# DEPARTMENT OF LABOR'S NEW OVERTIME RULES:

## WHAT NON-PROFITS NEED TO KNOW

KROKIDAS & BLUESTEIN
ATTORNEYS

**Presentation for Non-Profits** **Thursday, October 6, 2016**

# Today's Presenter



**Paul Holtzman, Esq.**

Partner

**Krokidas & Bluestein LLP**

*Providing legal services in the areas of public, non-profit and for-profit general corporate law, health and education law, real estate development, finance and property management, public and private civil litigation, labor and employment law, and social services law.*

[www.kb-law.com](http://www.kb-law.com)

# Employment Law Services



- Wage & Hour Issues, including
  - Misclassification of Employees as Independent Contractors
  - Overtime
  - Off the clock work
  - Meal Breaks
  - Minimum Wage
  - Earned Sick Leave
- Proper Use of Volunteers and Interns
- Family & Medical Leave
- Discrimination Issues
- Harassment
- Disability Accommodations
- Whistleblower claims
- Discipline decisions
- Termination decisions
- Severance Agreements
- Drafting and Updating Employee Handbooks
- Investigation of Complaints
- Compliance Audits
- Training of supervisors regarding
  - wage and hour compliance
  - progressive discipline
  - Harassment prevention

# Background



- FLSA requires that most employees be paid at least the federal minimum wage for each hour worked, as well as overtime time pay ("time and a half") for all hours over 40 in a workweek.
- FLSA allows for **exemptions** from these overtime and minimum wage requirements for certain employees who work in administrative, professional, executive, highly compensated, outside sales, and computer professional jobs. These employees are known as "exempt" employees. To be considered "exempt," these employees must generally satisfy three tests that focus on how the employee is paid and the type of job duties the employee performs:

# Background



**1. Salary-level test**

Employers will need to pay employees at least $913 per week to qualify for the executive, administrative, and professional employee exemptions.

**2. Salary-basis test**

With very limited exceptions, the employer must pay employees their full salary in any week they perform work, regardless of the quality or quantity of the work.

**3. Duties test**

The employee's primary duties must meet certain criteria.

# DOL FLSA Overtime Regulation



- Raises the salary level requirement from the current rate **$455 per week** ($23,660 per year) to **$913 per week** ($47,476 per year).
  - Represents the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage census region.
- Raises the salary level requirement for highly-compensated employees from the current rate of **$100,000 per year** level to **$134,004 per year**
  - Represents the 90th percentile of weekly earnings of full-time salaried workers nationally.

**TIP:** Implement changes during Thanksgiving week.

# Automatic Updates



- Salary and compensation thresholds will automatically update every 3 years.
- The DOL will publish updated rates in advance.
- January 1, 2020 - first automatic update:
  - Estimated to set the salary level requirement at:
    - $984 per week ($51,168 per year) for executive, administrative, and professional employees.
    - $147,524 per year for highly-compensated employees.

# Compliance



- Additional payments counted towards new threshold may include:
  - Commissions
  - Nondiscretionary bonuses
  - Incentive pay
- Upward salary adjustments must be made before December 1, 2016, to ensure continued application of employee exempt status.
- For employees paid bi-weekly, employers will need to adjust pay for pay period that includes December 1, 2016.

# Compliance



- Employers can:
  - Pay employees time-and-a-half for working overtime;
  - Raise salaries above the new threshold – if the employee qualifies for an exemption based on duties;

**Tip:** Beware the "duties gap"

  - Limit employee hours to forty hours per week; or
  - Evaluate employee workload to ensure equal distribution.

# Massachusetts Law re: Overtime



- Massachusetts law provides tough punishment for employers who violate the wage-and-hour laws. Punishment includes:
  - Triple damages: monetary penalty that is equal to triple the amount of wages that were denied to the employee(s).
- Class Action potential
  - Rapid multiplication of damages/exposure
- To avoid penalties, employers should ensure compliance
- Liability may include three years of back wages, interest, and any attorneys fees.

# Does the regulations apply to nonprofits? — 3 types of coverage



- **1. Coverage  through state law:** In at least 11 states, including Massachusetts, the new overtime regulations will automatically apply to all employers and employees.
  - these states expressly incorporate by reference the FLSA regulations into state law by way of statute, regulation, or administrative ruling.
    - Alaska, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Carolina, and Ohio.
- **2. Enterprise Coverage:** All employees of an organization will be covered by the FLSA and overtime regulations if the entity has annual revenues of at least $500,000, measured by volume of sales made or business done.

# 3 types of coverage continued



- **3. Individual Coverage:** Even if the employer does not meet the standard for enterprise coverage, an individual employee will be covered by the FLSA if he or she engages in interstate commerce or in the production of goods and services for interstate commerce. This can include such activities as regularly making out-of-state phone calls, receiving and sending mail or email, ordering goods from out-of-state suppliers, and handling credit card transactions.

# Exemptions



- To be exempt under the FLSA:
  - Salary Test: Employee must be paid a predetermined and fixed minimum salary that is not subject to reduction because of quality or quantity of work performed
  - Duties Test: Employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations
- To be an exempt highly-compensated employee:
  - Employee is paid more than $134,004 (current) per year
  - Employee performs office or non-manual work
  - Employee customarily and regularly performs one identifiable executive, administrative or professional duty.

# Exemptions



- **Executive Exemption** To qualify for the **executive employee** exemption, <u>all</u> of the following tests must be met:
  - The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $913 per week;
  - The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
  - The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
  - The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

# Exemptions



- **Professional Exemption** To qualify for the **learned professional** employee exemption, <u>all</u> of the following tests must be met:
  - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
  - The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
  - The advanced knowledge must be in a field of science or learning; and
  - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

# Exemptions



- **Creative Professional Exemption** To qualify for the **creative professional** employee exemption, all of the following tests must be met:
  - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
  - The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

# Exemptions



- **Administrative Exemption** To qualify for the **administrative employee** exemption, <u>all</u> of the following tests must be met:
  - The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
  - The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

# Exemptions



- **"Highly Compensated Employees" Exemption** To qualify for the "**Highly Compensated Employee**" exemption, the following tests must be met:
  - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee; and
  - The employee earns at least $134,004 per year in total compensation, including at least $913 paid on a weekly salary basis.

# Cost-Neutral Salary Formula



- With a newly non-exempt employee who works 40-plus hours per week, an employer might drop the base pay rate and allow him/her to make up for the shortfall by receiving overtime pay. But what should the pay rate be, so that when the person works overtime their total compensation isn't more than the current total compensation?
- Such a cost-neutral formula is possible if you have a good estimate of the person's expected weekly hours (including overtime).

The formula would be: **Weekly Salary/(40+(OT Hours x 1.5))**

# Cost-Neutral Salary Formula



- Example: An employee works 45 hours every week with a weekly salary of $800. His hourly pay rate for the purposes of calculating overtime is $20 per hour ($800/40), so his OT-rate would be $30 per hour ($20 x 1.5). Now if this employee worked 45 hours per week, he'd make $950 per week ($800 + $30 x 5).
- Using the cost-neutral formula where he is working 45 hours per week, his base weekly pay rate would be dropped to $16.84 ($800/40+(5 x 1.5)). That would mean his OT-rate would be $25.26 ($16.84 x 1.5). So his weekly take-home pay for 45 hours' worth of work is $800 ($16.84 x 40 + $25.26 x 5).
- Of course, unless the employee reliably gets five hours of overtime each week, he will be earning less – and will not be pleased. So this option may not be viable for many employees

# Non-Enforcement Special Exception



- The Labor Secretary announced that the Department will not enforce the higher salary thresholds until March 17, 2019 for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. This means that those employers will have an additional 28-month grace period before being required to pay overtime for affected employees.

# Reclassified employees become NON-EXEMPT employees



- Whether Salaried or hourly, they are subject to the same wage & hour rules as other non-exempt employees:

**Employer**

- Must maintain accurate time records (even if no OT is ever worked)
- Must monitor employee work to ensure all hours are paid, including:
  - Off-the-clock work
  - Meal breaks
  - Travel time
  - Work performed via remote access
- Must pay OT premium for hours worked in excess of 40/week

# Exempt Salary Increase Process



## Steps When Exempt Employees Receive a Salary Increase:

1. Confirm duty requirements qualify for exemption
   - If the exempt employee's performance of non-exempt duties threatens the ability to argue that the primary duty of the employee is an exempt one, consider whether any of the non exempt duties can be shifted to a non-exempt employee
2. Confirm job description includes actual job duties
3. Have a communication plan for affected employees
4. Give written notice to affected employees
   - Ensure that, in addition to changing each employee's rate of pay for payroll and withholding purposes, payroll updates and itemized wage statements accurately the employee's new rate of pay.
5. Prepare HR and management with information to answer employee questions

# Potential Claims From Employees



- Exempt employees whose pay is not raised
- Exempt employees whose pay is raised, but who think they should be reclassified as non-exempt and therefore eligible for overtime
- Reclassified employees who question why they weren't classified as non-exempt, and paid overtime, from the start of their employment
- Reclassified employees who allege off-the-clock work, missed meal breaks, or improperly calculated overtime pay

# Risk of a "Wave" of Claims

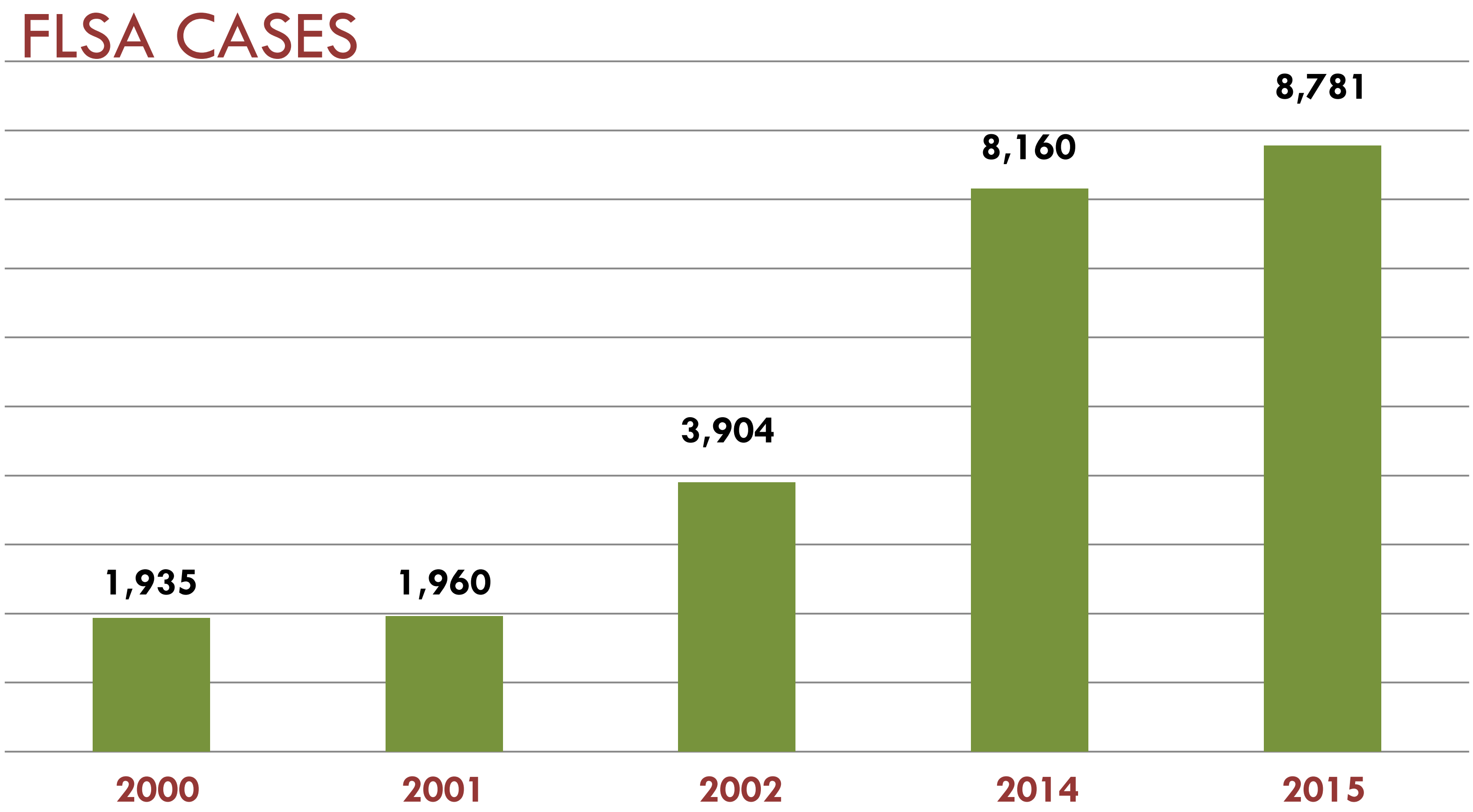


- Press coverage about December 1 effective date of new rules inspiring employees and lawyers to seek avenues to recover damages
- More lawyers who become aware of and educated about how to file FLSA and state law overtime claims
- Workplace talk that leads to "me-too" concerns among a wide variety of employees

**TIP:** Beware of unlawful limitations on workplace discussion of compensation

# Trend In FLSA Cases – Employers Take Note






Source: www.uscourts.gov

# Examples – Recent Settlements

# Best Aire Compressor Services Inc.



- Best Aire Compressor Services Inc. (“Best Aire”) and its owner did not pay 13 employees for working over 40 hours per week.
- Best Aire misclassified its salaried managers and some clerical staff as being exempt from overtime.
- Best Aire now must pay 13k in unpaid overtime damages to the 13 employees.

# Bloomberg LP



- Customer service employees claimed Bloomberg LP did not pay them overtime wages.
- One plaintiff in particular, Jackson, claimed she worked 10 additional hours per week without pay. She was :
  - Expected to come into work earlier;
  - Left after her shift;
  - Worked from home after leaving the office; and
  - Worked through lunch.
- Bloomberg eventually settled for $3.2 million.

The Boston Globe

# Labor Department wins $2.4m wage settlement with Mass. construction firms

By Beth Healy Globe Staff August 02, 2016

A Lunenberg construction company and a *related Framingham firm agreed to a $2.4 million settlement with the Department of Labor* in a case involving unpaid overtime for 478 workers.

An investigation by the Labor Department's wage and hour division found that Force Corp. and AB Construction Group Inc., and principals Juliano Fernandes and Anderson Dos Santos, misclassified the bulk of their employees as independent contractors to avoid paying overtime wages and other benefits.

In addition, the companies allegedly used a combination of payroll checks and cash payments to employees, often avoiding paying overtime, and kept inadequate and inaccurate records.

## *Dollar General Stores*

DOLLAR GENERAL®

The lawsuit alleged the discount retailer failed to properly pay store managers for overtime, in violation of the *Fair Labor Standards Act (FLSA).*

Specific allegations were  that company required the store managers to work as much as 90 hours per week and misclassified them as exempt from overtime, even though they generally spent less than 10 hours weekly performing managerial duties.

According to the complaint, most of the store managers' work hours involved non-managerial tasks such as operating cash registers.
The $8.3 million settlement will cover some 2,722 individual claims.

# Will Rule Take Effect As Scheduled?

LAS VEGAS REVIEW-JOURNAL CAPITAL BUREAU

Posted: September 20, 2016 - 10:47am

Bu Sandra Chereb

# Nevada, 20 other states challenge Obama's new overtime rules

CARSON CITY — A lawsuit filed Tuesday by Nevada Attorney General Adam Laxalt and joined by 20 other states challenges the legality of new overtime rules implemented by the Obama administration and set to take effect Dec. 1.

The lawsuit, filed in the Eastern District of Texas, argues the rule the Labor Department implemented is unconstitutional because it dictates wages states must pay employees for government functions and exceeds congressional authority.

It further argues it would upset the state budgeting process by requiring states to pay overtime to more employees.

"Long-standing federal law requires an overtime exemption for 'bona fide executive, administrative or professional' employees," Laxalt said in statement.

# Questions?

# Krokidas & Bluestein LLP



Thank you!

Paul Holtzman, pholtzman@kb-law.com

**www.kb-law.com**

600 Atlantic Avenue
Boston, MA 02210
(617) 482-7211