$616** per week and two production bonuses; **\$1300 in June** and **\$2500 in December**. As a result, Employee A's total salary for the year is:
 - $\$616 \text{ (salary)} \times 52 \text{ weeks} = \$32,032$ amount paid in salary on a weekly basis.
 - $\$32,032 \text{ (salary paid)} + \$3,800 \text{ (Bonuses earned)} =$
 - **\$35,832 (salary plus nondiscretionary bonuses paid).**
- **Analysis:** Employee A received \$616 per week on a salary basis, which exceeds \$615.60 (90 percent of the standard salary level required). Employee A's salary and nondiscretionary bonuses total \$35,832, which exceeds the standard salary level of \$35,568 ($\$684 \times 52 \text{ weeks}$) for that period. Because the employee meets the duties test for an exempt executive and met the salary level requirements, Employee A is exempt from overtime pay for the year.

Challenges

- Litigation filed May 22, 2024 – Eastern District of Texas
- Challenges reminiscent of 2016 litigation:
 - Subverts duties test by excluding bona fide EAP employees
 - Automatic increases require notice and rulemaking
- Potential additional challenges:
 - No authority for any salary level (or salary basis) test
- Timing?



What Employers **SHOULD** (and Should Not) Do Now

What Should Employers Do Now?

1. Identify exempt employees who earn less than \$844/week (\$43,888/year)
2. For each such employee:
 - a. Identify applicable exemption(s)
 - b. Evaluate strength of exemption(s)
 - c. Assess “need” for exempt status
 - d. Ascertain hours worked
 - i. Average per week
 - ii. Predictability / Variability

What Should Employers Do Now?

3. For each such employee:
 - a. Decide whether to reclassify or raise salary
 - b. If decision is to reclassify:
 - i. determine new compensation arrangement
 - ii. develop / implement new policies
 - c. If decision is to raise salary:
 - i. consider impact of salary compression
 - d. Decide timing (before or after challenge to Final Rule is resolved)

What Should Employers Do Now?

4. Repeat Steps 1 – 3 for each employee
 - a. Who is paid less than \$1,128/week (\$58,656/year)
 - b. Who is paid less than \$132,964/year and employer relies on HCE test
 - c. Who is paid less than \$151,164/year and employer relies on HCE test
5. Communications and Training

Final Rule as Opportunity



Don't forget the duties test!

Depending on **strength** of exemption and **need** for exemption, employers may want to reclassify certain positions **without waiting** for legal challenges to the Final Rule to be resolved.



Next Steps

Communicate the Changes

- Need to communicate with senior management, managers of reclassified employees and the employees themselves
- Protecting Attorney-Client Privilege
- Key decisions
 - Who will communicate the changes?
 - What will be communicated?
 - How will changes be communicated?
 - When will the changes be communicated
- Prepare talking points and FAQs

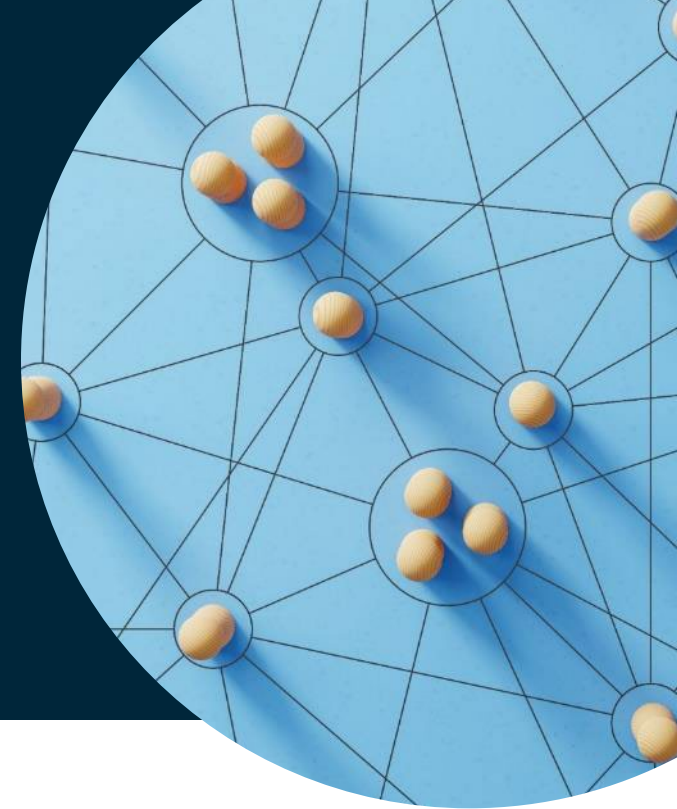
Training

- Train the reclassified employees and their managers
 - Wage and hour policies
 - Timekeeping procedures
 - Activities that are compensable work



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Thank You

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Inspired by you.®

Questions?

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