



# Welcome!

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## **Proposed Rule for Overtime Exemptions Is Issued by the Department of Labor:**

What Will It Mean For You?

*Presented by Susan M. Parrott and Kerry A. Shad*





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# Proposed Rule for Overtime Exemptions Is Issued by the Department of Labor: What Will It Mean For You?



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Ms. Shad's practice focuses on representing employers in connection with all aspects of employment-related litigation and counseling. She has represented clients in state and federal courts throughout the country, including North Carolina, Arizona, California, Florida, Georgia, Illinois, New York, Pennsylvania, South Carolina, and Tennessee. Her experience includes defending individual, class and collective action claims of discrimination, harassment, wrongful discharge, retaliation, and wage and hour violations; representing clients in investigations by state and federal Department of Labor and The Equal Employment Opportunity Commission and similar agencies; serving as "in-house" employment litigation counsel to large company managing employment litigation across the country; and representing clients in disputes involving alleged violations of non-competition agreements.



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Ms. Parrott regularly assists clients in complying with state and federal employment-related laws and preventing employee lawsuits. Her experience includes identifying and managing employment-related issues in mergers, acquisitions, reorganizations, and plant closings, and developing and interpreting employment, non-competition, confidentiality, and severance agreements. Her appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. Prior to attending law school, Ms. Parrott worked for the United States Environmental Protection Agency and obtained a Masters Degree from the University of North Carolina, School of Public Health.



# Proposed Rule for Overtime Exemptions Is Issued by the Department of Labor

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What Will It Mean For You?

# The Life Cycle of the Proposed Rule

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- March 2014 - President Obama directed the Department of Labor to propose revisions to the “white collar exemptions” to:
  - “modernize and streamline the existing overtime regulations;”
  - “address the changing nature of the workplace;” and
  - “simplify the regulations to make them easier for both workers and businesses to understand.”
- July 6, 2015 the Notice of Proposed Rulemaking is published in the Federal Register (80 FR 38515)

# The Life Cycle of the Proposed Rule

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- September 4, 2015 – comment period ends (could be extended)
  - [www.regulations.gov](http://www.regulations.gov)
  - Rule Identification Number (RIN) 1235-AA11
- DOL reviews and considers comments
- DOL issues final rule
- Effective date generally 90 – 120 days thereafter
- **No action required by employers now – but need to plan**

# Key Provisions of New Proposed Rule

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- Increase Salary threshold/level
  - \$455/week (\$23,660/year) to \$970/week (\$50,440/year)
- Increase annual compensation level for Highly Compensated Employees (HCEs)
  - \$100,000 to at least \$122,148
- Establish a mechanism for automatically updating salary and compensation levels going forward
- No change to the job duties tests (yet)

# Possible Effects of Proposed Rule on Workplace

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- Department of Labor estimates annualized direct employer costs of between \$239.6 and \$255.3 million per year
- Department of Labor estimates 4.6 million workers would become entitled to OT in the first year
- DOL estimates 40% of F/T salaried employees will become OT eligible



# Possible Effects of Proposed Rule on Workplace

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- Department of Labor estimates 36,000 HCEs may become eligible for minimum wage and OT
- Impact could be greater in:
  - retail, hospitality, non-profit where salaries tend to be lower
  - geographic areas where lower wage market prevail

# A Little Refresher: FLSA Key Exemptions

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- “White Collar” exemptions:
  - Executive
  - Aministrative
  - Professional
  - Outside Sales – not affected
  - Computer Employee – not affected
- Proposed Rule deals with the **EAP** exemptions

# A Little Refresher: When do the EAP exemptions apply?

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- Paid on salary basis (the “salary basis test”)
- Paid requisite, weekly amount of salary (the “salary level test”)
- Satisfies job duties for exempt category (the “duties test”)

# A Little Refresher: Salary Basis

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- Exempt employee regularly receives a predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Generally, must be paid the full salary for any week in which the employee performs any work

# A Little Refresher: Salary Basis

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## No Docking, except for:

- Full sick/disability days if under a wage replacement plan, policy or practice
- Full personal days
- To offset jury fees, witness fees, or military pay
- First and last week of employment
- Suspension for violation of written work rule
- Penalty for violating “safety rules” of major significance
- Unpaid FMLA leave

# Proposed Rule Increases Salary Level

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- Standard salary level to be set at the 40th percentile of weekly earnings for full-time salaried workers
  - anticipated to be \$970/week; \$50,440/year in 2016
  - this is the 1975 level adjusted for inflation
- Currently EAP exempt employees earning less will be entitled to OT under the new rule

# Proposed Rule Increases Level for Highly Compensated Employees

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- HCE exemption requires that the employee receive the required compensation level AND regularly perform at least one of the exempt duties or responsibilities under one of the EAP exemptions

# Proposed Rule Increases Level for Highly Compensated Employees

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- Compensation to increase to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers
  - at least \$122,148/year in 2016
  - Still can include commissions, nondiscretionary bonuses and other nondiscretionary income
    - But at least \$50,440 will have to be paid on a salary basis
  - Still can't include payments for insurance, retirement, fringe benefits, boarding, etc.



# Proposed Rule Will Provide for Automatic Increases

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- DOL will establish a mechanism for indexing or automatically updating the salary and compensation levels annually going forward based on:
  - Fixed % of wages; or
  - Consumer Price Index
  - Comments invited on which should be used
  - 60 days' notice of increase

## Key Issues Left Open for Comment

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- DOL poses a series of questions for comment to consider whether the standard duties tests are working to “screen out employees who are not bona fide white collar exempt employees.”
- DOL believes that the increased salary level could obviate the need to reexamine the duties tests by making misclassification less likely.

# Key Issues Left Open for Comment

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1. Should changes be made to the duties tests?
  - minimum time spent on primary duty?
    - if so, should the California model (50%) be the standard or something less?
  - do the single standard duties tests appropriately distinguish between exempt and nonexempt employees? Or should the long/short duties tests be reconsidered?
  - does allowing “executive” employees to perform exempt and nonexempt duties concurrently inappropriately bring nonexempt employees under the exemption?
  - should the amount of nonexempt work be limited?

# Key Issues Left Open for Comment

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2. Whether/how nondiscretionary bonuses/incentive payments may be used to partially satisfy the salary level?
  - currently, can be applied only to satisfy total comp level for the HCE exemption
  - DOL recognizes that in some industries bonuses comprise a large part of the total earnings
  - DOL would limit to 10% that portion of a bonus that could satisfy the new salary level
  - DOL considering whether to require more frequent payment of the bonus, e.g. monthly or weekly

# Key Issues Left Open for Comment

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2. Whether/how nondiscretionary bonuses/incentive payments may be used to partially satisfy the salary level? *(cont.)*
  - DOL not considering use of a “catch up” payment like under the HCE
  - DOL concerned about including “commissions” in salary level because “inside sales” people not generally exempt

# Key Issues Left Open for Comment

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- Other Issues for Comment
  1. DOL has invited suggestions of how the EAP exemptions might apply to specific occupations
    - Employers can suggest examples of positions they think should be exempt
  2. DOL has specifically requested comment regarding examples of exempt computer-related positions/duties
    - recognizes “tremendously rapid pace of significant changes occurring in the information technology industry”

# Key Issues Left Open for Comment

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- Other Issues for Comment
  2. DOL has specifically requested comment regarding examples of exempt computer-related positions/duties (*cont.*)
    - willing to consider updating the examples of computer-related positions exempt under the EAP exemptions
    - offered example of IT Specialist who “without supervision, routinely troubleshoots and repairs significant glitches in the company’s point of sale software for the company’s retail clients” as possibly meeting the requirements of the administrative exemption

# Key Issues Left Open for Comment

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- Other Issues for Comment
  3. Use of Electronic Devices
    - proposed rule does not address
    - DOL will issue a Request for Information asking stakeholders to comment on the use of electronic devices by nonexempt employees outside of regular work hours



# Opportunities for Employers: What to do Now

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- Use the time to audit classifications
  - if find problems, correct them
  - take advantage of proposed new rule to explain why the changes are being made
  - could minimize questions about prior classification decisions
- Identify the exempt employees and their salary levels to determine if they meet the new salary level
  - Job sharing / part-time must hit salary level, no proration

# Opportunities for Employers: What to do Now

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- Consider Options for Minimizing Additional Costs
  - Increase salaries to meet new level and maintain the exemption (reduce benefits or bonuses to keep total compensation level?)
  - Reduce salaries of exempt employees so that earnings are the same when they become OT eligible
  - The exempt employee could be converted to hourly with the hourly rate reduced so that total compensation including overtime remains the same
  - Consider whether the FWW might be an option so that OT is only  $\frac{1}{2}$  the regular rate
    - Note: Not permitted in all states

# Opportunities for Employers: What to do Now

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- Consider Options for Minimizing Additional Costs *(cont.)*
  - Limit employee to 40 hour workweeks
  - Hire part-time employees
  - Consider running numbers with new salaries/hourly rates and calculate effect on operating budgets

# Opportunities for Employers: What to do Now

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- Develop a Plan for Implementing Reclassification
  - Documentation of the reclassifications
  - Communication to affected employees (and maybe others) regarding:
    - OT eligibility
    - Whether their pay is being affected
    - Any changes to work schedules (reduction in flexibility, remote work, attending to e-mails away from work)
    - Whether any other benefits have been affected (e.g. PTO)

# Opportunities for Employers: What to do Now

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- Develop a Plan for Implementing Reclassification *(cont.)*
  - Training regarding new timekeeping and modified policies (e.g. use of electronic devices, meal and rest breaks) that affect reclassified employees and their managers

# Resources

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- Proposed Rule

<https://www.federalregister.gov/articles/2015/07/06/2015-15464/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>

- Fact Sheet

<http://www.dol.gov/whd/overtime/NPRM2015/factsheet.htm>

- Frequently Asked Questions

<http://www.dol.gov/whd/overtime/NPRM2015/faq.htm>

# “Joint Employment” and Title VII

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*Butler v. Drive Automotive Industries of America, Inc.*  
(4<sup>th</sup> Circuit July 15, 2015)

# “Joint Employment” and Title VII

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## Facts:

- Butler worked at the Drive factory
- Drive hires some employees directly, employs others through temporary employment agencies
- Butler was hired by Resource MFG (staffing agency)
- Butler wore Resource MFG’s uniform
- Butler was paid by Resource MFG
- Butler parked in special Resource MFG parking lot



# “Joint Employment” and Title VII

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## Facts:

- Resource MFG ultimately responsible for discipline and termination
- Drive determined Butler’s work schedule
- Drive arranged part of Butler’s training
- Drive employees supervised Butler on factory floor
- Butler alleged that Resource MFG told her that she worked for both it and Drive

# “Joint Employment” and Title VII

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## Facts:

- Butler alleged that a Drive supervisor (Mr. Green) sexually harassed her
- Butler reported the harassment to Resource MFG’s on-site representative and to Green’s supervisor
- Nothing done
- Green later told Butler “she was a temp and could be easily fired.”

# “Joint Employment” and Title VII

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## Facts:

- Butler told Green’s supervisor who asked a different supervisor to terminate Butler
- Request to terminate sent to Resource MFG
- Green called Butler and implied she could save her job by performing sexual favors for him, she refused
- Resource MFG called and told her she was terminated from Drive

# The Lawsuit

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- Butler filed suit against Drive and Resource MFG
- Resource MFG was dismissed by agreement
- District Court granted summary judgment for Drive, not sufficient control to be liable as employer

# The Appeal – Fourth Circuit Reverses

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- Joint Employment doctrine is applicable in the Title VII context – prevents an “employer” from evading liability by “hiding behind . . . a staffing agency”
- “Hybrid Test” to determine extent of “control” over a worker
  - 1) Authority to hire and fire
  - 2) Day to day supervision, including discipline
  - 3) Who furnishes the equipment used and the place of work

# The Appeal – Fourth Circuit Reverses

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- “Hybrid Test” to determine extent of “control” over a worker
  - 4) Possession of/responsibility for employment records (payroll, insurance, taxes)
  - 5) Length of time the individual has worked for the entity
  - 6) Whether formal or informal training is provided
  - 7) Whether the duties are like those of regular employees

# The Appeal – Fourth Circuit Reverses

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- “Hybrid Test” to determine extent of “control” over a worker
  - 8) Whether the individual is assigned solely to the entity
  - 9) Whether the individual and entity intended to enter into an employment relationship (“of minimal consequence”)

# The Appeal – Fourth Circuit Reverses

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- “Hybrid Test” to determine extent of “control” over a worker
  - First three are KEY
  - Factors can be modified to the specific industry
  - No one factor is determinative
  - “[C]ontrol remains the principal guidepost”



# The Appeal – Fourth Circuit Reverses

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- Application of Hybrid Test to Butler – “High Degree of Control”
  - Drive directed Resource MFG that Butler “be added to the list for replacement.”
  - Although Resource MFG fired her, Drive “had effective control”
  - Resource MFG could not point to an example of refusing to follow Drive’s direction regarding discipline or termination

# The Appeal – Fourth Circuit Reverses

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- Application of Hybrid Test to Butler – “High Degree of Control”
  - Drive employees supervised both sets of employees
  - Drive and Resource MFG employees worked “side by side,” same tasks, same equipment, produced goods “core to the business”

# The Appeal – Fourth Circuit Reverses

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- Butler is Drive's employee as a matter of law
- Remanded for consideration of the merits of the Title VII claim