

The Wright & Kimbrough Report



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AVOIDING EMPLOYEE LITIGATION

A Guide to The DOL's New Overtime Regulations

THE DEPARTMENT of Labor has more than doubled the salary threshold for exempt employees to \$47,476, which means anyone earning less than that must be eligible for overtime if they work more than 40 hours a week.

The increase equates to a minimum salary of \$913 per week, compared to the current \$455 per week – or \$23,660 a year.

This means if you currently have an exempt manager earning less than \$47,476, they will be non-exempt starting Dec. 1, unless you give them a raise. If they work more than 40 hours a week, regardless of their duties, you will have to pay overtime.

The move by the DOL means that you'll have to change your payroll systems to comport with the new standard or risk breaching wage and hour laws at a time when lawsuits for these types of violations have been on a steep rise.

The DOL estimates that some 4.2 million workers will become eligible for overtime under the new regulations.

The last time adjustments were made to the white-collar overtime exemption, in 2004, there was a surge in wage and hour litigation.

Experts say that these changes will likely see a similar rise due to employers making mistakes about the way time is kept or misunderstandings among employees about how bonuses are calculated (see below). It is therefore imperative that you as an employer adjust your payroll systems so that they comply with the new regulations when they take effect in December.

Here's what you need to know about the new regulations:

1. Inclusion of bonuses

The final rule allows employers to include any bonuses and commissions (up to 10% of the salary) when calculating the salary figures.

2. Duties test unchanged

The new rules do not change the "duties test," which specifies what kind of employees can be classified

as exempt:

- Executive
- Administrative
- Professional
- Outside sales
- Creative professional

3. "Highly compensated" staff

The new annual compensation requirement for highly compensated employees subject to a minimal duties test has increased to \$134,004, up from \$100,000 currently.

4. Regular increases

The new threshold will be updated every three years. Based on wage growth projections, that means the overtime threshold could rise to \$51,000 by 2020, according to estimates from the White House.

See 'Start' on page 2

CONTACT US



If you have any questions regarding any of these articles or have a coverage question, please call us at:

Wright & Kimbrough Insurance

2150 Douglas Blvd #210
Roseville, CA 95661
Phone: (800) 822-3694
Fax: (916) 751-7690
info@wkins.com

License No: 0670151



Leasing a Car? Put It in Your Company Name

YOU'RE SUCCESSFUL at running your business and you decide it's time for a new car. You want to take advantage of the great leasing deals many carmakers have on offer, so one weekend you enter into a lease for that car.

On Monday you tell your bookkeeper to add the car to your company's business auto policy, but he tells you that the insurer can't add it since it's in your name. Knowing you're going to be using this car primarily for business, you realize you're suddenly in a bind.

As a business owner or company director wanting to lease a car for yourself, you have the choice of either business contract or personal car leasing, and each option has its own implications, benefits and disadvantages, particularly in terms of insurance.

And if you are using your new car mostly for work (think sales calls and visiting job sites), and you bought the car in your name, that mistake can cost you as your business won't be able to insure it properly.

Your personal auto policy will provide coverage for some business use of your vehicle. The same is true for your employees' personal auto policies, which also cover some business use of their vehicles.

But, a personal auto policy is unlikely to provide coverage, if the vehicle is used primarily in business.

The personal auto policy, whether yours or your employee's, may not have high enough limits to protect your business.

For example, take the scenario: You are driving to a business meeting while having an intense conversation on your phone with your production department and you plow into a car in front of you, injuring the driver and three occupants. Then they sue you and your company.

If you have only a personal auto policy, your insurer will probably defend you personally and pay the claim up to the policy limit. Your personal auto policy insurer will not defend or pay damages on behalf of your business, however. Most certainly, once your policy limits are exhausted your business could be on the hook for the rest of the damages, but your firm's insurance would likely not cover it.

If you or your employees are driving personal vehicles on business and relying on your personal auto policies, be sure you and they have sufficient liability coverage to protect your business in the event of a serious auto accident.

Do not expect to rely on a personal umbrella policy for any claims that arise from business use of a vehicle. Typically, the personal umbrella excludes all claims occurring in the course of a business endeavor.

The takeaway

If you are in the market for a new car that you'll be using a significant amount of the time for work, you should seriously consider leasing it in your company name. It will save you from headaches later if you are involved in an accident. ❖

Business auto insurance checklist

If you answer "yes" to one or more of these questions, you need business car insurance to stay properly covered:

- Run business errands during the day?
- Travel to client or business meetings?
- Travel between different business sites?
- Drive colleagues or business contacts around?
- Allow other employees to drive your vehicle?
- Make deliveries or collections?



Continued from page 1

Start Auditing Your Current Employee Classifications Now

Take action

There will be a lot to do and the deadlines for compliance may be tight. For example, to make cost-effective salary determinations for your company, you may need to take a close look at employee hours. To get a head start on the work, the law firm of Frankfurt Kurnit Klein & Selz recommends that employers consider the following steps now:

1. Audit current classifications of employees as exempt or non-exempt and correct any misclassifications.
2. Audit the hours worked by any current exempt employees who may fall beneath the proposed salary limit. If you do this, once the final rules are published, you will be in position to decide whether, for example, to increase certain employee salaries to a point at or

above the new threshold - or to pay those employees overtime moving forward.

3. Determine how to best communicate changes to employees to maintain morale and reduce the risk of litigation.

The Ultimate Backstop

Employment Practices Liability Insurance can provide protection if you are sued for wage and hour issues.

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Protecting Outdoor Workers From UV Damage

MOST EMPLOYERS with outdoor workers already understand that they have to protect them from heat illness. But, while the California Occupational Safety and Health Administration already has strict rules that employers have to follow regarding protecting workers against heat illness, protecting their skin is also important even if it's not in code.

There is little precedent of workers' comp judges ordering insurers and employers to pay workers' comp benefits to outdoor workers who have developed skin cancer. Still, you should advise your workers to wear the proper clothing and apply sun screen if working outside.

While federal OSHA and state OSHA regulations don't specifically require employers to guard against skin cancers, they do require them to minimize the risk of harm to their workers. States have varying laws on whether skin cancer is an occupational disease, the main ones being:

- **California** – Lifeguards who work three consecutive months in a year and develop skin cancer during such employment may get workers' compensation for an occupational disease in California.
- **Colorado** – A firefighter killed or impaired by skin cancer after working for five years is considered to have an occupational disease.
- **Massachusetts** – Skin cancer is considered an occupational disease in Massachusetts among firefighters, state police with the fire investigation unit, members of the state police K-9 unit, and crash crewmen, crash boatmen, fire controlmen and assistant fire controlmen.

Boris Lushniak, the acting surgeon general, recommended in a blog on the National Institute for Occupational Safety and Health website, measures that both employers and workers should take:

Recommendations for workers

- Wear a broad spectrum sunscreen with a minimum of SPF 15. An SPF of 15 will allow a person to stay out in the sun 15 times longer than they normally would be able to stay without burning. SPF does not refer to protection against UVA. A broad spectrum sun screen protects against both UVA and UVB rays.
- Sunscreen performance is affected by wind, humidity, perspiration and proper application.
- Follow the application directions on the sunscreen bottle. Sun screens should be liberally applied (a minimum of 1 ounce) at least 20 minutes before sun exposure.
- Special attention should be given to covering the ears, lips, neck, tops of feet, and backs of hands.
- Sunscreens should be reapplied at least every two hours, and each time a person gets out of the water or perspires heavily.
- Some sunscreens may also lose efficacy when applied with insect repellents, necessitating more frequent application when the two products are used together.
- Old sunscreens should be thrown away because they lose their potency after one to two years.
- Wear protective clothing. Dark clothing with a tight weave is more protective than light-colored, loosely woven clothing.
- High-SPF clothing has been developed to provide more protection for those with photosensitive skin or a history of skin cancer.
- Wear wide-brimmed hats and sunglasses with UV protection.

Recommendations for employers

Employers should take the following steps to protect workers from exposure to UV radiation:

- When possible, avoid scheduling outdoor work when sunlight exposure is the greatest.
- Provide shaded or indoor break areas.
- Provide training to workers about UV radiation including:
 - » Risks of exposure
 - » Prevention of exposure
 - » Signs and symptoms of overexposure.

EMPLOYERS TARGETED

Employees Increasingly File FMLA, FLSA Lawsuits

THE NUMBER of employee lawsuits against employers for Family Medical Leave Act (FMLA) and wage and hour violations has skyrocketed in the last five years and your firm could be the next target even for a small misstep, which can be costly.

The Department of Labor has increased its budget and the number of investigators pursuing employers who violate the Fair Labor Standards Act (FLSA), which covers wage and hour complaints, including exempt and non-exempt employee violations, overtime violations and similar issues.

Employment law attorneys say that the surge in FMLA complaints is a result of more people knowing about the law as the DOL has expanded its reach and publicized the act in press releases about actions it has taken against various employers.

Also, they say, the term “serious health condition” is broadly defined, making it easy for employees to satisfy.

Here we take a look at the problem and what you can do to avoid being sued.



FMLA

Qualifying reasons for FMLA leave include: birth of a child; a serious health condition that makes the employee unable to perform their work functions; and to care for a spouse, child or parent with a serious health condition.

The rapid rise in FMLA lawsuits is a direct result of the law becoming increasingly complex for employers to navigate, and its increased enforcement. The number of FMLA cases filed in 2014 hit 1,108, almost a fourfold increase from the 280 that were filed in 2012.

What you need to know and do:

- Post and distribute information about employees’ FMLA rights and include it in your employee handbook.
- Don’t retaliate against someone seeking FMLA leave.
- Develop an internal process for employees to use when applying for FMLA leave.
- Make sure managers and supervisors apply your FMLA process consistently.
- Be careful to balance any pushback against the employee, but you have the right to ask for more information from the employee and their doctor. And you can monitor the use of FMLA days.

FMLA cases filed



NOTABLE SETTLEMENTS OR AWARDS:

Staples Inc. – \$275,000
Solvay Chemical – \$1.5 million
Christ Hospital and Medical Center – \$11.6 million



FLSA

Wage and hour lawsuits are typically filed under the Fair Labor Standards Act, and they’ve been creeping up, a trend employment lawyers attribute to more people working from home and technology, which has blurred the lines between when workers are on or off the clock.

What you need to know and do:

- There are four main areas you need to be concerned with: minimum wage, overtime pay, record-keeping and youth employment.
- Make sure you properly classify your employees as non-exempt or exempt (the minimum salary to be classified as exempt will rise to \$47,476 a year later this year. Currently it’s \$23,327).
- There are six exempt positions: executive, administrative, learned professional, creative professional, computer professional and outside sales staff.
- Track exempt employees’ hours just in case.
- Compute overtime properly.
- Employees must be compensated for time spent answering e-mails during off hours, including vacation.

FLSA cases filed



NOTABLE FLSA SETTLEMENTS:

Walgreens – \$23 million
Wells Fargo – \$15 million
Roto-Rooter – \$14.2 million



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