

DOL's New Overtime Rules: How Retailers and Restaurants Are Preparing for Change

September 2016



Ready to go?



Or, Ready to Panic?



- December 1st is only 60 days away!
- OMG, we are not ready!



Minimum Salary Level

\$913 per week (\$47,476 annualized)

- Up from the current \$455 per week (\$23,660 annualized)
- Down from DOL's proposed \$50,440
- Set at the 40th percentile of full-time non-hourly paid employees is the lowest wage Census region (South)



Bonuses and Commissions

Nondiscretionary bonuses, incentive payments and commissions, paid at least quarterly, can satisfy up to 10 percent of the minimum salary requirement



How Will This Work?

- Each workweek, the employer must pay the exempt employee a salary of at least 90% of the minimum salary level – \$821.70 (\$42,728.40 annualized)
- At the end of the quarter, if that salary plus all bonuses/commissions paid during the quarter do not equal \$11,869 (\$47,476 ÷ 4), to maintain the exemption, the employer has to make up the shortfall in the first pay period of the next quarter.



Automatic Salary Level Increases



- The salary levels will automatically increase every 3 years, beginning January 1, 2020
- DOL estimates the minimum salary level will increase to \$51,000 in 2020
- DOL will provide notice of the new salary levels “not less than 150 days before the January 1st effective date” in the Federal Register and at www.dol.gov/whd

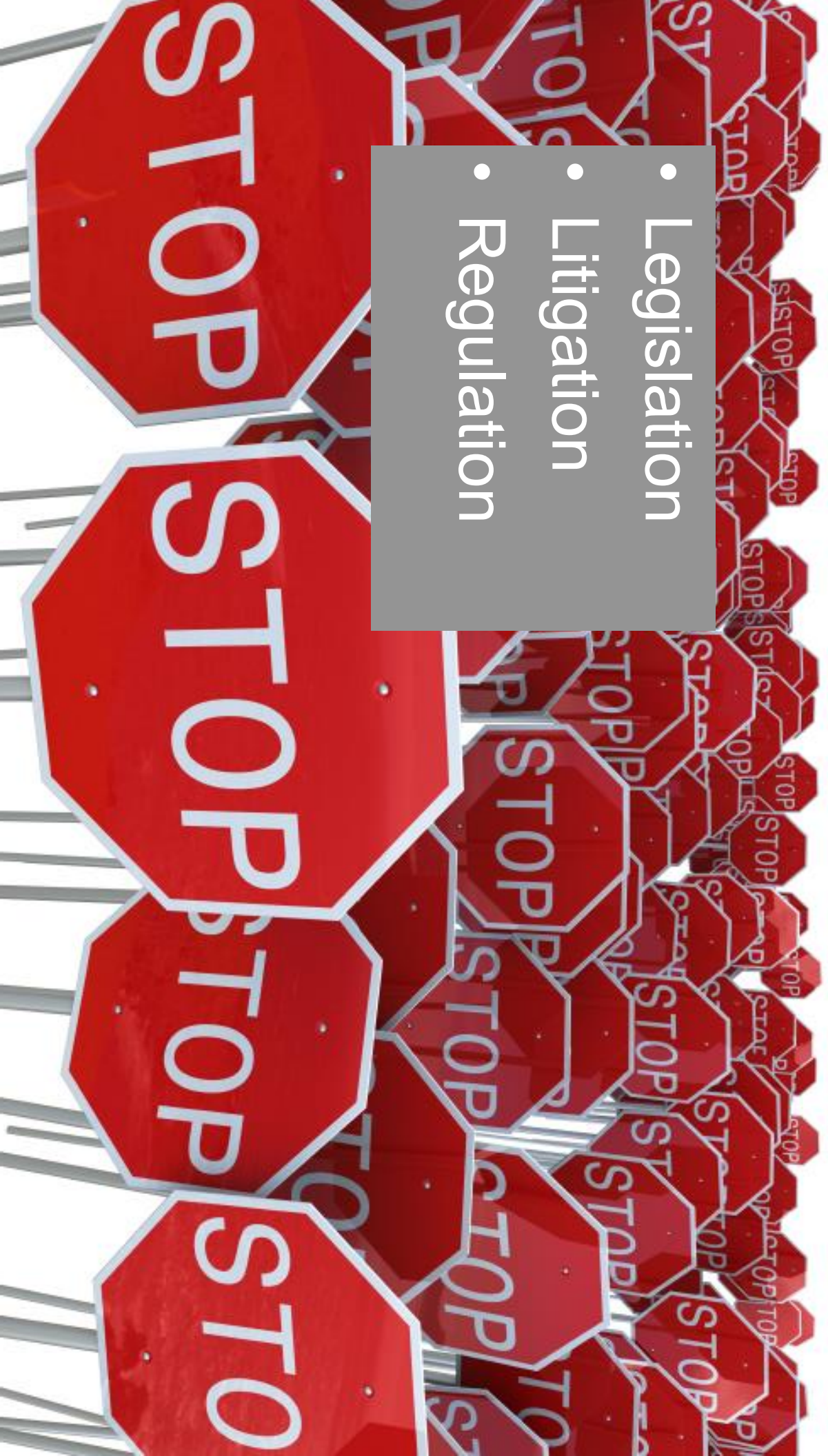
Effective Date

- December 1, 2016
 - Typical DOL: yes, that is on a Thursday!
- But remember, some states require advance notice to employees of changes in pay
 - In some states only applies to reductions in pay
 - Most common is one pay period
 - Longest is 30 days in Missouri for reductions in pay



Efforts to Stop the Rule

- Legislation
- Litigation
- Regulation



Pending Legislation



Protecting Workplace Advancement and Opportunity Act

- Introduced March 17th by Senate and House Republicans
- Nullify final rule and require DOL to analyze economic impact
- Prohibit automatic salary increases

Pending Legislation

Overtime Reform and Enhancement Act

- Introduced July 14th by Rep. Kurt Schrader (D-OR), with five Democrat and 3 Republican co-sponsors
- Supported by the Chamber and National Retail Federation
- Phase in the salary level increase over 4 years:
 - \$35,984 effective December 1, 2016
 - \$39,780 effective December 1, 2017
 - \$43,628 effective December 1, 2018
 - \$47,476 effective December 1, 2019
- Nullify the automatic salary increases

Pending Legislation

Regulatory Relief for Small Businesses, Schools, and Nonprofits Act

- Introduced September 21st
- By Rep. Tim Walberg (R-Mich.), with 46 other Republican and one Democrat (Rep. Kyrsten Sinema, AZ) co-sponsors
- Delay the effective date of the regulations until June 1, 2017



Passed the House
246-177

Pending Legislation

Overtime Reform and Review Act

- Introduced September 29th by Senator Lamar Alexander (R-TN), with 3 Republican co-sponsors
- Phase in the salary level increase over 5 years:
 - \$35,984 effective December 1, 2016
 - \$39,780 effective December 1, 2018
 - \$43,628 effective December 1, 2019
 - \$47,476 effective December 1, 2020
- Nullify the automatic salary increases

Litigation

- Two lawsuits filed on September 21st in the Eastern District of Texas
 - Coalition of over 50 business associations, including the National Retail Federation
 - 21 state governors and attorneys general
- Challenging both the high minimum salary level and the automatic salary increases



Non-Exempt Compensation Options

Non-Exempt Hourly:

Setting the Hourly Rate

- Salary divided by 40
- Salary divided by current hours worked
- Cost-neutral hourly rate

Non-Exempt Salary:

Calculating Overtime

- Salary divided by 40
- Salary divided by actual hours worked
- Fixed salary for fixed hours
- Fluctuating workweek



Comparing the Costs

- Assistant Manager earning \$730.77 per week and working 50 hours
- Cost of salary increase is \$9,476 (\$47,476 - \$38,000)



Non-Exempt Hourly

Current Salary / 40

- $\$730.77 / 40 = \18.27
- Regular = $\$18.27 \times 40 = \730.77
- OT = $\$18.27 \times 1.5 \times 10 = \274.04
- Total weekly: $\$1,004.81$
- Total annual: **\$52,250**

Cost: \$14,250

Current Salary / 50

- $\$730.77 / 50 = \14.62
- Regular = $\$14.62 \times 40 = \584.80
- OT = $\$14.62 \times 1.5 \times 10 = \219.23
- Total weekly: $\$804.03$
- Total annual: **\$41,809**

Cost: \$3,809

Cost-Neutral

- $\$730.77 / (40 + (10 \times 1.5)) = \13.29
- Regular = $\$13.29 \times 40 = \531.60
- OT = $\$13.29 \times 1.5 \times 10 = \199.35
- Total weekly: $\$730.95$
- Total annual: $\$38,009$

Cost: \$9



Non-Exempt Salary

Salary / 40

- OT Rate = $\$730.77 / 40 = \18.27
- OT = $\$18.27 \times 1.5 \times 10 = \274.04
- Total weekly: $\$1,004.81$
- Total annual: **\$52,250**

Cost: \$14,250

Salary / 50

- OT Rate = $\$730.77 / 50 = \14.62
- OT = $\$14.62 \times 1.5 \times 10 = \219.23
- Total weekly: $\$950$
- Total annual: **\$49,400**

Cost: \$11,400

Fluctuating/Fixed

- OT Rate = $\$730.77 / 50 = \14.62
- OT = $\$14.62 \times 0.5 \times 10 = \73.08
- Total weekly: $\$803.84$
- Total annual: **\$41,800**

Cost: \$3,800



Fixed Versus Fluctuating

Fixed

- Hours worked over the “fixed” hours must be paid at 1.5
- No prohibition on bonuses or commissions
- Can deduct from salary when an employee works less than 40 hours

Fluctuating

- All overtime hours are paid at 0.5
- May not be able to pay bonuses or commissions
- Cannot deduct from salary when an employee works less than 40 hours

Thank
you!



Practical Implications
of the New Overtime Rule