

2017-2018 Update for the DOL Wage & Hour Division



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- The material presented is designed and intended for general informational purposes only.
- It is not intended and it should not be construed or relied upon as legal advice.
- For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.
- Consult with your own legal counsel before taking action or making changes.



Minimum Salary Rule for FLSA White Collar Exemptions (a/k/a the Overtime Rule)



Obama Admin Timeline



- 3/13/2014 Memo from Pres. Obama
- 6/30/2015 Proposed Rules Announced
265,000 comments rec'd
- 5/18/2016 Final Rules Issued
- 11/22/2016 Preliminary Injunction Issued
Stopped 12/1 effective date for rules
- 12/9/2016 DOL appeals

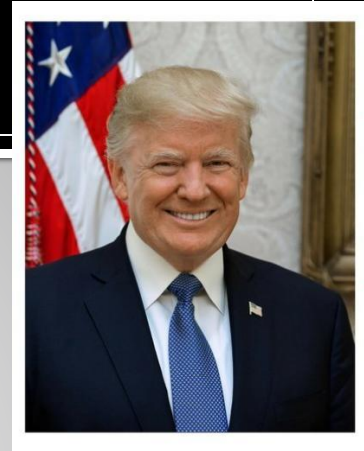


Summary of 2016 Rules

- Change Minimum Salary for Executive, Administrative, and Professional Exemptions from \$23,660 to \$47,476
- Change Minimum Total Comp for Highly Compensated Exemption from \$100,000/year to \$134,004/yr
- Allow up to 10% of non-discretionary bonuses to count toward minimum EAP salary
- Automatically index salary levels for triennial changes, beginning 1/1/2020



Trump Admin Timeline



- 6/27/2017 Request for Information (RFI) issued
- 6/30/2017 DOL abandoned defense of the rule, but appealed to retain authority to set salary thresholds for exemptions
- 7/25/2017 New, wider-ranging RFI issued
- 8/31/2017 Court threw out 2016 rule (MSJ)
- 9/6/2017 DOL dropped appeal of Prelim. Injunction
- 10/30/2017 DOJ/DOL appealed MSJ, but asked court to await further action until DOL undertakes further rulemaking

Jan 2019

Est. Date to Issue New Proposed Rules

2nd RFI Questions



- Did the salary levels in 2016 Rule effectively identify Exempt positions?
- Should there be multiple and variable salary tests depending on employer size, employer location, industry, exempt category, etc?
- Should only a duties test be used?
- Should the Rules include automatic increases?
- If so, how should such increases be determined?

Almost 161,000 comments received to RFI

Return of the Opinion Letter





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Are you a Worker? Go to our [Worker Resource Page](#) for information on how to file a complaint, workers' rights in specific industries, online advisors, and more.

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New online submission for requests for opinions: <https://www.dol.gov/whd/opinion/>

Timeline



- 3/24/2010 Obama DOL stops Opinion Letters; begins Administrator Interpretations
- 2010-2016 Seven FLSA AIs Issued (2 for FMLA)
- 6/27/2017 DOL announced the return of Opinion Letters and the demise of Administrator Interpretations
- 1/5/2018 17 Bush-Era Opinion Letters from 2009 Released by Trump's DOL
- 4/12/2018 3 New Trump-Era Opinion Letters Released



January 5, 2018

Opinion Letter Topics



In My Opinion.

Classification of Jobs as Exempt or Non-Exempt

- Plumbing sales/service techs = EX from OT (Retail/Service)
- Civilian helicopter pilots = NE
- Insurance Client Service Managers = EX (Admin)
- Construction project superintendents and supervisors (commercial and residential) = EX (Admin)
- Many Coaches = Exempt (Teacher)
- Consultants, Coordinators, and Business Development Mgrs of a business providing temporary medical personnel = EX (Admin)
- Field Information Analyst (Admin) and Supervisory Special Agent (Exec) in insurance = EX
- Analysts and Special Agents in fraud unit of insurance company = NE
- Product Display Coordinators = EX (admin)



January 5, 2018

Opinion Letter Topics



In My Opinion.

Hours Worked and Regular Rate & OT Calculations

- Formulae for OT for firefighters not OK, but those for alarm operators are OK
- On-Call hours for ambulance personnel \neq Compensable
- Make-up OT not needed for year-end non-discretionary bonuses paid as a percentage of total straight time & OT pay
- Flat dollar per day bonuses for oilfield workers must be included in regular rate calculation used to determine OT



January 5, 2018

Opinion Letter Topics



In My Opinion.

Pay Docking for EX Employees Paid on Salary Basis

- EX nurses and other EX/salaried employees who are absent for a full day (sick or personal reasons) can be docked pay on the basis of # of hours missed (even when scheduled hours for full days missed are more or less than 8 hrs)
- If EX employee is gone a full day for sick or personal reasons, but does not have enough paid leave to cover the full day, employer may deduct uncovered portion on an hourly basis



January 5, 2018

Opinion Letter Topics



In My Opinion.

Miscellaneous

- Whether paid EMTs contracted to cover a volunteer fire company's staffing needs can also provide volunteer, unpaid service to that company depends on whether the paid EMTs can be considered employees of that company rather than independent contractors. If employees, then no, they cannot be unpaid volunteers and paid employees for that company.



April 12, 2018

Opinion Letter Topics



In My Opinion.

FLSA 2018-18

Travel time for non-exempt employees who don't have "normal" work hours

FLSA 2018-19

15-minute breaks every hour, as required by doctor under FMLA, and which benefit a NE employee, are non-compensable; but breaks otherwise provided by employer that benefit the employer (by re-energizing the employee's productivity) are compensable for FMLA-covered NE employees

CCPA2018-20NA

15 of 18 forms of payments to employees are subject to garnishment under Consumer Credit Protection Act



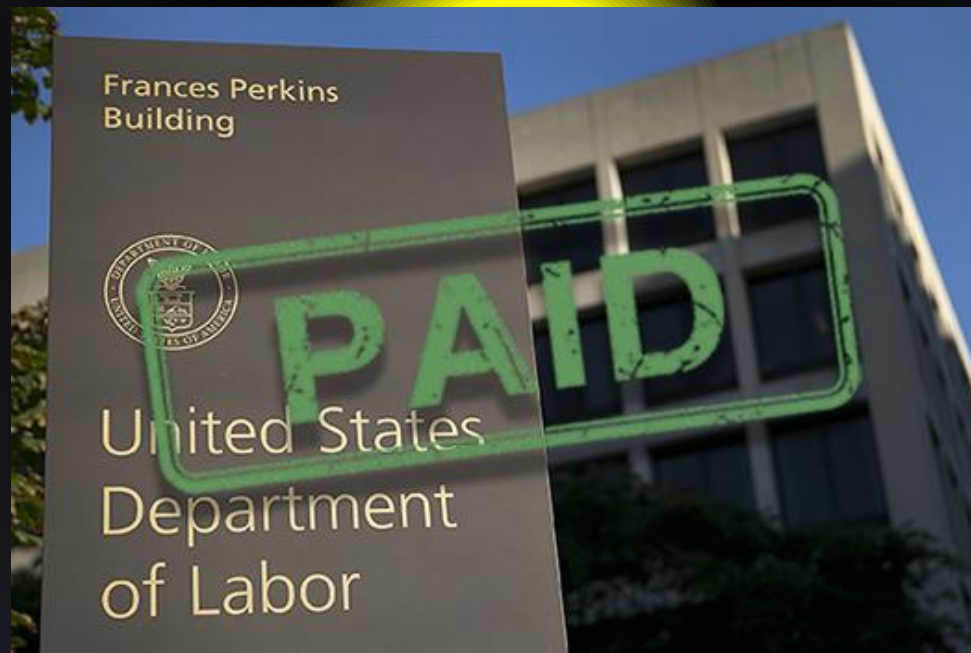
April 12, 2018

Fact Sheet #17S

- Discusses when teachers, coaches, and other workers in higher education should be paid OT
- No OT due if primary duty is teaching
- No OT due if qualify under Executive or Administrative exemptions (e.g., Deans, admissions counselors)



P.A.I.D. Program



PAID Program

Payroll Audit Independent Determination

Timeline

- 3/6/2018 Program announced
- 4/3/2018 Program began
- 10/1/2018 Program ends



PAID Program, Generally



- Proactive resolution of inadvertent FLSA violations (OT & min. wage) w/o litigation
- Overseen by DOL
- Payments and Releases limited to violations found
- Pros
 - Gets wages to employees faster
 - Improves employer compliance w/o liquidated damages or civil monetary penalties
- Not available for
 - Current investigations or issues in litigation/arbitration
 - Repeated use to resolve the same violation
 - Where employee or legal counsel communicated interest in litigation or settling claims
- 6 month pilot program; to be evaluated for permanency



PAID Program Process

- Employer

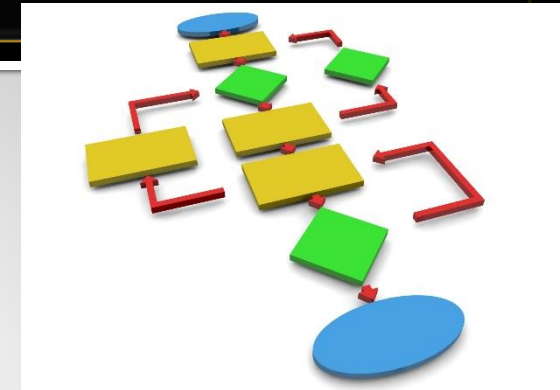
- Reviews electronic compliance materials
- Audits compensation practices for violations
- Identifies and submits to DOL/WHED
 - ✓ Potential violations
 - ✓ Affected ees
 - ✓ Time frame covered (max. 2 year look back)
 - ✓ Back wages believed to be owed with evidence and explanation
 - ✓ Certification to adjust practices and comply with law in future

- DOL

- Evaluates information
- Contacts E to discuss next steps and/or request additional information
- Assesses 100% of back wages due
- Issues forms for payment and releases

- Employer

- Makes payments by the end of the next full pay period
- Submits proof of payment to DOL



Tip Pooling



Tip Pooling Timeline



- 5/5/2011 Regulation Issued Prohibiting tip pooling
- 2016 Interpretive Guidance clarification
- 12/5/2017 Proposed Rule Announced to rescind 2011 regs
- 2/5/2018 DOL Insp. G'l to audit rulemaking
- 3/23/2018 Congress amends FLSA in budget bill and abandons 2011 regulation (Tip Income Protection Act)
- 4/6/2018 WHD issues field assistance bulletin
- 8/2018 DOL expected to new issue proposed rules

Tip Pooling Amendment



- Invalidates 2011 regs that prohibit tip pooling even when all in the pool are paid minimum wage (no tip credit used).
- Returns to previous enforcement position, with a twist
 - Allows tip pools of tipped and nontipped employees
 - All in the pool get paid minimum wage w/o use of the tip credit
 - Managers and supervisors may not participate in tip pools.

Subject to state laws that differ (none in IA)



Interns



Test for Paid Interns

- DOL rescinded its previous test for determining when students/interns are employees under FLSA and must be paid minimum wage & OT
- That test had been rejected by several federal circuit courts
- DOL adopted the 7-part “Primary Beneficiary”/ “Economic Reality” test from *Glatt*
- Fact Sheet #71 was revised accordingly



New Test for Paid Interns



1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.



Paid Sick Leave



Paid Sick Leave Laws on the Books

Patchwork of Laws requiring Paid Sick Leave

- Employees of Federal Gov't Contractors by E.O. 13706 (2015)
- 10 states (CT, CA, MA, OR, VT, AZ, WA, RI, NJ, HI)
- District of Columbia
- 30 localities (e.g., Phoenix, Minneapolis, St. Paul)



Tax Cuts & Jobs Act



- 12/20/2017 Congress passed tax legislation
- 12/22/2017 President signed it into law
- 1/1/2018 Tax Credit for Paid Sick Leave Began
- 4/19/2018 IRS issued FAQs
- 5/4/2018 IRS issued tips in 2018-69
- 12/31/2019 Tax Credit for Paid Sick Leave ends

Tax Cuts & Jobs Act

Tax Credit

- Temporary general federal business tax credit for paid family and medical leave provided to eligible employees in 2018 & 2019
- Must have written policy that meets requirements
 - Must be available to FT and PT employees
 - Must provide at least 2 weeks of paid leave per year for family and medical purposes (tracks with FMLA) for FT; can be pro-rated for PT
 - Eligible employees must have at least 1 year of service
 - Eligible employees must be paid no more than 60% of the tax code definition of a highly compensated employee, in the year preceding leave (\$72,000 in 2017)
- Tax Credit
 - If pay at least 50% of regular wage while on family and medical leave, get 12.5% tax credit on those wages
 - If pay more than 50% of regular wage while on such leave, get incrementally larger tax credit; increases by .25% for each 1% above 50%
 - Max credit is 25% on wages paid while on leave, if paying 100% of wage
 - Max credit is limited to 12 weeks of paid leave per year per employee
 - Any leave required by state or local law cannot be taken into account when determining this federal tax credit



Tax Cuts & Jobs Act – Unanswered Questions



- When the written leave policy must be in place
- How paid family and medical leave relates to an employer's other types of paid leave
- How to determine whether an employee has been employed for one year or more
- The impact of state and local leave requirements
- Whether members of a controlled group of corporations and businesses under common control are treated as a single taxpayer in determining the credit



Paid Sick Leave – Other Attempted Other Federal Legislation

- Healthy Families Act (HR 1516/S 636)
- Workflex in the 21st Century Act (HR 4219) (SHRM)
- SHRM working on federal law to pre-empt state/local laws on paid leave



Miscellaneous



2018 Maximum DOL Civil Monetary Penalties

- \$1,964 per person for repeated or willful violations of minimum wage or OT law
- \$12,529 per person for violations of child labor laws resulting
- \$56,947 per person for violations of child labor laws resulting in serious injury or death (doubled if due to repeat or willful violation)
- \$169 for willful violation of FMLA posting req



FMLA Forms

- FMLA forms expired 5/31/2018
- Law requires the forms to be reviewed and approved by OMB every 3 years to insure processes aren't too "bureaucratic"
- DOL extended that to 7/31/2018
- DOL did not request any change to the forms this time around



Revised I-9 (yet again!)

The image shows a thumbnail of the revised Form I-9, titled 'Form I-9, Employment Eligibility Requirements'. The form includes sections for 'Section 1: Employee Information and Verification', 'Section 2: Employer Information and Verification', and 'Section 3: Additional Information'. A large, semi-transparent blue watermark with the text 'FORM I-9' is oriented vertically across the center of the form.

Timeline

- 7/17/2017: Revised I-9 issued
- 9/18/2017: Mandatory use began

Summary – Minor changes

- Minor changes to instructions & lists of acceptable documents
- Streamlined process for foreign nationals
- Explicitly accepts FS-240 (consular report of birth abroad to a US citizen parent) for List C
- Substituted new name for DOJ department (“Immigrant and Employee Rights Section”)

Feb. 2018: ICE warned of increased I-9 audits & worksite raids



2017-2018 US Supreme Court Term: FLSA-Related Opinions



Encino Motorcars v. Navarro

(4/2/2018)

- Held: Service Advisors at car dealerships are exempt from FLSA as “salesmen primarily engaged in servicing automobiles”
- Service advisor duties
 - Greet customers
 - Assess needs
- Rejected the long-held principle that exemptions should be “narrowly construed”



Epic Systems Corp. v. Lewis (5/21/2018)

- Held: Class/Collective action waivers are valid under Federal Arbitration Act and do not violate NLRA, Sect. 7, but can be unenforceable on other legal or equitable grounds
- DOJ filed amicus for employers, against NLRB's position for employees
- Decision Reversed NLRB Decisions
 - D.R. Horton (2012)
 - Murphy Oil USA (2014)
- Federal legislation has been introduced to overturn *Epic Systems*



Epic Systems Corp. Predicted Impact

- Explosion of use of class/collective action waivers and arbitration agreements
- Resolution of many pending cases
- Use of Private Attorneys General Acts to end-run FAA (e.g., Calif.)
- Chipped away at *Chevron* deference standard



Thank you!



<https://www.dickinsonlaw.com/blogs-articles/wage--hour-watch/>

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