



Fair Labor Standard Act (FLSA) Proposed Changes

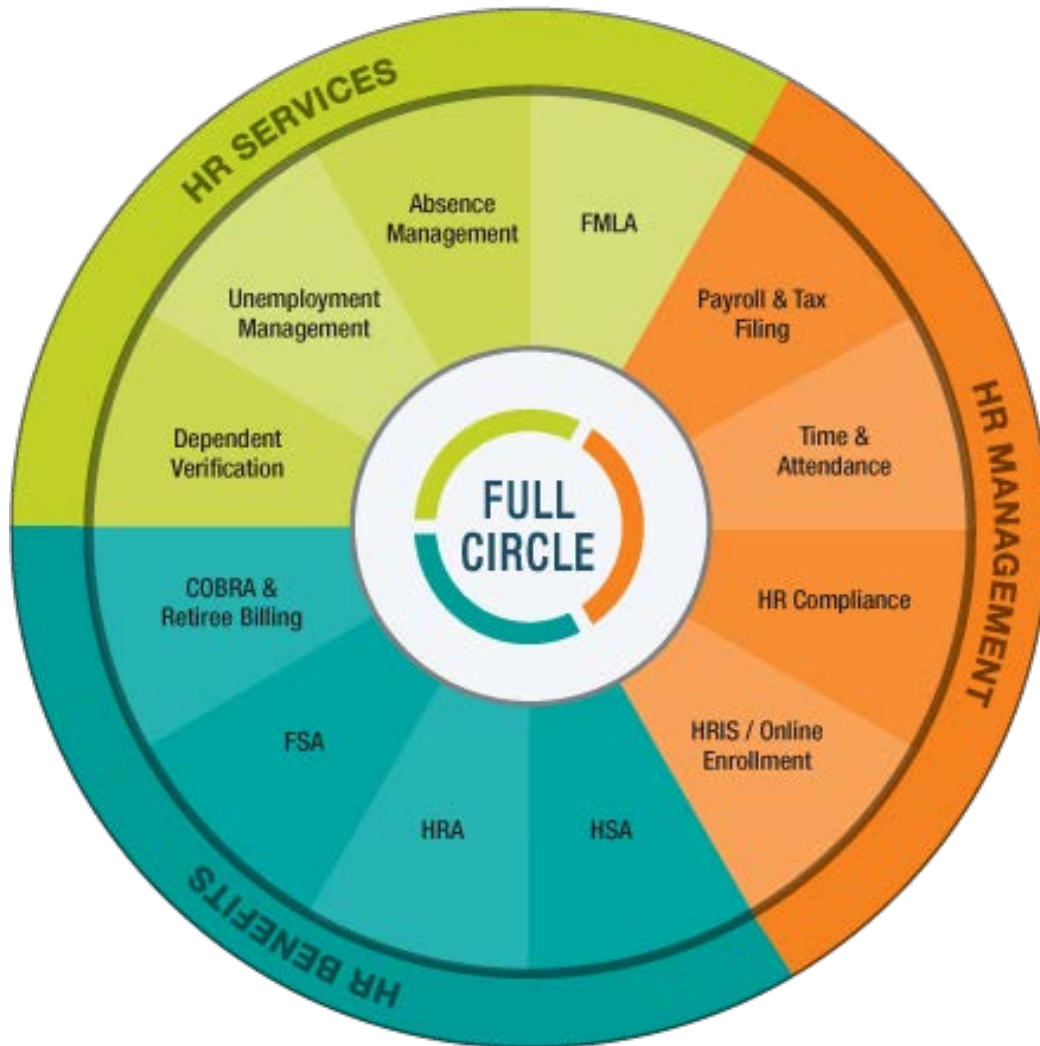
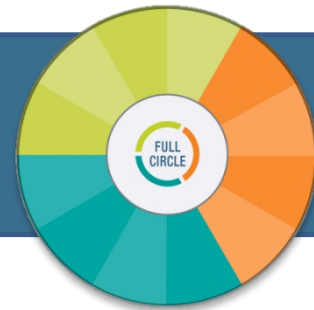
Presented by: Kevin M. McCarthy



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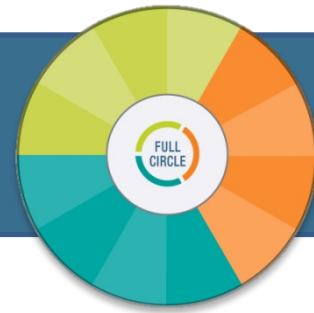
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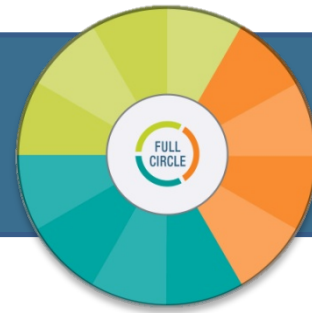


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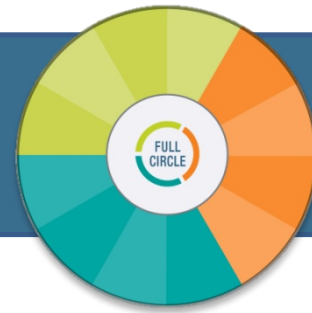
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Agenda



- Basics of the current FLSA exemptions
- The process that has gotten us to where we are
- What the DOL has proposed
- What is up the DOL's sleeve?
- What employers should be doing

Current FLSA Exemption Basics



- General Rule – All employees must be paid 1-1/2 times their regular rate of pay for hours worked over 40 in a workweek

Current FLSA Exemption Basics



- Primary Exemptions
 - Executive, administrative and professional (“EAP”) employees
 - Highly compensated employees
 - Computer professionals
 - Seasonal workers

Current FLSA Exemption Basics



- Executive, administrative and professional exemptions
 - Must meet a primary duties test
 - Must meet a salary test, with some exceptions for the administrative exemption
 - Salary must be at least \$455/week (\$23,660/year)

Current FLSA Exemption Basics



- Highly compensated employee exemption
 - Must perform at least one exempt duty
 - Must be paid at least \$100,000/year, with a salary of at least \$455/week

The Political Process



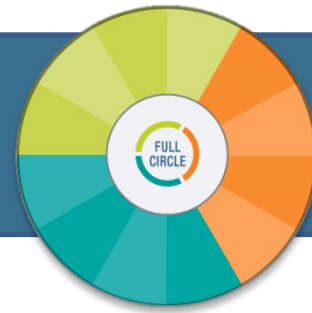
- March 2014 – President Obama directs DOL to update and simplify FLSA exemptions to make more employees eligible for overtime pay
- Proposed regulations originally due by end of 2014
- Then in the first quarter of 2015
- Then by June 22, 2015
- Finally issued July 6, 2015

Purpose of the Proposed (and Other) Changes



- Proposed regulations: “The department [of Labor] is concerned that in some instances the current tests may allow exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not EAP employees in any meaningful sense.”
- Under what is being proposed, “The Department estimates 4.6 million currently exempt workers . . . would . . . become entitled to minimum wage and overtime protection . . .”

What Was Expected?



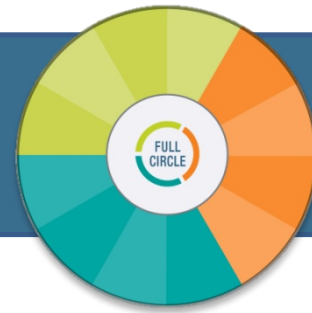
- Changes in the level of the salary test
- Changes in the primary duties tests

The July 2015 Proposed Regulations



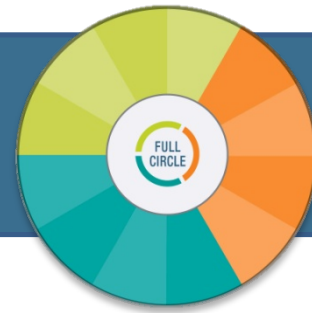
- DOL only proposed two specific changes:
 - For EAP exemptions, increase the minimum salary level from \$455/week to an amount equal to the weekly earnings of the 40th percentile of full-time salaried employees
 - Would be \$921/week (\$47,892), using 2013 data
 - Estimated to be \$970/week (\$50,440) in 2016
 - Increase the minimum salary level for the highly compensated exemption from \$100,000 to \$122,148 (the 90th percentile of annualized income for all salaried full-time employees)

HOWEVER...



- The July 6 announcement also asked for public comments on multiple other issues for prospective alterations to the exemption regulations
- It was couched as listing 5 issues, but that is misleading

Comment Item #1- Catch-all Question

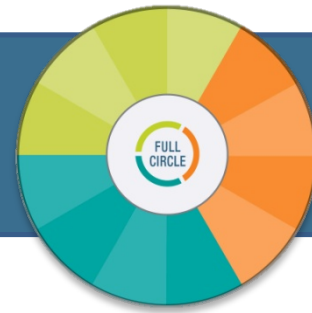


- “What, if any, changes should be made to the duties tests?”
- This is a difficult question to answer when there is no focus to it
- It is also difficult to provide comments against undesirable changes when they are not identified
- We will return to this later . . .



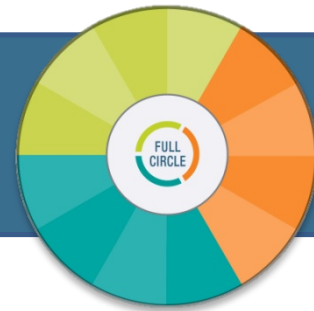
- “Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, what should that minimum amount be?”

Comment Item #3- Incorporate California Law on This Point?



- California's wage & hour law requires employees to spend more than 50% of their work time exclusively on work of an exempt nature to meet the duties test.
- Question: Should this rule be incorporated into the FLSA regulations? If 50% is not the right threshold number, what is the correct one?

Comment Item #4- Go Back to the Old Long- and Short-tests for Primary Duties?

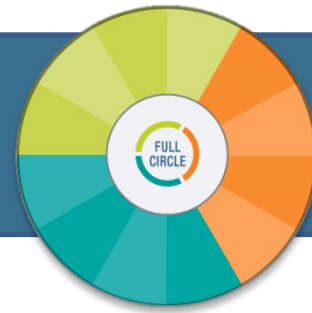


- From 1949 to 2004, the FLSA regulations contained long and short duties tests, depending on the level of salary being paid.
- Question: “Does the [current] single-standard duties test for each exemption category appropriately distinguish between exempt and non-exempt duties? Should the department [of Labor] reconsider its decision to eliminate the long- and short-duties test structure?”



- “Is the concurrent duties regulation for executive employees – allowing the performance of exempt and nonexempt duties concurrently – working well or does it need to be modified? Alternatively, should there be a limitation on the amount of nonexempt work that an exempt worker can perform? To what extent are exempt lower-level executive employees performing nonexempt work?”

Additional Questions Raised by the DOL



- How should future increases in the minimum salary levels for the EAP exemption tests be set?
 - Apply annual changes in the CPI-U?
 - Adjust it to equal a fixed percentile of the earnings of salaried workers? If so, what should that percentile be?
- The wording of the proposal indicates the DOL favors the CPI-U option

Additional Questions Raised by the DOL



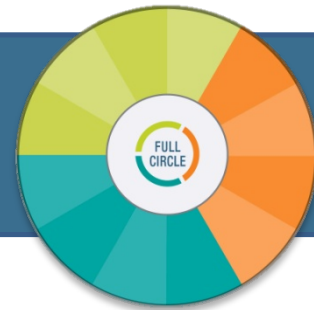
- What additional methodologies (other than the use of the CPI-U or a fixed percentile) should be used to set the minimum salary threshold for the EAP exemptions?
 - Presumably, this would also apply to the highly compensated employee exemption, but that is not stated by the DOL

Additional Questions Raised by the DOL



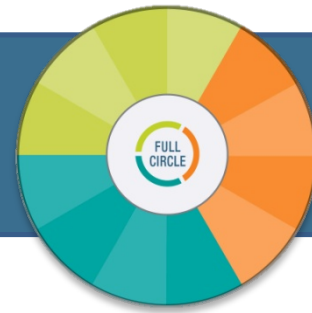
- Should the amount of nondiscretionary bonuses be included in an employee's pay when deciding if she meets the EAP salary thresholds?
 - Currently, they are not included, but they are included as to the highly compensated employee exemption
 - According to the DOL, “one proposal . . . would require the payment of bonuses on a monthly (or more frequent) basis.”
 - “Another proposal would limit the amount of nondiscretionary compensation counted toward the salary threshold to 10% of the employee's annual salary.”

Additional Questions Raised by the DOL



- Specifically, the DOL is seeking comments, “on what types of employees typically earn nondiscretionary bonuses and incentive payments, the types of nondiscretionary compensation employees receive, and to what extent including nondiscretionary bonuses and incentive payments as part of the salary level would advance or hinder the test’s ability to serve as a dividing line between exempt and nonexempt employees.”
 - Are these questions being asked to expand the EAP exemptions or restrict the highly compensated exemption?

Issues Related to Changes to the Duties Tests



- Could be anything
 - Definition of primary duties
 - Meaning of “independent judgment and discretion”
 - Interpretation of “supervision”
 - Should there continue to be a highly compensated employee exemption?
 - Anything else identified by public comments or the DOL

What Should Employers Be Doing?



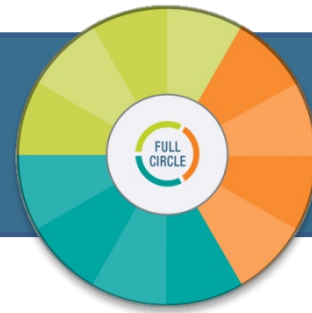
- The comment period is currently set to end on September 6 – take advantage of this and submit comments
- The changes will likely not become effective until 2016 – no need to panic
 - Changes will not be retroactive
- Planning is difficult because we don't know what may be addressed in the final regulations
- Employers – particularly retail and food service employers -- should plan on increased wage costs in 2016 and beyond

What Should Employers Be Doing?



- Take the opportunity to reevaluate exempt/nonexempt status of employees
 - Utilize attorney-client privilege to do this
- Determine if it is necessary and appropriate to
 - Increase salary levels to keep employees exempt
 - Modify duties and job descriptions so that 50%+ (or whatever the final % is) of exempt employees' time is on exempt duties

What Should Employers Be Doing?



- With respect to employees being reclassified as nonexempt
 - Identify an appropriate hourly rate
 - Determine the hours to be worked by them and staffing levels
 - Be able to explain to them why they are no longer salaried



Questions



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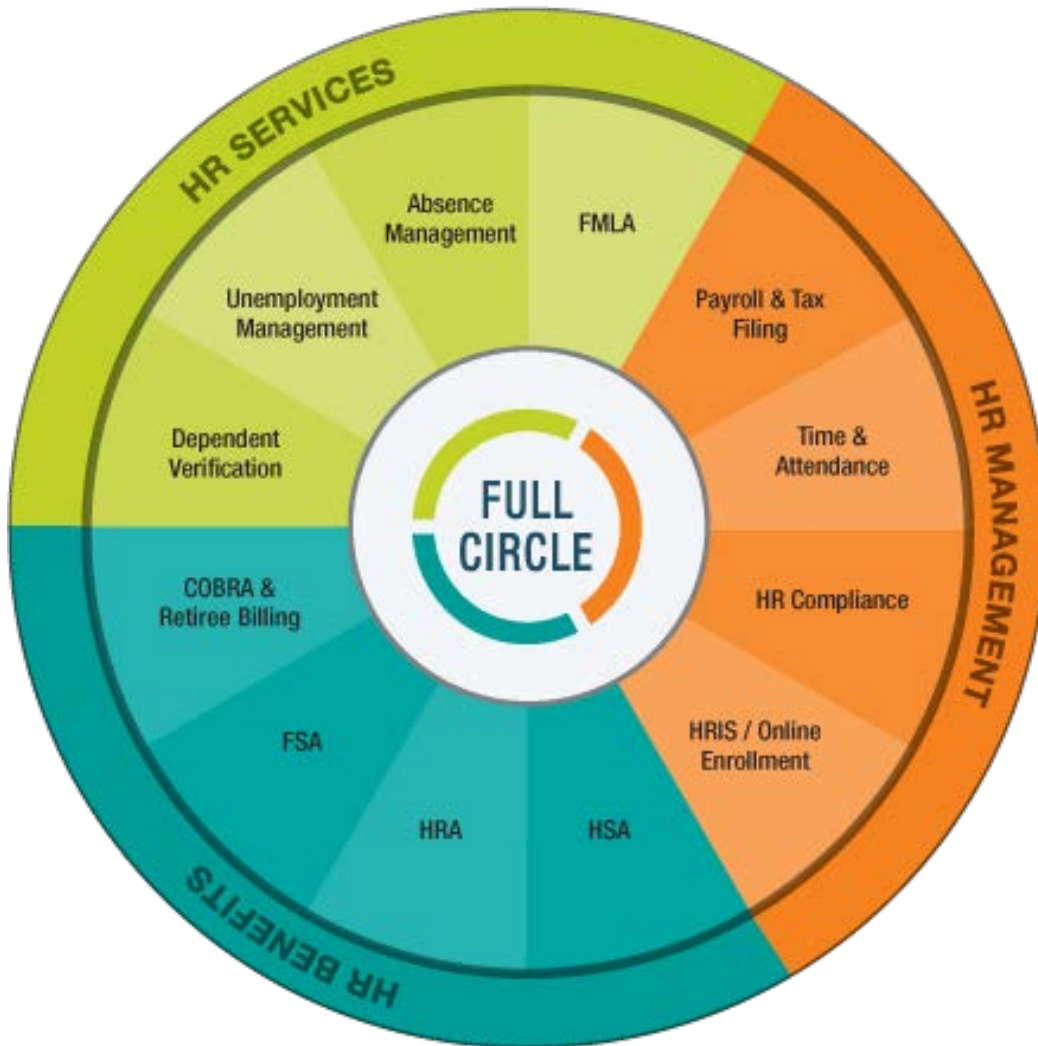


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