



Overtime Overhaul

Unpacking Changes to the Federal Wage Law

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Introduction

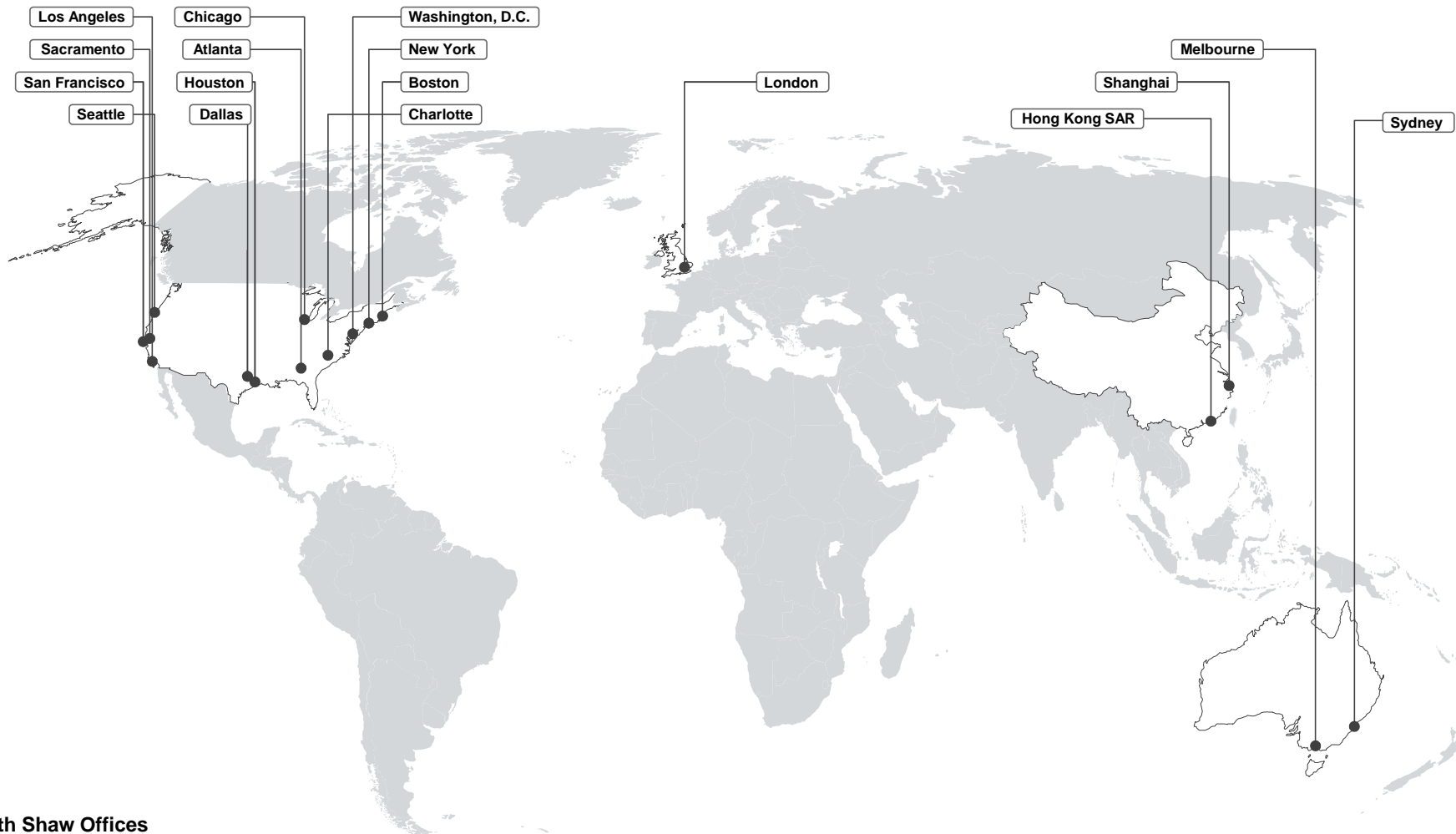


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Overview for Today

- 01 Refresher on FLSA Overtime Exemptions**
- 02 Examining the Final Rule**
- 03 Challenges Ahead for the Final Rule**
- 04 Next Steps for Employers**

The FLSA and its Exemptions

a look at status quo

The FLSA is a Shield and a Sword

- The FLSA is:

- ☐ Landmark legislation from **height of the Great Depression**
- ☐ The source of **federal minimum wage, overtime pay, and child labor** protections
- ☐ ...as well as **exemptions**, including for employees working in an **executive, administrative, or professional (“EAP”) capacity**
- ☐ A model for various **state OT and MW laws**, some **stricter** than the FLSA

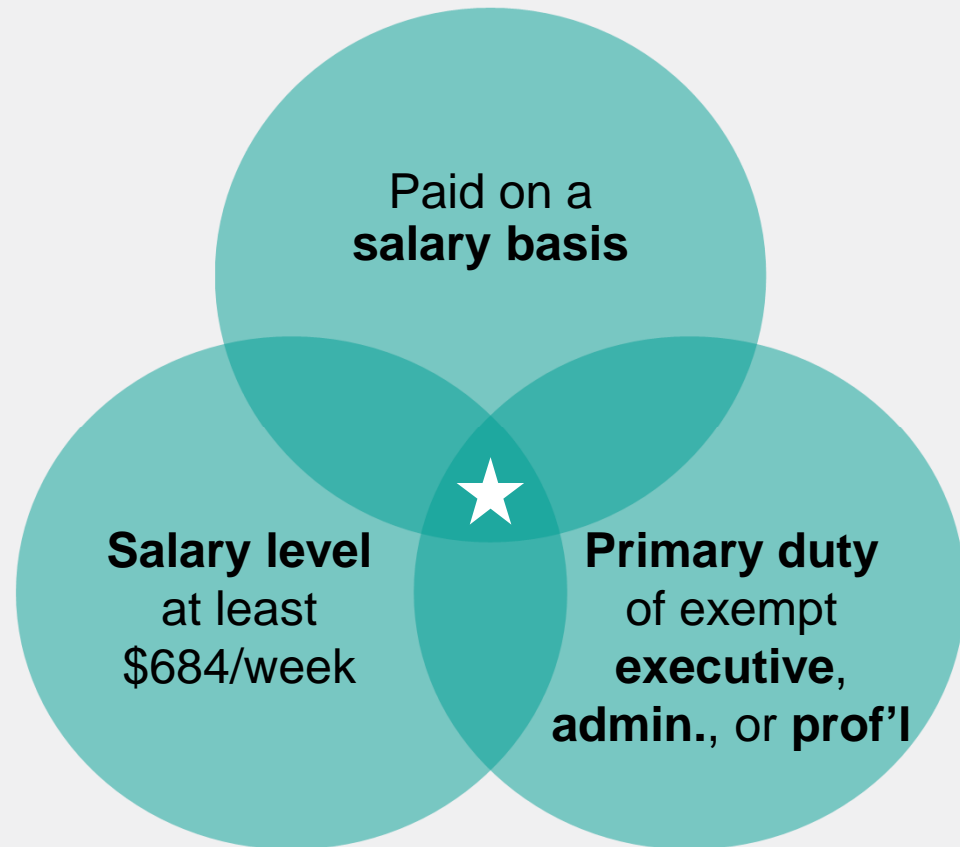
- The FLSA is also:

- ☐ Notoriously **difficult to interpret** for employers and judges
- ☐ The source of **over 6,000 lawsuits in federal court per year**
- ☐ An avenue for lawyers to win **certified classes, double damages, and fees**
- ☐ A driver of **costly litigation**, with routine **multi-million-dollar class settlements**

The DOL Defines EAP “Capacity” Through Duties and Pay

	Custodian	CEO
Hourly rate of \$150/hour	Not Exempt	Not Exempt
Salary of \$500,000/year	Not Exempt	Exempt

The EAP Exemption Rules as of Today



Also an exemption for “highly compensated” employees (“HCE”)

1. **Total comp of \$107,432**, inclusive of min. salary
2. A **relaxed duties test** (essentially at least one EAP duty)

Other FLSA Exemptions That May Apply to News Media

	General Description	Pay Requirement	Exempt From
Outside sales	Generally for employees who (i) make sales and (ii) are regularly engaged away from employer's place of business	Any basis	Overtime and minimum wage
Creative professional	Primary duty requires invention, imagination, originality, or talent in recognized field of artistic or creative endeavor (e.g., writing, graphic arts)	Salary or fee basis (level changing)	Overtime and minimum wage
207(i) ("7(i)") exception	(i) Employees of retail or service establishments , who (ii) earn at least 1.5x minimum wage , and (iii) receive at least half of total earnings via commissions	At least 50% of total earnings via commission	Overtime only

Other FLSA Exemptions (cont.)

	General Description	Pay Requirement	Exempt From
Small circulation papers	Employees of weekly, semiweekly, or daily newspaper with circulation of less than 4,000 primarily in county of publication or contiguous counties	Any basis	Overtime and minimum wage
Small town radio/TV announcers, editors, chief engineers	Announcers, editors, or chief engineers of a radio or TV station , the major studio of which is in certain small cities or towns	Any basis	Overtime only
Newspaper delivery	Employees delivering newspapers to consumers	Any basis	Overtime, minimum wage, child labor

Some States Define Exemption More Narrowly

- Some states have their own overtime laws with their own exemptions
- **Salary level is higher in some states**, including (but not limited to):
 - ☐ California: \$66,560 annually
 - ☐ Colorado: \$55,000 annually
 - ☐ New York: \$58,458.40 to \$62,400 annually, depending on location
 - ☐ Washington: \$67,724.80 annually
- **Duties tests differ in some states**, including (but not limited to):
 - ☐ California: quantitative duties test (50%)
 - ☐ Colorado: quantitative duties test for executives
- And **plenty of states don't recognize all exemptions**, such as HCE and numerous other exemptions

Unpacking the New Rule

the DOL's push to
\$58,656

The New Rule Focuses on Salary Level

- No changes to the duties test

“While...[the] duties test is not universally popular, it is well known to employers, employees, and the courts, making it easier and more efficient for employers to implement and for workers to understand.”

- Focus is on **higher salary level**, as well as **new auto increases**
- DOL believes:
 - ☐ More than 4 million workers newly entitled to OT pay in year 1
 - ☐ \$1.5 billion in costs to employers and “income transfer” to employees
 - ☐ Increased worker productivity, reduced turnover, better balance

Changes to the EAP Salary Levels

	2004 (R)	2016 (D) (enjoined)	2019 (R) (current)	2024 (D) (July 2024)	2025 (?) (Jan. 2025)
Salary Level	\$455/week (\$23,660/year)	\$913/week (\$47,476/year)	\$684/week (\$35,568/year)	\$844/week (\$43,888/year)	\$1,128/ week (\$58,656/ year)
Percentile	20 th in lowest- paid region	40 th in lowest- paid region	20 th in lowest- paid region	20 th in lowest- paid region	35 th in lowest- paid region
Auto- Increases	No	Yes, every 3 years	No	Auto increase in Jan. 2025	Yes, every 3 years, starting July 1, 2027

Potential Ratcheting Caused By Auto-Increases Tied to Wages Paid to Full-Time Salaried Workers



Note: The graphs and projected thresholds reflected on these graphics are neither precise nor to scale; they are intended for illustrative purposes.

Changes to the HCE Compensation Levels

	2004 (R)	2016 (D) (enjoined)	2019 (R) (current)	2024 (D) (July 2024)	2025 (?) (Jan. 2025)
Total Annual Comp	\$100,000	\$134,004	\$107,432	\$132,964	\$151,164
Percentile	-	90 th nationally	80 th nationally	80 th nationally	85 th nationally
Auto-Increases	No	Yes, every 3 years	No	Auto increase in Jan. 2025	Yes, every 3 years



Additional Points

- U.S. territories
 - Unlike the proposed rule, the DOL stated that the salary changes will not apply to Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.
- Motion picture industry
 - Unlike the proposed rule, the DOL did not carve out a special change for the motion picture industry.

Challenges Ahead

2016 all over again?



The Rule Will Face Challenges

- Challenge to salary rules as exceeding DOL's authorization to define EAP "capacity"
- Challenge to salary level as too high
- Challenge to auto-increasing as exceeding regulatory charge
- Challenge to DOL's authority to publish new rules with no confirmed secretary
- Political uncertainty around Nov. election



Challenge to **Salary Amount** and **Auto-Increasing** Feature

- In 2016, a judge in Texas enjoined Obama DOL's rule, which increased salary level and added automatic updates
- The court's main concern: rule would exclude too many workers who perform exempt duties
- Similar challenges here:
 - ☐ Salary level: Obama DOL went to 40th, Biden DOL goes to 35th
 - ☐ Auto updates: Both rules include



Challenge Concerning Gaps in DOL Permanent Leadership

- DOL does not have Senate-confirmed Secretary in place (led by Acting Secretary Julie Su)
- Issuance of rule without a permanent Secretary in place has drawn heat from some industry groups

Next Steps for Employers

**opportunities and
imperatives**



What Should Employers Be Doing?

- The DOL will not stall the effective date due to threatened or actual litigation
- Waiting for legal challenges to start planning, even if not messaging out, means high risk of waiting too long
- Many states already have salary thresholds at or above where the federal level is going



What Should Employers Be Doing? (cont.)

- Critical to partner with counsel to prepare for potential changes to impacted jobs
 - ☐ Any roles earning less than new thresholds?
 - ☐ For roles that straddle both sides of the line, what is tolerance for (a) raises; (b) split-classification roles; or (c) reclassification of entire role
 - ☐ For roles being reclassified, need to assess budget impact, new comp approaches, and effects on impacted employees
- Opportunity to assess other exemption-related issues



How Can Counsel Help?

- **Triage** exempt jobs to focus time and resources in a sensible way
- Understand what **drives risk**
- Work backwards from “go live” to ensure organized, well-communicated changes
- Help **protect privilege** or, if desired, bolster **good faith defense**

questions?

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