



## XpertHR Podcast

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# What New Overtime Pay Rules Mean For HR

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David Weisenfeld: I’m David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this podcast, our focus turns to the historic new overtime pay rules that have attracted nationwide attention. As a result of the changes, millions of employees are now eligible to receive overtime who previously could not claim it. The new rules take effect December 1<sup>st</sup>, so there’s still time to comply, but employers that don’t familiarize themselves with the changes soon could be at significant risk.

To get to the bottom of the Department of Labor’s new overtime rules, we’re joined now by Tammy McCutchen, one of the nation’s leading authorities on wage and hour laws. Tammy is an employment attorney with Littler Mendelson and Managing Director of Compliance HR. She’s also a former administrator of the Department of Labor’s Wage and Hour Division and now regularly represents companies being investigated by the DOL and various state agencies.

Tammy, it’s good to have you back with us.

Tammy McCutchen: Oh, it’s great to be with you again.

David Weisenfeld: Tammy, the overtime threshold, as I mentioned, will jump on December 1<sup>st</sup> and it’s going to go from \$23,660 a year to more than \$47,000. It seemed like a jump from the \$20,000 range was long overdue. What are your preliminary thoughts? [0:01:40.2]

Tammy McCutchen: Well it was long overdue but \$47,500, which is basically what it is, is way too high and is going to cause a lot of disruption in lower-profit industries like restaurant and retail, and in lower cost of living, lower median earning states, particularly in the South, in states like Louisiana and Arkansas and Kentucky and Mississippi.

And it’s different than they calculated it. They set that rate, DOL did, using a methodology that’s never been used before. If we had used the same methodology that I used, and set that \$455 salary level back in 2004, we’d be around \$35,000-\$38,000 and that’s what I think

the real number should be. But unfortunately we're going to have to live with that \$47,500 and figure out how to deal with it.

David Weisenfeld:

It sounds like from what you're saying there could be some unintended consequences and could one of those be that some employers could actually lower base pay across the board in some industries to offset any overtime they'll then have to pay out?  
[0:02:45.2]

Tammy McCutchen:

Yeah, absolutely, I think that's going to be one of the results. Employers in my experience don't have extra piles of cash laying around to give to employees. They've budgeted for their labor costs, they know how much it is, and they know how much revenue they have to generate in order to cover that cost, and so I think you will see a lot of employers doing what I call 'remixing.' You know, they might lower base salary so that when they account for and pay for the overtime hours, in the end the employees will receive the same amount of total pay each work week and each year, but it will be a different mix between base salary and overtime.

Employers might also remix their bonus programs and other incentive pay programs by lowering the bonus programs and pulling that into base pay to also offset the costs.

Another option for employers is to review their entire compensation package, including other employee benefits, and see if there's ways to shave costs on employee benefits like increasing the percentage of a premium that employees have to pay for healthcare, decreasing the availability of paid vacation or paid company-provided life insurance or dental insurance.

And so I think employers who can't afford either giving an increase or paying more for overtime will have to look at their total compensation practices and remix to try to keep their labor cost at the same level that it is today.

David Weisenfeld:

I've also read where you've said that some employers may actually decide to give small, base pay raises to avoid having to pay overtime in the hopes that they may come out ahead that way. Do you think that many will take that approach? [0:04:24.0]

Tammy McCutchen:

I think for exempt employees that are currently making just a few thousand dollars below that \$47,500, somebody's making \$44,000 or \$45,000, that might be the cheaper option, is to give them the salary increase in order to maintain their exemption, especially for employees who are working a lot of hours.

Of course when you do that there might also be the ratcheting effect that their managers will want an increase too if the employee who's at the lower level getting an increase is now pushed up against the salary of their managers. You might see a ratcheting effect of the entire chain in a job ladder. But it's something I think employers will consider.

So their options really are giving the wage increase, reclassifying and paying overtime, and then of course the third option is finding that

cost-neutral base pay that's going to get you in the end the same weekly salary.

And I think you are aware that my company, ComplianceHR, we actually have a free app, which is available through your website, that can calculate those three numbers for your members – What's the cost of the salary increase? What will be the cost of the overtime? And what is that cost neutral hourly rate that will not result in an increase in labor cost? It's called the Overtime Cost Estimator.

David Weisenfeld:

Yes indeed, and you can definitely check that out through ComplianceHR and also Tammy will be presenting an hour-long webinar on all of these issues, which you can access on the podcast and webinars tab on [www.xperthr.com](http://www.xperthr.com).

Tammy, in terms of the overtime pay changes, what else really stands out to you that HR needs to be aware of? [0:06:05.7]

Tammy McCutchen:

Well one of the other huge changes is that for the first time in the 77-year history of these regulations, DOL is going to allow us to count towards 10% of that minimum salary level bonuses and commissions that we pay. And that's good news. I was surprised by that. I didn't think that they would do it because it's so different from anything the DOL has done in the past. But for up to 10%, from like \$4,700 and change per year, you can use in bonuses and commissions to get up to that \$47,500 salary level.

But it is a trap for the unwary. You have to carefully make sure that you're implementing it correctly, and I'm going to talk more in detail about this on our webinar, but if you want to take advantage of this 10% rule, you have to implement it carefully because if you get it wrong you're going to lose the exemption for the employees if it's not implemented correctly. So it's a good little throw to the employers, but you really have to implement it very carefully.

David Weisenfeld:

Again, we're speaking with Tammy McCutchen of ComplianceHR and Littler Mendelson. Tammy, let's talk a bit about what's *not* changing because there are some professions that may not be impacted after all in light of the changes. Tell us what's staying the same. [0:07:22.7]

Tammy McCutchen:

One of the wonderful things is no changes to the duties test. Now you may recall that the Department of Labor proposed making some major changes to the job duties that exempt employees have to perform in order to be denied overtime pay, including looming us towards the regulations under California law, where an exempt employee can only spend a limited amount of time performing non-exempt work. And DOL decided not to make those changes and that's really good news.

Also, teachers, lawyers, doctors, and outside sales employees – those four groups do not have to comply with these salary level requirements or the salary basis requirements. So nothing in the final rule impacts those employees, and there's no changes at all to outside sales, lawyers, doctors and teachers.

David Weisenfeld: Now you testified before the Senate about these rules prior to their taking effect. What was your biggest concern about them from an HR standpoint? [0:08:23.0]

Tammy McCutchen: For HR it's really about figuring out how your company can pay for it, how you're going to be able to continue to operate. And to me it's also not just where you're going to find the money or how you're going to have to redesign somebody's compensation plan, but you have to make sure that your business operations can continue. You might not be able to manage employees to under 40 hours. You might need to have your employees working more than 40 hours and if that's the case, how are you going to comply with this law while still being able to have your company operate its business and make a profit? And I think especially for small businesses it's particularly going to be difficult because they tend to not be paid at the highest levels. But DOL thinks everything is paid.

Also non-profits are a particular concern. In the non-profit sector generally, exempt employees or all employees don't earn at high levels because it's about doing good for your community, and at that Senate hearing we had testimony from a wonderful woman with a company called Operation Smile that does cleft palate operations all over the world, and they basically said that at this level, they will no longer be able to hire employees in the US to go to other countries to be on missions, and instead they're going to have to switch to hiring in that country. So I think you're going to see job losses. I think you're going to see non-profits who can't afford to give salary increases or pay overtime having to reduce their services to some of the most vulnerable parts of our society.

And the other thing of course, I think that a lot of employees who get reclassified are not going to like it. They're not going to like having to track their time. They're not going to like losing pay if they take a longer lunch or they go home early on Friday, which is how things are when you're a non-exempt employee. I think a lot of employees are going to see this as a demotion. And so I think communicating to employees about the changes they're going to be facing, it's going to be a sensitive, difficult, but very important issue that HR professionals are going to have to face.

David Weisenfeld: Now on the other side of the coin, you've said that these rules actually could present a rare opportunity for employers, specifically dealing with classification issues. Talk a little bit about that. [0:10:34.5]

Tammy McCutchen: Certainly. The rare opportunity is to get your house in order. Even though there's no duties test changes in these regulations, everybody listening to this podcast I'm sure can think of a few jobs in your organization that you know currently are probably misclassified under the current regulations in the job duties. Because there's going to be so many other changes based on the salary level, I think it's a really rare opportunity and a good time to fix that too, and to reclassify employees who should be non-exempt because they're not performing the required job duties under the current regulations.

The last time this rule was changed was 2004, so this is literally a one-in-a-decade opportunity to reclassify some employees and have it happen under the radar and with less risk that an employee is going to sue you for back wages. So it's an excellent time, not only to reclassify people because of the salary level, but to reclassify people and to get into compliance based on a job duties test also.

David Weisenfeld:

Tammy, we've only got a minute or so left, so is there any final piece of advice that you'd like to leave with our listeners before we let you go? [0:11:44.9]

Tammy McCutchen:

Yes. You need to start planning to get into compliance right now. I know that you have until December 1, but there are so many decisions you're going to be having to make over the next six months, and it is going to take you six months to be ready to be in compliance. That includes a complete redesign of employees' compensation plan, looking at all of your wage and hour policies and processes and doing training because you are going to have most likely a group of employees and managers who've never had to deal with clocking in and clocking out, thinking about, 'Am I working? Am I not working?'

For example, a lot of these employees are going to be reclassified because their entry-level managers are going to have cell phones and laptops that they take home. There are going to be types of employees who might travel for work. All of a sudden, all of those employees are going to be non-exempt all at that time, answering emails at home, working at home, travel time, meeting time, training time. All of that is now going to be work time that needs to be tracked and paid for. So you really do need to look at your wage and hour policies and your timekeeping practices and make sure that the reclassified employees and the managers who supervise them are trained on those policies and processes and on what activities are considered work.

Also developing communication. I mentioned that earlier but you really should do written talking points and FAQs to communicate to the reclassified employees about the changes and about their responsibilities to accurately track their time. All of that is going to take a lot of time for you to get in place, and so don't wait. Don't think, 'Oh, I've got six months, I don't have to, I can wait until after the summer to start.' You really need to start right now.

David Weisenfeld:

Tammy McCutchen is a former administrator of the Department of Labor's Wage and Hour Division. She's now the Managing Director of ComplianceHR and practices with Littler Mendelson, the nation's largest law firm exclusively representing management in labor and employment law. Tammy, thanks so much for your insights.

Tammy McCutchen:

Thank you for having me and I look forward to our webinar, and I hope everybody who listens to this will join us for that.

David Weisenfeld:

And you can hear that webinar from Tammy about the DOL's new overtime rules under the podcasts and webinars tab on [www.xperthr.com](http://www.xperthr.com). I'm David Weisenfeld. We hope you've enjoyed this podcast. Thanks for listening. Continue checking our website

regularly for more programs on key employment topics including what the paid sick leave trend means for HR.

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