Department of Labor New Overtime Rules: Be Prepared for the Changes

Independent Lubricant Manufacturers Association

Wednesday, August 31, 2016

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Department of Labor New Overtime Rules: Be Prepared for the Changes
Program Overview

• What is the new DOL overtime rule and how does it impact FLSA exempt employees?
• Understanding FLSA non-exempt employees and common wage and hour pitfalls.

“Exempt” vs. “Non-Exempt” Employees

• Most workers are classified as either exempt or non-exempt depending on their salary and the type of work they do.
• The Fair Labor Standards Act (FLSA) and related state laws contain dozens of exemptions under which specific categories of employers and employees are exempted from overtime requirements.
  – The most common exemptions are the “white-collar” exemptions for administrative, executive, and professional employees, computer professionals, and outside sales employees.
  – The primary advantages of classifying employees as exempt are that you don’t have to track their hours or pay them overtime, no matter how many hours they work.
• Nonexempt employees must be paid at least the federal minimum wage for each hour worked and given overtime pay of not less than one-and-a-half times their hourly rate for any hours worked beyond 40 each week.
DOL Final Rule – Overview of Changes

- Department of Labor (DOL) final rule announced on May 18, 2016, increases minimum salary level to “white collar” overtime exemptions to the Fair Labor Standards Act (FLSA).
- New increased salary of $47,467. Up to 10% of non-discretionary bonuses and incentive payments may count toward salary. Salary level is slightly lower than originally proposed by DOL.
- New increased salary of $134,004 for Highly Compensated Employees (HCE).
- Effective date - December 1, 2016.
- Includes automatic salary level update every three years.

What Has Not Changed

- No change to “duties test”.
- No change to “salary basis” test.
- No change to existing non-exempt workers.
- No change to impact of FLSA on part-time workers (i.e., no pro-ration of the salary test for "part-time" exempt employees).
Economics Of New Salary Level

- DOL: Salary level is “the best single test of exempt status for ‘white collar’ employees.”
- Existing minimum salary of $23,660 ($455/wk) outdated. Below the 2015 poverty level for a family of four.
- $47,476 ($913/wk) – Amount equal to 40% of earnings of full-time salaried workers in lowest-wage census region (South).
- HCE - $134,004, increased from $100,000 – Amount equal to 90% of earnings of full-time salaried workers nationally.
- First automatic update January 1, 2020 – Wage growth projections expect minimum annual salary to raise to more than $51,000, and more than $147,000 for HCE.
- Compare to: California ($41,600); New York ($35,100).

Bonuses May Be Included To Meet Salary

- In assessing salary level, DOL consistently looked only at actual salary or fee payments, bonuses were not included (except for HCE).
- Many American salaried employees are compensated with bonuses tied to productivity or profitability.
- Employers now allowed non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the new minimum salary level.
- $4,747.60/yr or $91.30/wk is the maximum bonus amount that may be used to meet the salary level. Bonus payments may be higher so long as minimum salary met.
- Bonus must be paid at least quarterly.
- No change to HCE for bonuses, which looks to annual compensation.
Who Is Impacted By New Rule

- Most “white collar” employees:
  - Executive employees,
  - Administrative employees,
  - Professional employees (except teachers, doctors, and lawyers because no salary basis requirement),
  - Outside Sales employees not impacted because no salary basis,
  - Computer employees paid on a salary (hourly computer employees not impacted).
- Does not impact other FLSA exemptions, e.g., motor carrier employees; commissioned retail salespersons; agricultural employees; automotive salesperson, partsmen and mechanics; seasonal amusement or recreational establishment employees.

Options For Compliance With New Overtime Rules

- Remain exempt and increase salary of employees who meets the duties test to the new minimum salary level.
- Reclassify as non-exempt, pay either hourly or salary, but must pay overtime for hours worked over 40.
- Reclassify as non-exempt, and reduce or eliminate overtime work.
- Reduce base pay to absorb increased overtime costs.
How To Plan For Compliance And Mitigate Risk

• Assess number of hours currently being worked by exempt employees to determine overtime costs.
• Be pro-active about messaging to employees.
• Consider timing of normal wage increases before December 1 and impact on wage changes resulting from the new DOL rule.
• Be mindful of equal pay issues if modifying employees’ wages.
• Consider and plan for impact on benefits issues where differences are drawn based on exempt status.
• Consider the new DOL rule as an opportunity to reclassify employees who may have been previously misclassified due to not satisfying the duties test.

How To Plan For Compliance And Mitigate Risk

• Caution against using/converting employees to independent contractors (IC) to avoid overtime pay. Individuals must meet IC test, which is under increased scrutiny.
• Conduct wage and hour audit, assess existing policies, procedures and practices.
  – Clear policies need to address issues such as impermissible deductions, overtime payments, time recording and off-the-clock work issues.
  – Policies should provide reporting mechanisms for employees to raise potential violations.
• Conduct employee training (document who attended and when).
Qualifications For White Collar Exemptions

- Generally must meet “duties test” and “salary basis” requirements.
- Duties test unchanged with new DOL rule – employees must meet certain minimum requirements related to their primary job duties.
- Job titles and job descriptions do not determine exempt status.
- Paying a salary rather than an hourly rate does not determine exempt status.
- Unclear whether or to what extent meeting the “modernized” salary level makes it easier to establish exempt status for employees performing arguably exempt duties.

Salary Basis Requirement

- Salary basis test is unchanged by new rule. Salary level has been increased. What does this mean?
- Payment on a salary basis reflects an employee’s discretion to manage his or her time and to receive compensatory privileges commensurate with exempt status.
  - Employee regularly receives predetermined amount of compensation each pay period.
  - Predetermined amount cannot be reduced because of variations in the quality or quantity of work.
  - Employee entitled to full weekly salary for any week in which employee performs work, regardless of number of days or hours worked.
  - Salary not required to be paid where employee performs no work during week.
Salary Basis And Permissible Deductions

- Deductions permitted only in limited circumstances:
  - Absences for one or more full days for personal reasons (other than sickness or disability).
  - One or more full days because of sickness or disability where deduction is made pursuant to bona fide plan, policy or practice of providing wage replacement benefits.
  - Jury duty, witness duty, or military duty.
  - Major safety rule violation (interpreted narrowly and assuming penalty is imposed in good faith).
  - One or more full days as discipline for violation of workplace conduct rules (pursuant to a written policy and not applicable in several states).
  - Initial or terminal week of employment, if less than a full week worked.
  - Deductions for reduced or intermediate leave under federal FMLA.

Hypothetical

Suzie works as an exempt marketing manager at Company headquarters. The weatherman’s prediction actually holds true, and 20 inches of snow falls late on a Sunday night. The Company is closed on Monday and re-opens on Tuesday. Suzie calls-in Tuesday and reports for work at noon because she was still snowed in.

- Can the Company deduct any amounts from Suzie’s salary for Monday?
- Can the Company deduct any amounts from Suzie’s salary for Tuesday?
- What if Suzie took all of Tuesday off?
Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than $913 per week;
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

What to remember:

An employee who holds a fancy title implying that he or she is “the boss” but who does not in fact supervise two or more employees or who is not really “in charge” when on duty is not performing executive job duties. Thus, for example, a “manager” who does a purely production job but has a “manager” title is not performing executive job duties.
Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

• The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
• The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
• The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

What to remember

The administrative exemption is the most difficult job classification to get right. Employees are performing exempt administrative job duties if they do non-manual or office work which supports “the overall business operations of the employer, and which involves exercising independent judgment and discretion on important matters.”
**Professional Exemption**

*To qualify for the learned professional employee exemption, all of the following tests must be met:*

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $913 per week;
- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction (usually with at least a four-year degree).

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**What to remember**

A college degree alone does not necessarily meet the professional exemption.
Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

• The employee must be compensated either on a salary or fee basis at a rate not less than $913 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
• The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing specific duties.

What to remember

Many computer-related jobs do not meet the standard for exemption. For example, help-desk operators, or employees who install or repair computer hardware, are not exempt under the computer employee exemption.
Understanding Non-Exempt Employees

- Non-exempt employees are all other employees.
- Non-exempt employees can be paid either on an hourly basis or a salary.
- Non-exempt employees must be paid minimum wage and are entitled to overtime payments for working more than 40 hours during a workweek, even if paid a salary.
- Class-action litigation on the rise. Three years of backpay exposure.

Determining What Time Must Be Compensated

- Employees must be compensated for time spent performing the activities related to their job on the employer’s premises or at another work place.
- The Fair Labor Standards Act does not define the term "work." It does define the term "employ" to mean "to suffer or permit to work."
Preparatory and Concluding Activities

- Employees must be compensated for closely related duties and tasks that are indispensable to the performance of the employee's activities.
- Normally, time spent changing clothing or washing up at the beginning or end of the work day, checking in or out, commuting to or from the work site is not included as hours worked.

Examples of Preparatory and Concluding Activities:

- When an employee must begin the work day by preparing equipment or installing new equipment.
- When an employee must report 30 minutes before the start of a shift to distribute materials or equipment to co-workers.
- When an employee is required to clean a work station before and after scheduled work shifts.
Rest and Meal Periods

- Under federal law, employees must be completely relieved from duty in order to exclude meal period from time worked.
- Federal law does not require a meal period for adult employees.
- However, many states do require meal periods be given or require employees to be able to leave the premises.

Rest and Meal Periods

- Meal periods for office employees required to eat at their desk and manufacturing employees required to eat at their machines is working time.
- Short breaks of less than 30 minutes are considered work time and must be paid.
- Meal times are not counted as work time if the employee is completely relieved of duties for at least 30 minutes.
Rest and Meal Periods

EXAMPLE

- Sue, a receptionist, receives a 30-minute lunch break.
- She eats at her desk so she can answer emergency calls.
- She received one 60-second call during her lunch break.
- Must Sue be compensated for all, or any portion, of the meal break?

Yes. Sue must be compensated if she is not completely relieved from duty for at least 30 consecutive minutes.
Travel Time

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

Home to Work Travel:
An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.
Travel Time

Travel That is All in a Day's Work: Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Home to Work on a Special One Day Assignment in Another City:
An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.
Travel Time

Travel Away from Home Community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee’s workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days.

Some state laws (e.g., Wisconsin) are more protective.

On-call, standby and waiting time

- The test used for on-call time is whether the employee can use on-call time for his or her own purposes.
- Compensation is required if time is spent predominately for the employer’s benefit.
On-call, standby and waiting time

- Wearing a paging device, staying within paging range, and being able to arrive at work in specified time does not necessarily mean that time is "hours worked."

- Compensation, if required or elected by the employer, can be at a lower "on-call" rate.

The "Connectivity" Problem

- Beware of after-hours work performed by non-exempt employees using mobile devices.

- Make sure that all non-exempt employees document and report all hours worked remotely.
De Minimis Time

- "Insubstantial and insignificant" periods of time (typically 10 minutes or less) need not be compensated.

- The de minimis exclusion has many pitfalls, and an employer may not arbitrarily exclude time worked, however small, if the employee is regularly required to perform a task.

Factors to consider:

1. The amount of daily time spent on the additional work;
2. The practical administrative difficulty of recording the actual time;
3. The aggregate amount of compensable time; and
4. Whether the work was performed on a regular basis.

Training Time

Must be counted at time worked and the employee must be paid, unless:

- Attendance is outside working hours; and
- Attendance is voluntary; and
- The subject matter is not directly related to the employee's job; and
- The employee does not work during attendance.
Training Time

EXAMPLE

Gina, a secretary, attends a word processing class sponsored by her employer. Is the time Gina spends in class "hours worked?"

Training Time

Yes. The time Gina spends in the word processing class is considered "hours worked."
What if Gina takes a graphic design class on a Sunday afternoon in order to obtain a job in the marketing department?

No. The time Gina spends in the graphic design class is not hours worked.
Keep clear and accurate payroll records.

- This is necessary to avoid problems with record keeping requirements of federal and state wage and hour laws.
- An employer must be able to determine the actual number of hours worked by an employee and the payments made to the employee.

Common Wage and Hour Violations

- *Misclassification of employees.*
- Granting paid time off instead of paying overtime wages.
- Combining and averaging workweeks to avoid paying overtime. For example, if an employee works 50 hours this week, and 30 hours next week, an employer cannot average the two weeks to avoid overtime.
Common Wage and Hour Violations

- Requiring or allowing work off the clock. For example, an employer does not believe that an employee productively completed a task in a 40 hour work week, and requires the employee to work overtime without pay to complete the project.
- Improperly rounding time.

Penalties for Retaliation

Employers cannot discipline or discharge an employee who has brought suit or complained about violations of the FLSA.
About The Firm

For over 120 years, Quarles & Brady LLP has provided quality legal services to a wide range of industries on a national and international stage. We’ve strived to learn our clients’ businesses—to see the horizons through their eyes. We don’t just counsel, but invest in the success of each client, partnering with them to achieve their business goals. This dedication and investment is what sets Quarles & Brady apart: we provide a true partnership, in every sense of the word.

Quarles & Brady is a multidisciplinary AmLaw 200 legal services provider with more than 475 attorneys practicing at the top of the profession in Chicago, Indianapolis, Madison, Milwaukee, Naples, Phoenix, Scottsdale, Tampa, Tucson, and Washington, D.C. Our national presence allows us to draw upon a group of highly skilled attorneys from all across the country to ensure the right people are working on our clients’ matters. We have extensive experience working with the full industrial gamut, from cutting-edge technology to traditional manufacturing, and we have developed an extensive network of relationships with international legal counsel around the world, allowing us to effectively handle important matters for our clients on a global scale.

Our clients include major national and multinational corporations, technology companies, educational and research institutions, municipalities and government agencies, charitable organizations, industry executives, and high-net-worth individuals. They are industry leaders in technology, energy, financial services, health care, insurance, pharmaceuticals, real estate, and manufacturing, to name just a few.

A relationship is an investment, and Quarles & Brady understands the enduring rewards of a solid collaboration. We as a firm strive to see goals and benchmarks through your eyes—and then use our experience and insight to best position you to exceed them. Your challenges are our challenges; your triumphs are our triumphs. With Quarles & Brady, you’re not just a client—you’re a partner. Our attorneys have extensive experience within a wide range of practice areas and industries, including the following, among others:

- Banking & Financial Institutions
- Bankruptcy & Creditors’ Rights
- Business Law
- Energy & Environmental Law
- Franchise & Distribution
- Litigation & Dispute Resolution
- Mergers & Acquisitions and Joint Ventures
• Commercial Transactions
• Data Privacy & Security
• Direct Sales
• Emerging Growth Companies
• Employee Benefits

• Government Relations
• Health Law
• Immigration
• Intellectual Property
• International Services
• Investor Services
• Labor & Employment

• Product Liability Law
• Public Finance
• Real Estate
• Tax
• Tax-Exempt Organizations
• Trust, Estate & Wealth Preservation
Michael Aldana

Partner

Mike Aldana is a partner in the firm's Labor & Employment Group. He represents a broad range of employers in all facets of labor and employment law. Mike has substantial experience in defending employers in employment discrimination cases, wrongful discharge lawsuits, wage and hour claims, and union litigation in federal and state courts and before federal and state agencies. He also negotiates, on an ongoing basis, numerous collective bargaining agreements and assists employers in contract administration and arbitrations. He regularly counsels employers on day-to-day human resources issues and assists employers in reductions in forces and employment-related issues related to acquisitions and mergers. Mike is a frequent lecturer, both statewide and nationally, on employment, civil rights, education law, and constitutional topics.

Recent counseling and litigation experiences:

- Representation of numerous clients in reductions in force in several states.
- Representation of clients in developing background screening procedures, to ensure FCRA, EEOC and state law compliance and in litigation regarding these issues.
- Successful defense of employers in nationwide class actions wage and hour cases.
- Successful representation of client in disability class action lawsuit, resulting in complete dismissal of claims upon appeal to Seventh Circuit and recoupment of attorneys fees.

Legal Services

- Labor & Employment
- Class Action Defense
- Higher Education
- Financial Institutions Litigation

Education and Honors

- University of Notre Dame, Mendoza College of Business (Certificate of Executive Management, 2013)
- University of Michigan Law School (J.D., 1990)
- University of Wisconsin-Milwaukee (B.A., 1987)

Bar Admissions

- Wisconsin
• Indiana

Court Admissions

• U.S. Court of Appeals, 7th Circuit
• U.S. Court of Appeals, 4th Circuit
• U.S. District Court, Eastern District of Wisconsin
• U.S. District Court, Western District of Wisconsin
• U.S. District Court, District of Illinois
• U.S. District Court, District of Indiana
• U.S. District Court, District of Maryland

Professional and Civic Activities

• Milwaukee Bar Association (Member)
• American Bar Association (Member, Labor and Employment Section)
• Federal Labor Standards Committee (Contributing Editor)
• Wisconsin School Attorneys Association (President, 2004–2005)
• Next Door Foundation (Board of Directors)
• Mental Health Association of Wisconsin (Board of Directors)

Professional Recognition

• Selected for inclusion in the 2011-15 Wisconsin Super Lawyers® lists (Employment & Labor, Schools & Education)

Languages

• Spanish

Publications

04/11/16
Wisconsin's Right to Work Law Struck Down By Dane County Judge
Labor & Employment Alert

04/07/16
Update on Timing of Department of Labor’s Final Overtime Rules
Labor & Employment Alert

03/25/16
The Department of Labor Revises Its Rule Regarding "Persuader" Agreements - New Rule Likely to Draw Court Challenges
Labor & Employment Alert
02/23/16
Say What? Concealed Knives and Switchblades Are Now Permissible Without a License
Health/Labor & Employment Alert

01/28/16
The Department of Labor is at it Again: DOL's New Interpretation Makes Joint Employment "As Broad As Possible" Under FLSA
Labor & Employment Alert

11/09/15
Feds Step Up Enforcement of Transgender Student Rights
Higher Education Client Alert

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Labor & Employment Law Alert

09/02/15
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State Bar of Wisconsin, Inside Track

09/01/15
National Labor Relations Board Adopts New Joint Employer Standards - Broad New Test Likely to Draw Legal Challenges
Labor & Employment Law Alert

07/22/15
Department of Labor's Recent Interpretation Dramatically Changes the Independent Contractor Classification
Labor & Employment Law Alert

07/02/15
Department of Labor Proposes Compensation Increases for Overtime Exemption Tests, Including $50,440 Minimum Salary Basis
Labor & Employment Law Alert

03/09/15
Wisconsin Enacts Right to Work Law: Practical Consequences for Wisconsin Employers
Labor & Employment Law Alert

03/02/15
Wisconsin Poised to Adopt Right to Work Law: Practical Consequences for Wisconsin Employers
Labor & Employment Law Alert

12/17/14
NLRB Issues Final Rules Allowing “Quickie Elections”
Labor & Employment Law Alert
12/16/14
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Labor & Employment Law Alert

08/04/14
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Labor & Employment Law Alert

10/03/13
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05/21/13
Minnesota Joins "Ban the Box" Movement, Limits Inquiries into Convictions
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04/01/13
"FDIC Narrows Offenses that Bar Employment with Banks"
Wisconsin Banker

01/02/13
Feds Require New Form When Conducting Background Checks
Labor & Employment Law Alert

12/27/12
FDIC Narrows Offenses That Bar Employment With Banks
Labor & Employment Law Alert

09/30/11
New Independent Contractor Misclassification Settlement Program
Labor & Employment Law Alert

07/14/11
Bring Your Gun to Work Day? Employers and Businesses: Get Ready for Wisconsin's New Concealed Carry Law
Labor & Employment Law Alert
Christopher L. Nickels

Associate

Chris Nickels brings a practical approach to helping employers understand and navigate the technical and sometimes tricky confines of labor and employment law. Chris considers his client’s goals, resources and industry in determining which approach is best while recognizing that there are often business considerations beyond the discrete legal issues. He advises employers in a broad range of labor and employment law issues, including wage and hour compliance, discipline and discharge, leave and accommodation issues, employee policies and handbooks, reductions in force, among many others.

Chris also represents employers in complex workplace litigation concerning employment discrimination, wage/hour issues, whistleblower matters, wrongful discharge and many other areas of employment law. He has over a decade of litigation experience and is a member of the Firm’s class action defense team. Chris investigates, evaluates, and develops an effective litigation strategy within each client’s budget.

Chris frequently speaks on current employment law issues and provides on-site training to his clients. He is a member of the Firm’s Associate Policy Committee and has been recognized for his pro bono work and commitment to the community.

Legal Services

- Franchise & Distribution
- Labor & Employment
- Class Action Defense
- Banking & Financial Institutions
  - Labor & Employment for Financial Institutions
- Financial Institutions Litigation

Education and Honors

- Villanova University School of Law (J.D., magna cum laude, 2005)
  - Villanova Sports and Entertainment Law Journal (Managing Editor of Student Work)
  - Joseph R. Wenk Award for outstanding contribution to the Civil Justice Clinic
- University of Wisconsin (B.S., with honors, 2001)
Bar Admissions

- Wisconsin
- New Jersey
- Pennsylvania

Court Admissions

- U.S. District Court, Eastern District of Wisconsin
- U.S. District Court, Western District of Wisconsin
- U.S. District Court, Eastern District of Pennsylvania
- U.S. District Court, Western District of Pennsylvania
- U.S. District Court, District of New Jersey
- U.S. District Court, Northern District of Illinois

Professional and Civic Activities

- American Bar Association (Member)
- Milwaukee Bar Association (Member)
- Ronald McDonald House, Milwaukee (Member: Board of Directors)

Publications

05/18/16
New DOL Overtime Rules Announced, Minimum Salary of $47,476
Labor & Employment Law Alert

04/07/16
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11/11/15
"NLRB Finds No Joint Employment Relationship In First Test Since Browning-Ferris"
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Department of Labor Proposes Compensation Increases for Overtime Exemption Tests, Including $50,440 Minimum Salary Basis
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12/11/13
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BizTimes Milwaukee News Blog

09/23/13
Minimum Wage and Overtime Provisions to be Extended to Home Health Care Workers
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PNNACLE Annual Survey of Wisconsin Law

01/01/13
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Wisconsin Statewide Payroll Conference