

The Clock is Ticking: What Employers Need to Know NOW About DOL's New Overtime Rules

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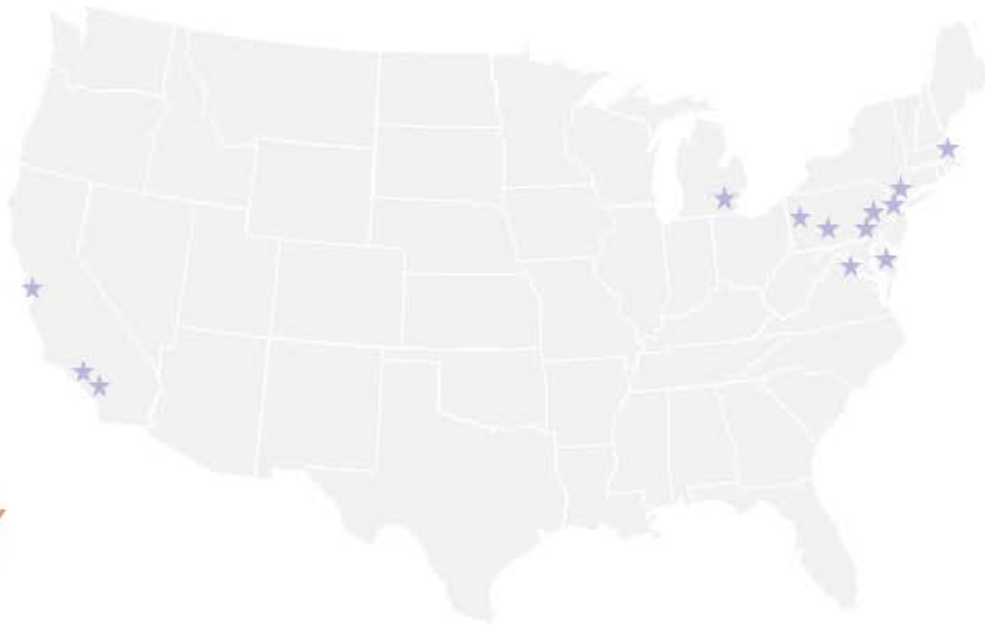
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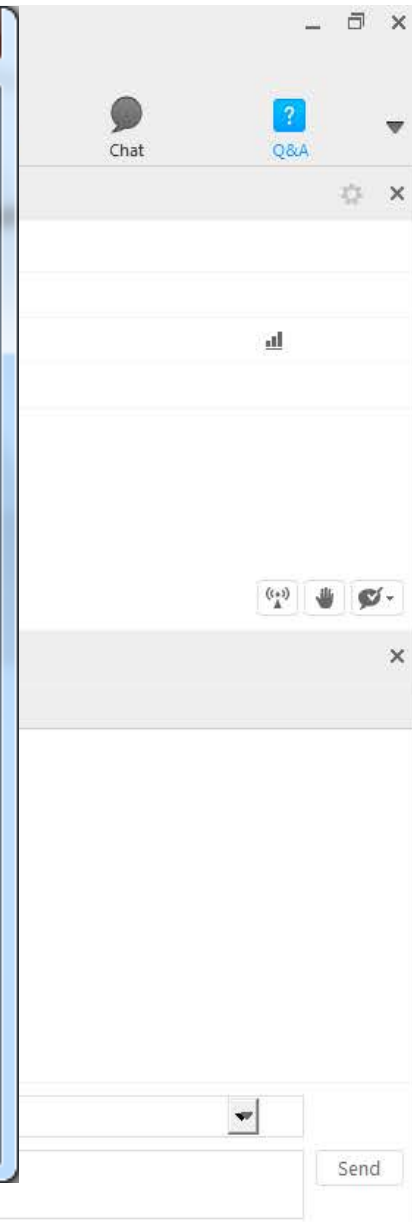
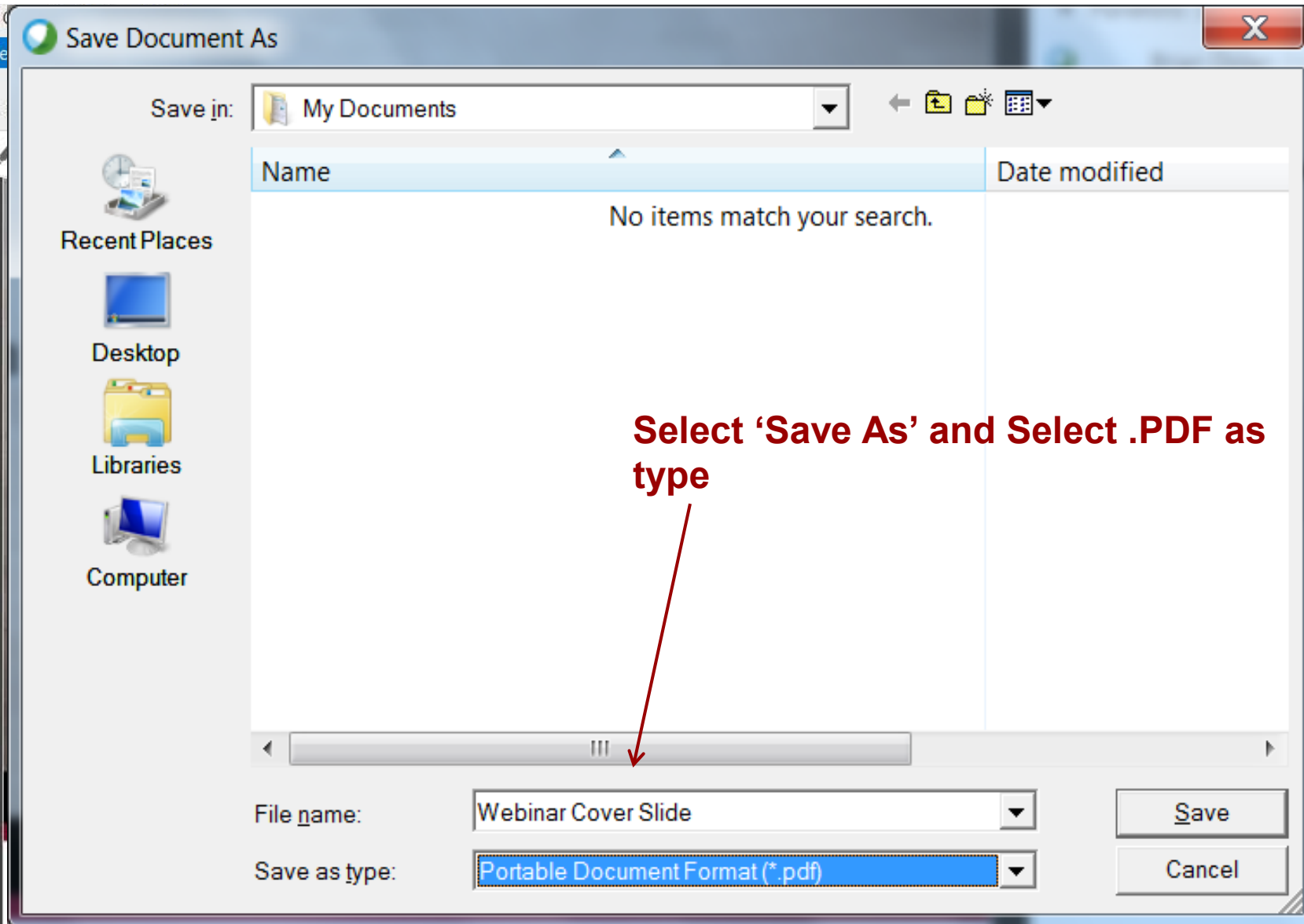
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- ▶ Chair of the firm's Labor and Employment Practice Group
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- ▶ Represents private and public sector employers before state and federal courts and administrative agencies, including the Equal Employment Opportunity Commission and Pennsylvania Human Relations Commission



Introduction

- ▶ New Regulations Published on May 17th
 - Effective **December 1, 2016**
 - Will have dramatic impact on overtime exemptions for **all** employers
- ▶ Compensation is a major political topic
 - Many states have enacted, or are considering, significant increases to minimum wage
 - Some states, notably California and New York, have enacted special rules for OT exemptions

Wage and Hour Litigation

- ▶ Fastest Growing Type of Employment Litigation
 - Class/Collective Actions
 - 8,954 cases filed in district courts in 2015
 - Filings were up more than 10% over 2014
 - Filings were up more than 450% over last 15 years
 - Plus state claims!
- ▶ New regulations and changes employers must make will spur even more litigation

Webinar Goals

- 1) Inform you about the substance of new overtime rules.
- 2) Discuss strategies for managing and implementing new rules.
- 3) Discuss some of the economical ways that Pepper can help you navigate the changing landscape of wage and hour law

What exemptions are impacted?

- ▶ The 3 major “white collar” or EAP exemptions:
 - **Executive**
 - **Administrative**
 - **Professional**
- ▶ To qualify for exemption, employees generally must:
 - Be paid a minimum weekly salary;
 - With some exceptions, regularly receives a predetermined amount of compensation each pay period regardless of number of hours worked; and
 - Primarily perform administrative, executive, or professional duties (duties test)

What exemptions are not impacted?

- ▶ Some exemptions not impacted include:
 - Outside Sales Employees
 - Still no minimum salary requirement; must meet other elements of test
 - Commissioned Retail Sales Employees
 - Exempt from overtime if certain tests met

What is the new minimum salary threshold for the White Collar/EAP exemptions?

- ▶ Minimum salary threshold to qualify for a white collar exemption is more than doubling
- ▶ Minimum salary is currently:
 - \$23,660 a year (\$455 a week)
- ▶ Minimum salary effective December 1 will be:
 - \$47,476 a year (\$913 a week)
- ▶ New Salary threshold is currently set at the 40th percentile of full-time salaried workers in the lowest income census region (currently the South)

How will minimum salaries automatically update over time?

- ▶ New rules automatically update the minimum salary threshold requirement every **3 years**.
- ▶ The first such change will take place on January 1, 2020
- ▶ Salary threshold is currently projected to increase to over \$51,000 per year on January 1, 2020
 - Next increase will take place on January 1, 2023

No Changes to the Duties Test

- ▶ When DOL released proposed rule, it sought feedback related to the duties tests and considered changing the duties tests
 - Employer comments: Changes to standard duties tests would be disruptive
- ▶ Hundreds of Thousands of comments made to DOL and DOL left the duties tests alone
- ▶ DOL and courts will continue to strictly construe exemptions

New Rules on Bonuses and Commissions

- ▶ Employers may count nondiscretionary bonuses and incentive payments to satisfy up to 10% of the standard salary threshold
- ▶ Larger bonuses are permissible but the amount that can be used to meet the standard salary threshold is capped at 10%
- ▶ Payments must be made on a quarterly or more frequent basis (once every 13 weeks)
 - If employee does not earn enough in nondiscretionary/incentive payments in a given quarter to remain non-exempt, the employer has up to one pay period to make up the short fall
 - If catch up payment not made, must pay employee OT for any OT hours worked during that quarter

What bonuses count?

- ▶ Bonus must be nondiscretionary
- ▶ Promised to employees to induce them to work more efficiently or remain with company
- ▶ Examples:
 - Bonuses tied to productivity or profitability (i.e. an announced bonus based on a specified percentage of employer profits in previous quarter)
 - Commissions
 - Attendance Bonuses
 - Production Bonuses
 - Retention Bonuses

What bonuses do not count?

- ▶ Purely discretionary bonuses
- ▶ Decision to award bonus and the amount of payment is **solely** at the employer's discretion and not in accordance with preannounced standards
- ▶ Example:
 - Unannounced bonus (e.g., Company has unexpected surplus and decides to give employees bonus based on how hard the employee is perceived to work)
 - Spontaneous reward for specific act

What is the new minimum salary threshold for the Highly Compensated Employee Exemption?

- ▶ Annual compensation threshold increasing from \$100,000 a year to \$134,004 a year
- ▶ PLUS (not a change):
 - The employee's primary duty includes performing office or non-manual work; and
 - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee
- ▶ New salary threshold set to 90th percentile of full-time salaried workers nationwide
 - Will also increase on January 1, 2020
 - Projected to increase to approximately \$147,524.

What do the rule changes mean for private employers?

- ▶ In general, exempt employees currently making an annualized salary of less than \$47,476 will:
 - Need to be given a raise OR
 - Converted to non-exempt
 - Non-Exempt will need to be paid 1.5 times regular rate for all hours worked over 40 in a work week
- ▶ Coordinate Commission/Bonus systems with your decision whether to classify a certain position as exempt or non-exempt
- ▶ Consider re-evaluating all of your positions classified as exempt

Strategies for Compliance

- ▶ What factors go into the question of whether to meet the new salary rule or convert an employee to non-exempt?
 - If an employee is converted from salaried exempt to non-exempt hourly employee, how do you set the employee's normal hourly rate?
 - Simply dividing an employee's annual salary by 2,080 hours (i.e., 40 hours per week multiplied by 52) could be a costly approach
 - Consider factoring expected overtime hours into the calculation
 - **Example**
 - Employee receives a salary of \$41,600 and works 45 hours/week
 - If converted to hourly based on 2080 hours, rate would = \$20/hour ($\$41,600/2,080$)
 - But at \$20/hour, because employee works 5 hours overtime/week, will receive additional \$7,800 per year (5 hours x \$30 x 52 weeks)
 - To maintain same total annual compensation, hourly rate would need to be \$16.84/hour.

Strategies for Compliance

- ▶ If considering whether to convert to hourly, think through:
 - Whether weekly compensation will vary, and how that may impact employees
 - Impact on employee morale due to loss of “prestige”
 - Perhaps convert to a salaried, non-exempt position
 - In some states (not PA) perhaps “fluctuating workweek”

- ▶ If dealing with an employee who was previously covered under the “highly compensated employee” exemption:
 - Might position qualify for another (EAP/white collar) exemption?
 - If not, can duties be reassigned so that position qualifies for another exemption?
 - If short of \$134,004, can make up shortfall with year end bonus.

Impact of Bonuses on Compliance

- ▶ Bonuses/Commissions can be “counted” toward the minimum salary for exempt employees
- ▶ Important to have a clear commission/bonus plan coordinated with overall pay strategy

Bonuses/Incentive Pay for Non-Exempt Employees

- ▶ Bonuses, Commissions, and other non-discretionary incentive pay for non-exempt employees
 - Must be included in the regular rate and factored into OT rate
 - Can be complex
 - Key Issue: Over what period the commission/bonus was “earned?”
 - Requires retroactive re-calculation of regular and OT rate
 - Can be dictated by employer in written bonus/commission plan or policy
 - Frequent litigation target
- ▶ Example
 - Commissioned Employees OT Horror Story

Bonus and Highly Compensated Employees

- ▶ Can utilize bonuses with a Highly Compensated Employee as long as the employee has a minimum guarantee of \$134,004 and makes at least \$913 per week
- ▶ If employee's total annual compensation does not total at least \$134K by the last pay period of a 52 week period, employer may make a year-end bonus to ensure the \$134K level is reached and preserve exemption
 - Payment must be made within one month of the end of the 52 week period

Reevaluating Exempt Employees

- ▶ Employers should be evaluating whether exempt employees meet the duties tests.
- ▶ Now is an opportune time to convert currently exempt employees to non-exempt; especially if there is a close case
- ▶ Changes often draw scrutiny but during this time period of change between now and December 1, changes will be so common that they may fly under the radar

Takeaways: Preparing for December 1, 2016

- ▶ Audit any exempt positions making less than salary threshold
- ▶ Identify options for any affected positions
 - Reclassify positions
 - Control hours
 - Utilize different exemption and/or one without a salary threshold
- ▶ Evaluate (cost, morale, etc.) and select best options
- ▶ Develop a communications plan
- ▶ Consider whether to implement policy to control overtime
- ▶ Ensure prepared for timekeeping and recordkeeping
- ▶ Train supervisors
- ▶ Implement selected options
- ▶ Monitor (compliance, cost, impact on operations)

Pepper's Approach to Economic Reviews and Audits

- ▶ Conduct a privileged review of job duties and compensation system
- ▶ Advise on exempt/non-exempt status and options
- ▶ Review Incentive Pay Policies and coordinate with strategy
 - Dedicated Team
 - Flat Fees and other creative fee arrangements
 - Predictable cost
 - Reduced risk of being a litigation target

Questions & Answers

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