

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

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**Pepper Hamilton LLP**  
Attorneys at Law

May 26, 2016 | Webinar

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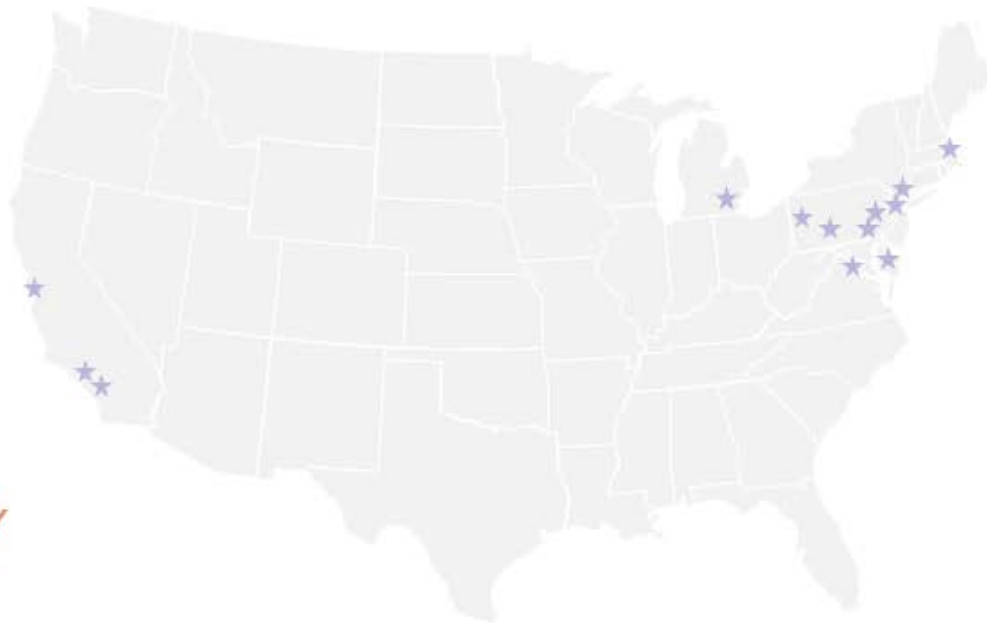
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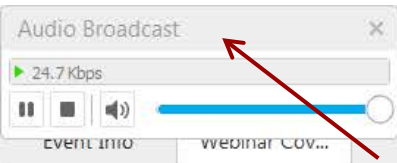
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# Audio

The screenshot shows the Cisco WebEx Event Center interface. At the top, there is a menu bar with 'File', 'Edit', 'View', 'Communicate', 'Participant', 'Event', and 'Help'. Below the menu bar, there are tabs for 'Event Info' and 'Webinar Cov...'. The main content area is divided into two sections. The top section contains a video player with a volume control icon and a play button. A red arrow points from the text 'If you cannot stream audio, click phone icon and a phone number will be sent to you' to a phone icon in the bottom right corner of the video player. The bottom section contains a Q&A panel with a dropdown menu set to 'All (0)' and a 'Send' button. The bottom right corner of the interface shows '5 Connected'.

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Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

Q&A

All (0)

Ask: All Panelists

Select a panelist in the Ask menu first and then type your question here. There is a 256-character limit.

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# Q&A

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Q&A

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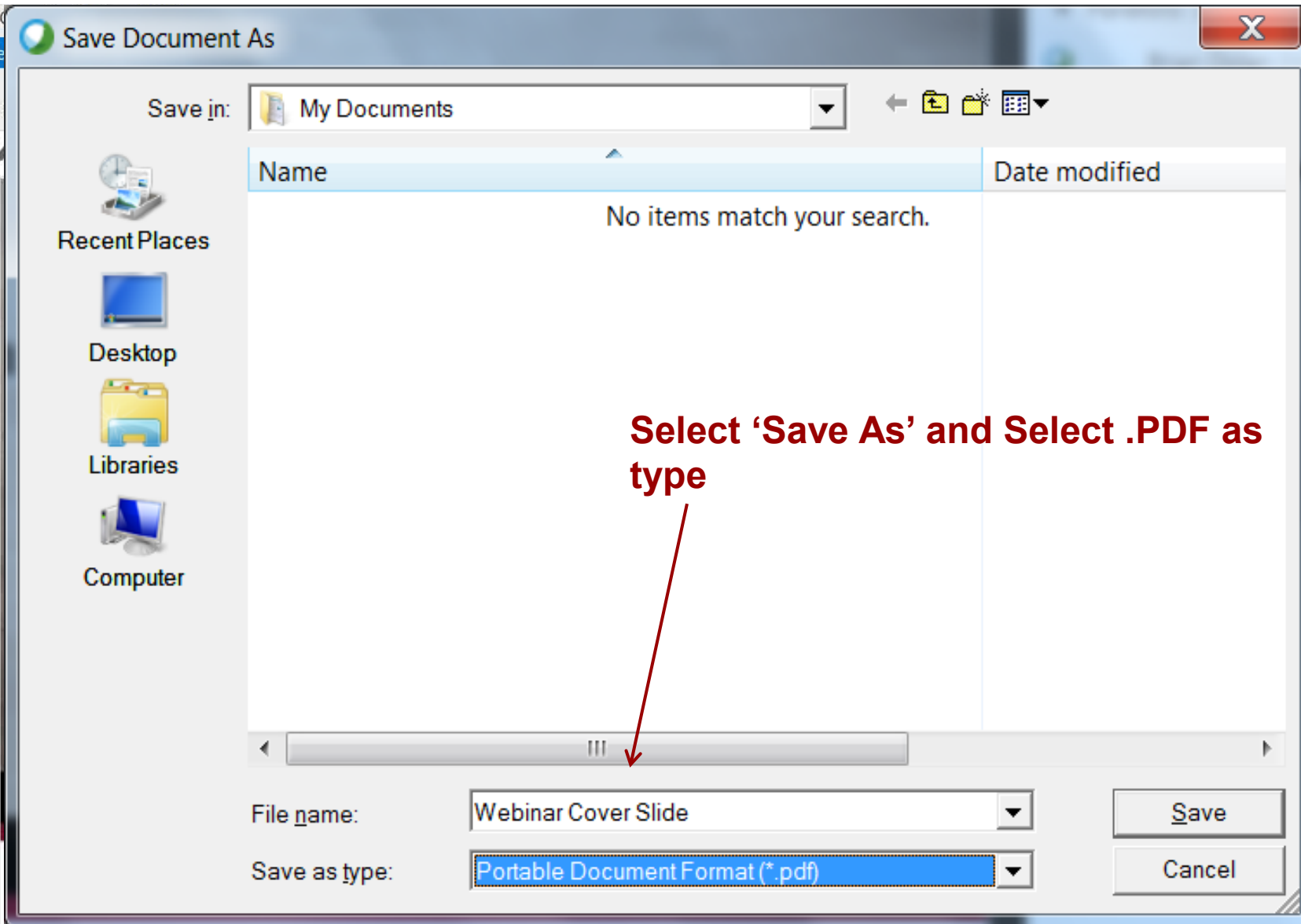
The screenshot displays the Cisco WebEx Event Center interface. At the top, the menu bar includes 'File', 'Edit', 'View', 'Communicate', 'Participant', 'Event', and 'Help'. The 'File' menu is highlighted with a red arrow and the text 'Click 'File''.

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On the right side, the 'Participants' panel shows 'Brian Dolan (Host)' as the speaker and 'Webinar Guest (me)' as the attendee. Below this is a 'Q&A' section with a 'Send' button.

At the bottom left, the Cisco logo is visible, and at the bottom right, the status 'Connected' is shown with a green indicator.

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# Introduction

- ▶ New Regulations Published on May 17<sup>th</sup>
  - 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:
  - **E**xecutive
  - **A**dministrative
  - **P**rofessional
- ▶ 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 40<sup>th</sup> 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 90<sup>th</sup> 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

For more information, visit

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