

# 2016 NTCA WAGE AND HOUR ISSUES

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# STATUTORY BACKGROUND

- Fair Labor Standards Act – federal law
- Enacted in 1938 – revisions in 1958, 1961, 1963, 1967, 1970, 1973, 1975, and 2004
- 2014 – President directed DOL to update regulations defining “white collar” and OT standards

# STATUTORY BACKGROUND

- Iowa Code Chapter 91D – Iowa law – consistent with federal law
- Check state and local laws for changes in minimum wage

# ENFORCEMENT

- Iowa Code Chapter 91A – Wage payment collection law - individual cause of action
- Iowa and U.S. Departments of Labor – agency investigation and enforcement
- Check state and local laws for enforcement procedures and forums

# RECORDS TO MAKE AND KEEP

- No particular format required
- Must show rate, hours worked, pay and deductions
- Advance notice for special arrangements and deductions

# RECORDKEEPING PROBLEMS

- Incomplete records
- Inaccurate records
- Employees keeping own records
- Lack of advance notice for pay arrangements and docking
- DOL investigations

# NON-WORK TIME

- Time may be paid under policies, labor agreements
- Some time not calculated for overtime – PTO, holiday
- Work at home and “volunteer” time may be compensable if work is done

# WORK TIME PROBLEMS

- “Suffered or permitted to work” – if employee is working, pay is due
- Work from home
- “Volunteer work”
- Off the clock work
- Breaks



# PROPOSED RULE CHANGES TO EXEMPTIONS

DOL – July 6, 2015 issued notice of proposed rulemaking

❖ Why? Economy and relative pay changes make current exemptions ineffective relative to original intent

# PROPOSED RULE CHANGES TO EXEMPTIONS

Status of rule changes – comment period has passed – adoption of final rules published on May 18, 2016, effective December 1, 2016



# CHANGES TO OVERTIME EXEMPTIONS

- Salary required - \$913 week annually/ \$47,476 annually
- May generate pay changes for some
- May change others to non-exempt hourly

	<b>Current regulations (2004 until effective date of Final Rule, 2016)</b>	<b>Notice of Proposed Rulemaking - NPRM</b>	<b>Final Rule – Effective December 1, 2016</b>
<b>Salary Level</b>	<b>\$455 weekly</b>	<b>\$970 weekly (if finalized as proposed)</b> <b>40th percentile of full-time salaried workers nationally.</b>	<b>\$913 weekly - \$47,476</b> <b>40th percentile of full-time salaried workers in the lowest-wage Census region (currently the South)</b>
<b>HCE Total Annual Compensation Level</b>	<b>\$100,000 annually</b>	<b>\$122,148</b> <b>90th percentile of full-time salaried workers nationally</b>	<b>\$134,004</b> <b>90th percentile of full-time salaried workers nationally</b>

Table source: USDOL Questions & Answers



Automatic Adjusting	None	Annually, with requests for comment on a CPI or percentile basis	Every 3 years, maintaining the standard salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census region, and the HCE total annual compensation level at the 90th percentile of full-time salaried workers nationally.
Bonuses	No provision to count nondiscretionary bonuses and commissions toward the standard salary level	Request for comment on counting nondiscretionary bonuses and commissions toward standard salary level	Up to 10% of standard salary level can come from non-discretionary bonuses, incentive payments, and commissions, paid at least quarterly.
Standard Duties Test	See WHD Fact Sheet #17A for a description of EAP duties.	No specific changes proposed to the standard duties test. Request for comment on whether the duties tests are working as intended.	No changes to the standard duties test.

Table source: USDOL Questions & Answers



# EXEMPTIONS - EXECUTIVE

- Paid on a salary basis
- Primary Duty – character of job as a whole
- Management – hiring, training, setting pay and schedules, directing work, maintaining records, adjusting grievances, discipline, control of work and methods, providing for safety, control of budget, legal compliance
- Department or Subdivision
- Customarily and Regularly
- Supervise two or more other employees
- Factors of Particular Weight in consideration



# EXEMPTIONS - EXECUTIVE

- Department or Subdivision – permanent status or function
- Customarily and Regularly – normally done every week, not isolated tasks
- Supervise two or more other employees

# EXEMPTIONS - EXECUTIVE

- Factors of Particular Weight in consideration – are there effective recommendations for supervised employees?
- 20% ownership interest exempt
- Comparison: Family Dollar litigation – inconsistent decisions on whether store managers were exempt when performing non-exempt work – case by case analysis



# EXEMPTIONS – HIGHLY COMPENSATED

- Total annual compensation of at least \$100,000/\$134,004
- At least \$455/\$913 per week paid on a salary or fee basis
- Perform office or non-manual work
- Customarily and regularly perform any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions<sup>1</sup>

# Make-Up Payment & Pro-Rating

- If an employee's total annual compensation does not equal \$100,000/\$134,004 by the end of the year:
  - The employer may, within one month after the end of the year, make one final payment to reach the \$100,000/\$134,004 level; or
  - The employee will be tested for exemption under the standard duties tests
- The \$100,000/\$134,004 may be pro-rated for employees who do not work the full year
- The employer may use any 52-week period as the year <sup>1</sup>



# Office or Non-manual Work

- The highly compensated test is not available for
  - Non-management production line workers
  - Non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers
  - Other employees who perform work involving repetitive operations with their hands, physical skill and energy (1)

# EXEMPTIONS - ADMINISTRATIVE

- Salary or fee basis - \$455/\$913week
- Primary duty of office or non-manual work directly related to management or general business operations of employer or customers
- Discretion and independent judgment with respect to matters of significance
- Highly compensated exemption available



# EXEMPTIONS - ADMINISTRATIVE

Work “**directly related to management or general business operations**” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities. <sup>2</sup>



# EXEMPTIONS - ADMINISTRATIVE

**“General business operations of the employer’s customers”** includes advising or consulting with employer’s clients or customers, for instance, as tax experts or financial consultants.<sup>2</sup>



# EXEMPTIONS - ADMINISTRATIVE

## **Discretion and Independent Judgment**

Includes: authority to make independent choice; work in formulating, affecting, interpreting or implementing management policies or practices; major assignments; substantially affecting business operations; authority to commit employer to substantial financial obligations; authority to deviate from established policies without prior approval.

Requires more than skill in applying established techniques, procedures or standards.



# EXEMPTIONS - ADMINISTRATIVE

“Matters of significance” include importance or consequence of the work performed – not necessarily financial <sup>2</sup>





# EXEMPTIONS - ADMINISTRATIVE

- Exemption depends on facts
- Consider whether the employee has authority to:
  - formulate, affect, interpret, or implement management policies or operating practices;
  - carries out major assignments;
  - perform work that affects business operations to a substantial degree;
  - has authority to commit the employer in matters that have significant financial impact;
  - whether the employee has authority to waive or deviate from established policies and procedures without prior approval <sup>2</sup>



# EXEMPTIONS - PROFESSIONAL

- Work requires advanced knowledge – intellectual, discretion and judgment; ability to analyze
- Science or learning
- Prolonged course of specialized intellectual instruction
- Creative, Teachers, Law, Medicine

# EXEMPTIONS - COMPUTER

- Either salary or fee basis - \$455/\$913 per week or \$27.63 per hour
- Systems analyst, programmer, software engineer or other similarly skilled work
- Primary duty: systems application, design, development, analysis, etc.
- Not: manufacturer or repair of hardware

# EXEMPTIONS – OUTSIDE SALES

- No salary requirement – must be at least minimum wage and overtime
- Primary duty must be making sales, obtaining orders or contracts for services or use of facilities of the employer
- Customarily and regularly engaged away from employer's business location

# CLASSIFICATION PROBLEMS

- Job titles and descriptions are not controlling
- Changes in duties may require reclassification
- Salary payment is not controlling

# PAY DOCKING PROBLEMS

- Deductions for non-working time when work is not made available by the employer
- Deductions for absences from the workplace caused by the employer
- Deductions for absences from work of less than a whole day

# PAY DOCKING PROBLEMS

## Permitted docking

- personal reasons, other than sickness or disability
- bona fide plan, policy or practice of providing wage replacement benefits
- offset jury fees, witness fees, or military pay
- penalty for violating safety rules of “major significance”
- disciplinary suspension of full days for violations of workplace conduct rules, such as rules prohibiting sexual harassment or workplace violence
- first and last weeks of employment
- unpaid leave under the Family and Medical Leave Act



# FUTURE CHANGES TO RULES

1. Automatic updates – annual consideration of pay rates
2. Examples in the rules – occupation specific
3. Impact – anticipate 4,646,000 persons by changes in exemptions



# IMPACT ON EMPLOYERS

- Need to assess job descriptions, essential functions, exempt functions
- Potential reclassification of jobs
- Establish hourly wage for reclassified positions
- Assess language in policies
- Additional recordkeeping and control of overtime

# IMPACT ON EMPLOYEES

- Need to keep track of hours for OT and actual hours worked
- Be careful of “suffered or permitted to work”
- Different policies may apply to exempt and non-exempt employees

# ENFORCEMENT

- Iowa and federal Departments of Labor may enforce
  - if complaint received or if there is an administrative identification of industry or problem
- Individual employees may also bring suit
- NLRB – may be involved with policies and “concerted activities” of employees who discuss or take action concerning wages

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# Source Materials

1. U. S. Dept. of Labor, Wage and Hour Division, “The Fair Labor Standards Act: Executive, Administrative and Professional Exemptions”
2. Fact Sheet #17C: Exemption for Administrative Employees under the Fair Labor Standards Act (FLSA), U.S. Wage and Hour Division (Revised July 2008)
3. See also Fact Sheets #17A, B (Executive Exemption), D (Professional), E(Computer), F(Outside Sales)

