

## THE (OVER)TIME IS NOW: ASSESSING, PAYING, & MANAGING THE NEWLY NON-EXEMPT EMPLOYEE

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**STACEY CORMICAN** is a member of Nyemaster practicing in Gaming Law, Labor and Employment, and Litigation. She works with employers in all matter of employment issues including employment contract disputes, sexual harassment, discrimination, wrongful termination, Family and Medical Leave Act, Fair Labor Standards Act and state wage and hour laws, non-compete and non-solicitation agreements, drug testing, and unemployment. Stacey's work with employers includes both representing employers in court and before state and federal administrative agencies, and counseling employers in matters such as employment policies and handbooks, employment contracts, drug testing, investigations and audits, hiring and firing, wage and hour issues, and employee leave issues. A graduate of the University of Iowa College of Law (2003) with high distinction, Stacey is a member of the Order of the Coif and was Executive Editor of the Journal of Corporation Law. She also earned her B.A. and B.J. degrees magna cum laude in political science and journalism from the University of Missouri.

## THE NEW WHITE COLLAR RULE

- **Effective December 1, 2016**
  - **Increases the minimum salary for exempt employees to \$47,476 (\$913/week)**
  - **Increases the minimum annual salary for highly compensated employees to \$134,004**
  - **Automatic increases every three years**

## THE PROJECTED EFFECT

- What the government says will happen
  - 4.2 million more workers eligible for overtime
  - 1.2 to 1.3 billion in pockets of workers annually
  - More jobs
  - More work-life balance

## THE PROJECTED EFFECT

- What companies say will happen
  - Lowering hourly rates of pay
  - Cutting bonuses and benefits
  - Reducing employee hours
  - Hiring more low-wage and part-time employees
  - Reducing the number of salaried executive positions
  - Automating or out-sourcing functions
  - Increased moonlighting

## POSSIBLE RESPONSES

- Raise salary to threshold
- Reclassify as hourly and pay overtime
- Reclassify, keep “salary” same, and pay overtime

# POSSIBLE RESPONSES

- **Reclassify and prohibit overtime**
- **Reclassify, reduce base pay to build in overtime, and keep overall pay the same**
- **Quit your job and leave the country**

# STEPS TO ASSESS

- **Step 1: Collect and analyze pay information**
  - Identify all currently exempt employees who are being paid below new salary threshold
  - Consider impact of bonuses and incentive pay
  - Consider compression effect on persons who are above threshold

# STEPS TO ASSESS

- **Step 2: Collect and analyze work hours and staffing needs**
  - Most valid information you can get on all hours worked in a week, including work done on mobile phones, email, travel
  - Badge swipe, log-in/log-out information
  - Formal and informal surveys, direct observation, interviews
  - Analyze staffing needs which can be used to predict amount of overtime hours



# STEPS TO ASSESS

- **Step 3: Consider Potential Changes**
  - Increasing salaries
  - Reclassify and pay hourly
  - Reclassify and use non-hourly compensation structure

# STEPS TO ASSESS

- **Step 4: Model Potential Changes**
  - **Consider whether benefit plans will need to be modified**
  - **Modification of timekeeping practices and systems**
  - **Effect on those above and below in compensation**
  - **Effect on promotion track**
  - **Effect on morale of those reclassified**

## POTENTIAL CHANGES

- **Raise salary to threshold**
  - **Can bonuses, commissions, incentives, or benefits be “reallocated” to salary?**
  - **Raise salaries for all in the position or just some?**
    - **If just some, should you create new job titles or pay bands for non-exempt positions?**
  - **Will exempt employees given raises be expected to perform additional duties?**

## POTENTIAL CHANGES

- **Reclassify to hourly and pay overtime**
  - **Will you reduce base wage to account for overtime?**
  - **Will there be a change in benefits?**

# POTENTIAL CHANGES

- **Reclassify and use non-hourly compensation structure**
  - Reduce base pay and increase compensation from bonuses and commissions
  - Non-exempt salaried
  - Fluctuating workweek agreement
  - Belo contracts

## SALARIED NON-EXEMPT

salary

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hours worked in week = regular rate

\$500

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50 hours = \$10 regular rate

\$500

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60 hours = \$8.34 regular rate

## POTENTIAL CHANGES

### Reclassify and Pay Overtime Hourly v. Salaried, Non-Exempt

	\$12 per hour			\$500 salary		
	Reg	OT (1.5x)	Total	Reg	OT (1.5x)	Total
40	\$480	\$0	\$480	\$500	\$0	\$500
50	\$480	\$180	\$640	\$500	\$150	\$650
60	\$480	\$360	\$840	\$500	\$167	\$667

## FLUCTUATING WORKWEEK

- A salary which is a “fixed amount” regardless of how many hours are worked in a given week
- Employee and employer have a “clear mutual understanding” that the fixed salary is compensation for all straight-time hours worked in a week regardless of how many hours are worked
- The weekly salary large enough so that hourly rate never falls below minimum wage
- Hours must fluctuate from week to week



## FLUCTUATING WORKWEEK

- Salary is straight-time compensation for *all* hours worked in a workweek, including those exceeding 40
- The “1” of the “1½” is included in salary
- For hours worked over 40 in the workweek, employee is due an additional 1/2 of the hourly rate

## FLUCTUATING WORKWEEK

### Fluctuating v. Salaried

	\$500 Flux			\$500 salary		
	Reg	OT (.5x)	Total	Reg	OT (1.5x)	Total
40	\$500	\$0	\$480	\$500	\$0	\$500
50	\$500	\$50	\$550	\$500	\$150	\$650
60	\$500	\$83	\$583	\$500	\$167	\$667

## FLUCTUATING WORKWEEK

- The DOL's enforcement position is any additional compensation in the form of a bonus or commission will invalidate the fluctuating workweek method.
- Iowa silent on fluctuating workweek, some states do not recognize
- Best practice is written agreements with employees

# BELO CONTRACT

- Belo contracts allow employers to set employees' salaries to cover up to 60 hours of work in a workweek, including 20 hours of overtime
- These agreements may only be used in limited circumstances where nature of job necessitates irregular hours fluctuating above and below 40 hours per workweek
- Regular rate disclosed and not less than minimum wage
- Time and a half for all hours over 40 included in salary
- Time worked over contracted-for hours paid at time and a half

## BELO CONTRACT

### Fluctuating v. Belo

	\$500 Flux			\$507.50 Belo		
	Reg	OT (.5x)	Total	Reg	OT (1.5x)	Total
50	\$525	\$52.50	\$578	\$507.50	\$0	\$507.50
60	\$525	\$87.50	\$613	\$507.50	\$0	\$507.50
70	\$525	\$112.5	\$638	\$507.50	\$109	\$616.25

## COMMUNICATING THE CHANGE

- Many employees will see reclassification as a demotion
  - Keeping employees “salaried” may alleviate some of this
  - Promoting increased work-life balance or increased income
  - Keeping benefits the same as much as possible
  - Reinforcing authority as supervisors, managers, or executive staff

## COMMUNICATING THE CHANGE

- **Written communication to employees who may be affected**
- **Individual meetings with reclassified employees**
- **Training on timekeeping and other policies that may now apply**

# COMMUNICATING THE CHANGE

## The Silver Lining:

Perfect opportunity to reclassify misclassified workers  
without raising suspicion!



## TIMEKEEPING OPTIONS AND TIPS

- **Make it as easy as you can**
  - Exception method
  - Passive time trackers
  - Passive and active time trackers
- **Train newly exempt employees on timekeeping**
- **Follow up to make sure timekeeping is being done**

## REDUCING OVERTIME

- **Policy**
  - **No overtime**
  - **No unscheduled overtime**
  - **No unapproved overtime**
  - **Can discipline employees for violating policy, but must pay overtime!**

## REDUCING OVERTIME

- **Increasing efficiency**
  - Training to make your employees or processes more efficient
  - Can any tasks or duties be automated or out-sourced?
  - Can any tasks or duties be reassigned to under-utilized (or additional or exempt) employees?
  - Efficiency bonuses

## PREVENTING OFF-THE-CLOCK WORK

- **Written policy**
  - Requires employees to record and report all work
  - Requires employees to verify their time reports are accurate
  - Penalty for violations

## PREVENTING OFF-THE-CLOCK WORK

- **Smart phones**
  - **Employees who use smart phones work about 13.5 hours per day, up to 72 hours per week, including weekends**
  - **Restrict communications to company channels and have sunsets**
  - **Consider having an exempt person designated for “emergencies”**

# PREVENTING OFF-THE-CLOCK WORK

- **Tone must be set from top**
  - **Employees not expected to work on their off hours**
  - **Training regarding and monitoring for behavior from managers that encourages off-the-clock behavior**
  - **Consider offering efficiency training for struggling employees**

# QUESTIONS?

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