

### U.S. Department of Labor Final Overtime Rule<sup>1</sup>

#### QUESTION 6:

#### What Surprises Are in the Final Rule?

**There are two.** The first has to do with the Department of Labor's (DOL's) *purpose* and *intent* for the changes and the second has to do with *recordkeeping requirements* for positions classified as nonexempt.

**Regarding the DOL's purpose and intent for the new rule . . .** While employers are scrambling to figure out what changes are necessary and how to go about making wage adjustments in a way that preserves their revenue and profit margins, the DOL is counting on all paths leading to a reduction in work hours for millions of salaried workers.

Contrary to what most people think, the DOL's purpose for the new rule is not to line the pockets of salaried workers (even though this will certainly be an outcome for many); rather, it is to promote two key Fair Labor Standards Act (FLSA) objectives: (1) to reduce unemployment by putting financial pressure on employers so they are incentivized to hire more workers in lieu of requiring current employees to work overtime, and (2) to protect employees from underpay and "*the evil of overwork*," which has a detrimental effect on health and well-being.

Under pressure to minimize costs related to increasing salaries, the DOL believes employers will **reduce the work hours of first-line supervisors and managers in several industries and occupations**, including, among others, the restaurant industry, retail and nonretail sales, the "green" industry (those with landscaping, lawn service, and groundskeeping workers), and positions that supervise mechanics, installers, and repairers. This is where the DOL will likely focus their enforcement of the new rule once it is in effect. **If your business is one of these industries, we recommend that you carefully evaluate the classification of first-line supervisors and managers.**

**Regarding the recordkeeping surprise . . .** Most employers are aware that *the burden of proof* rests with them to maintain accurate and complete records of work time for their nonexempt employees. To meet this obligation, employers commonly require nonexempt employees to record their work time either manually, by using a time clock, or by some electronic or biometric means. To ensure that the burden of proof can be adequately met, employees that must keep track of their work time manually are typically required to record the precise start and stop time each work day, including times in and out for bona fide meal breaks.

Employers that have been investigated by the DOL are well aware of what can occur when they do not have accurate, complete time records: **employee interviews**. Not surprisingly, when a DOL investigator interviews an overtime-eligible employee and asks how much time the employee works, the amount mysteriously grows. The result is often inaccurate and excessive back wages that are based on an amount of time that the DOL investigator constructs. To avoid this "constructive overtime," employers must have accurate time records that cannot be refuted.

<sup>1</sup> This client advisory is excerpted from the Seawright & Associates May 31, 2016, e-bulletin, "U.S. Department of Labor Final Overtime Rule: Ten Things Every Employer *Must* Know Before Making Changes." To obtain the full content of the e-bulletin, contact [Seawright & Associates](http://Seawright & Associates)



Notwithstanding this long-standing enforcement practice, the DOL's new guidances addressing the overtime rule suggest recordkeeping practices that are vastly different from their enforcement practices. **This is a trap for the unknowing.** In our opinion, the suggested practices can result in significant liability for employers.

For example, in several of the enforcement guidances:

1. The DOL emphasizes that employers *"must keep an accurate record of the number of daily hours worked by the employee."* While it is true that the burden of proof rests with an employer to establish compliance with FLSA recordkeeping practices, this verbiage seems to suggest that it is the employer who **MUST** track and record time for a worker.

From experience we know that most employers do not have "timekeepers" on staff and, more importantly, such a practice raises questions about actual work time and can lead to unnecessary complaints to the DOL if a worker disagrees with the work time recorded by the employer. During an investigation, this practice can lead to employee interviews and inaccurate amounts of constructive overtime.

2. The DOL suggests that employers can allow employees to *"just provide the total number of hours worked each day, including the number of overtime hours, by the end of each pay period."* This type of practice is contrary to the DOL's enforcement practices that we (and many employers) have encountered over the past 25 years. It is also contrary to the sample timekeeping format the DOL suggests in one of their fact sheets and to the [timekeeping app](#) that the agency created for employees to record their work time and calculate the amount of money they are owed from their employer.
3. The DOL states that for employees who work a fixed schedule: *"An employer need not track the employee's exact hours worked each day; rather, the employer and employee can agree to a default schedule that reflects daily and weekly hours, and indicate that the employee followed the agreed-upon schedule, if that is true. Only when the employee deviates from the schedule is the employer required to record the number of hours worked each day."*

Although this language is similar to language in the current regulations pertaining to records that employers must keep, it differs in practice to how the DOL enforces its recordkeeping regulations.

**We believe that the DOL included these examples in response to the outpouring of NPRM-related comments it received from employers and their advocates who expressed great concern about the significant recordkeeping burden associated with reclassifying workers.** The DOL does not give credence to this concern and commented numerous times in the Final Rule about the ease of recordkeeping and limited (if any) burden on employers. **The DOL enforcement guidances support this erroneous opinion by conveying seemingly simple recordkeeping examples and requirements.** Unfortunately, these examples and requirements are in stark contrast to the agency's long-standing enforcement practices and history of constructing overtime when faced with inaccurate or no records.

Given the passion and affinity that DOL investigators seem to have for collecting backwages from employers, **we recommend that employers continue to require nonexempt employees to maintain a time record showing the start and stop times each day, including times in and out for uninterrupted breaks that are a minimum of 30 minutes in duration.** Ideally and when possible, the start and stop times should be recorded to the minute. A time clock is not required; a handwritten record or work time recorded via computer, a phone/tablet application, or a biometric device will suffice as long as the start and stop times are recorded.