

Top HR Topics and Issues for 2016

March 2016



Here are the top HR issues you should be prepared for this year.

1. The Department of Labor (DOL) is set to issue final regulations making millions of exempt employees nonexempt under the FLSA.

The DOL released its much-anticipated proposed changes to the FLSA exemption regulations last July, 2015, and employers have been waiting anxiously for them to be finalized. The DOL received over 270,000 comments on the proposed changes and has had since early September 2015 to review them, but the agency has not provided a definite release date for the final regulations. We just learned that the DOL recommendations have been provided to the White House. Current estimates suggest July 2016, however it could be delayed. Once released, most experts expect the new regulations to take effect within 30 to 60 days.

The primary proposed change to the exemption definition is a significant increase to the salary basis, which is the first requirement of the exempt status test. Under the proposed regulations, in order to meet that test, Clubs will have to pay exempt employees at least \$970 per week (\$50,440 annually) by the time the new regulations take effect, more than double the current salary rate of \$455 per week (\$23,660 annually).

It is important to note that the DOL has not proposed any specific changes to the job duties requirements. However, they did pose several questions about the job duties and requested comments from employers. This request is an indication that the DOL could implement substantial changes to the job duties test, so employers will likely have to deal with additional and/or new job duties requirements in the final regulations.

Important Note ... Simply increasing an employee's pay to meet the new exempt salary minimum will not be sufficient. Employers must be sure that the position's primary duties meet whatever the exemption requirements are and that they are not spending too much time doing nonexempt work.

In preparation of these potential changes, Clubs should take the following actions:

- Determine how they will adjust to an increased salary level for exempt employees (proposed at \$970 a week). One option would be to simply raise the salary levels to meet or exceed the new dollar threshold for exempt employees. Or, as a second option, make more employees nonexempt or hourly. **(See Example Chart Below)**
- Audit current exempt position job duties. Although no concrete changes have been proposed, most experts expect the DOL to modify the job duties. Further, even if the DOL does not make any changes to the exempt job duties, employers may face increased scrutiny.
- Lastly, provide training to exempt employees who become nonexempt under the new exemption regulations. Special attention should be provided to these employees on overtime restrictions, as well as all of the recordkeeping and other requirements that apply to nonexempt employees and thus did not apply to them in the past.
- Per the information provided regarding the FLSA proposed changes, if you have any changes that need to be made, please wait and make the change effective the date that the new FLSA changes go into effect. We will keep you posted.

	OPTION 1	OPTION 2
FLSA Classification	Exempt	Non-Exempt
Annual Base Pay	\$35,000	\$35,000
Overtime (5 hours per week)	N/A	\$6,563
Total Base + OT Pay	\$35,000	\$41,563
Increase to FLSA Min	\$50,440	N/A
<i>Difference to Budget</i>	<i>+ \$15,440</i>	<i>+ \$6,563</i>
Federal Taxes (7.65%)	\$1,181	\$502
Retirement (3%)	\$463	\$197
<i>Total Difference to Budget</i>	<i>+ \$17,084</i>	<i>+ \$7,262</i>

2. The DOL will aggressively go after employers that do not pay for all hours worked, for nonexempt positions, especially if overtime is triggered.

Don't expect much of a grace period after the final exemption regulations take effect (see #1, above). Most HR and legal experts expect the new regulations to take effect within 30 to 60 days, and the DOL may be on a mission to target employers that are not paying overtime properly to their newly nonexempt employees. Even without the final exemption regulations in effect, the DOL has been targeting employers that do not properly track and pay overtime hours.

One of the surest ways to provoke a wage and hour claim is not to properly pay employees for all hours worked, particularly if the time results in overtime. According to DOL overtime regulations, you must pay nonexempt employees for all time that they are engaged in physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and its business. Further, if a Club is aware that an employee is working more time than is scheduled, the employee must be compensated, even if the Club did not specifically request the additional work.

Thus, the best line of defense is to have a clear policy allowing employees to work only as scheduled and to make sure there is an accurate record of all time worked. But, if the policy requiring prior authorization for overtime work was not followed and a manager was aware the employee performed the work, the employee must still be paid for the time worked and any overtime. The manager may, however, discipline the employee (and manager) under the Club's normal disciplinary procedures for violating your work rule prohibiting unauthorized overtime.

In addition, the Club should pay special attention to training exempt employees who become nonexempt under the new exemption regulations. These employees are going to need special instruction on overtime restrictions, as well as all of the recordkeeping and other requirements that apply to nonexempt employees and did not apply to them in the past.

3. State and Local Minimum Wage Rate Increases

While the federal minimum wage remains unchanged, a number of states and cities will be hiking local wage rates on Jan. 1. Other state and local increases are slated for later in the year. As minimum wage requirements continue to change, Clubs will have to adjust their payroll systems, overtime pay rates and, in some cases, employee exemptions from overtime requirements to ensure compliance with the laws in each of the locations where they operate.

While 29 states and the District of Columbia already have general minimum wage rates above the federal minimum, 16 states, from Alaska to West Virginia, have implemented 2016 rate increases. The minimum

wage in more than a dozen other states—such as Arizona, Colorado, Florida, New Jersey, Ohio, Oregon and Washington—is indexed for inflation and will automatically adjust annually for increases in the cost of living.

In addition to state minimum wage hikes, a number of major cities and counties will be increasing their wage rates in 2016. This includes 10 cities in California, three in Kentucky, two in Washington, plus cities in Alabama, Iowa, Illinois, Maryland, and Maine. Some of these localities increased rates effective Jan. 1, 2016, while others have announced raises to take effect at a future date.

While efforts to increase the federal minimum wage have stalled in Congress, organized labor and other groups continue to call for a \$15 minimum wage nationwide. Many state and local governments have already adopted minimum wage rates above the federal minimum, with further increases to be phased in. As this occurs, Clubs will need to monitor their pay practices in each of their locations to ensure compliance with federal, state and local wage and hour laws. Finally, Clubs should make sure to post updated minimum wage posters, as required, when new rates take effect.

4. The Patient Protection and Affordable Care Act (PPACA or ACA) will continue to confuse and complicate employment health benefits decision making.

2016 is the first year that the employer mandate provisions of the Patient Protection and Affordable Care Act (commonly referred to as the ACA) are in full effect for most covered employers. The ACA provisions require all “large employers” to provide health care coverage that is “affordable” and meets the minimum standards or face penalties for every full-time employee (or their equivalent) beyond the first 30 workers if even one employee receives federal insurance subsidies instead of the minimum employer coverage. “Large employers” are defined as those with 50 or more full-time employees; full-time employees are defined as those who work 30 or more hours a week. In addition, individuals must have health care coverage or face penalties.

The ACA also adds several reporting and notice requirements for covered employers, including W-2 health care costs reporting, notices to employees of the availability of ACA exchanges, and the provision of a Summary of Benefits and Coverage. In addition, the ACA requires covered employers to file a return with the IRS that reports for each employee who was a full-time employee for one or more months during the calendar year certain information about the health care coverage the employer offered to that employee, or, if applicable, that the employer did not offer health care coverage to that employee. According to regulations proposed by the IRS, the return typically should be filed annually by February 28 (if by mail) or by March 31 (if filed electronically). However, covered employers also should note that the IRS has extended the filing date for this year until May 31, 2016 (if by mail) and to June 30, 2016 (if filed electronically).

5. The IRS, DOL, and states will apply pressure to employers that improperly classify independent contractors.

Both federal and state agencies have a stake in the issue of proper classification of workers. The Internal Revenue Service (IRS) has spent the last few years trying to increase its tax collections by pursuing employers that misclassify employees as independent contractors, and this trend will continue this year.

So, if a Club uses or is considering adding more independent contractors to provide services normally performed by employees, it must understand the criteria for independent contractors. There are three different standards commonly used by the federal courts and agencies to determine independent contractor status: (1) the IRS 20-factor analysis for coverage under federal withholding requirements; (2) the “economic reality” test, used to determine compliance with requirements of the FLSA (as interpreted by the DOL and focusing on economic dependence); and (3) the common law “right to control” test, used by many courts to administer discrimination and benefits statutes. In addition, be sure the Club can support the classification with documentation showing that the worker meets the IRS and other independent contractor criteria.

6. A big increase in OSH Act penalties will take effect in 2016.

For the first time in 25 years, penalties under the Occupational Safety and Health Act (OSH Act) will be raised significantly to account for inflation. The OSH Act is the primary federal law regulating safety and health in the workplace. The “general duty clause” of the Act requires every covered employer to provide its employees with employment and a place of employment free from recognized hazards which cause or are likely to cause death or serious physical harm. Employers with 11 or more employees, except employers in certain low-hazard industries, must maintain a log and summary of all recordable work-related injuries and illnesses. The OSH Act also imposes penalties on employers for violations of its general and specific industry standards and its recordkeeping requirements. Previously, the OSH Act penalties have been exempted from automatic increases for inflation included in the 1990 Federal Civil Penalties Inflation Adjustment Act. The new increase was included in the massive budget bill signed into law by President Obama in November 2015, the Bipartisan Budget Act, and directs the Occupational Safety and Health Administration (OSHA) to issue an interim final rulemaking implementing the penalties’ increase by August 1, 2016. Safety experts expect that OSHA penalties for willful or repeated violations will increase to \$127,000 from the current rate of \$70,000. Recordkeeping, notice posting, and other less-than serious violations also will jump from \$7,000 to about \$12,000. Employers should be prepared for these increases and take steps to eliminate potential OSHA problems to prevent big fines, particularly those that must

record injuries and illnesses.

7. Pregnancy discrimination and accommodation will be a hot issue for employers and the EEOC.

In last year's Supreme Court case, *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015), the Supreme Court made it clear that if an employer provides accommodations to other employees, even if only to employees with workers' compensation injuries or who are disabled, it should provide similar accommodations to pregnant employees.

The EEOC already had embraced a similar approach in its 2014 Enforcement Guidance on Pregnancy Discrimination and Related Issues and indicated that if you normally provide light duty positions for other employees with temporary medical conditions, you must also do so for pregnant employees. The bottom line for employers is that neither the EEOC Guidance nor the Supreme Court's decision requires employers to provide light duty or other accommodations for pregnant employees if you do not currently provide them for other categories of employees.

8. Health Benefits

Creative benefits can attract and retain desirable employees, but benefits can often become confusing or imbalanced if what's offered doesn't match people's needs. Consider your environment and understand the benefits that will have the most positive effect.

Employers are using "health care analytics" to design better plans and to demonstrate to employees the costs associated with their health care plans. Claims data and historical usage helps employees see how much new plan designs may save them, enabling them to make better decisions. And providing administrators with visualized data views into their plan costs, employee adoption, and utilization details enable companies to make better decisions in designing plans, finding administrative efficiency, and providing a more personalized year-round experience for their employees.

Companies continue to adopt comprehensive strategies to defend against rising medical and pharmacy costs. This often means promoting health care consumerism by shifting to high-deductible health plans (HDHPs) and providing—and funding—health savings accounts or health reimbursement arrangements that help employees pay their out-of-pocket expenses and allow them to keep funds that go unspent. A word of caution, consumer-driven HDHPs only really work when employees have adequate information about their benefits and a selection of cost-effective health care services and providers.

One way to provide more customized offerings is through a larger range of voluntary benefits, typically specialized insurance coverage negotiated at group rates by the employer but paid for entirely or in part by employees through salary-deferred payments. Related to increased adoption of HDHPs is increased adoption of voluntary benefit offerings, especially those that address gaps in coverage” such as critical illness/critical accident coverage and vision care.

As part of the larger consumerism trend, telemedicine services and onsite clinics also are becoming more prevalent as cost-effective health options for employers. These offerings also appeal to employees who are paying more out-of-pocket for their care.

Another aspect of customization is targeted employee communications that speak directly to different employee demographics. Note that employees beginning their careers and those transitioning into retirement have different financial, education and enrollment preferences.

9. State Sick Leave Benefits

Five states, 22 cities, and one county across the United States have paid sick time laws on the books. [Click here](#) to find a document that provides an overview and comparison of the sick time laws across the United States.

- **Section I** provides a comparison of paid sick time laws that have been passed at the statewide and countywide level, as well as Washington D.C.'s law.
- **Section II** provides a comparison of paid sick time laws that have been passed at the city level.
- **Section III** provides a brief overview of additional paid sick time laws that are narrower than the ones covered in the chart in the above link.

10. Promote Financial Wellness

Financial wellness benefits are part of a larger trend toward more-customized benefits, and that will continue into 2016 as more companies are looking to engage workers with the right benefits at the right time. Driven in large part by the influx of younger workers—think the Millennials, but also their younger cousins in Generation Z—employers are evolving their voluntary benefits to reflect the post-recession economic realities that their workers face.

11. HR Integration with Social Media and Marketing

Clubs may want to think beyond what workers want to accomplish day to day: What *kind* of worker does the Club want to attract to your company? Which skills can they bring? How do you want them to represent your brand?

Social media is the space that nearly everyone operates on all throughout their waking hours. The Club may want to develop a cohesive brand message to attract and retain top talent. Companies have discovered their own employees can be advocates for their brand and are finding out this is good for business. Studies suggest that when done properly, employee engagement and advocacy programs not only expand a company's social media reach but also produce impressive results. Content shared by employees gets eight times more engagement than content shared by brand channels and is re-shared 25 times more frequently.

12. The Influx of Generation Z

Millennials are currently the largest worker demographic, but their younger counterparts born after 1994 are starting to filter into the job market. Generation Z, as they are called, show notably different work behaviors and preferences than older generations: They are more entrepreneurial, loyal, flexible and realistic in their approach to careers and purchasing than Millennials. They also show different ambitions, with nearly a third of them saying they want to become managers in the next five years and 45 percent of them saying that working with baby boomers will hold challenges.

Clubs may have to rethink their recruiting practices to attract this group, and now is the time to start. Those who want to take advantage of Gen Z talent in the future will need to develop relationships today with teenagers in grades seven through 12. Get into their schools, provide mentorship and education, and put yourself in a position to help shape their career decisions.

Filling the talent pipeline has never been so critical now that the United States is facing a skills gap in most industries. These young adults are so mature and they learn so fast, they might just be ready to take over by the time they're 22.

13. Workplace Flexibility Is the New Norm

Workers value flexibility over almost anything else. Recent surveys indicate that flexibility was the second most important factor, after salary, job candidates consider when evaluating a job offer. 66% of American Millennials said they felt an organization that adopts a flexible, mobile and remote work model has a competitive advantage over one that requires employees to be in the office from 9 a.m. to 5 p.m. In an age when finding and retaining top talent is among the strongest predictors of a company's success, workplace flexibility is now a critical way to find the best talent and provide them with opportunity for greater productivity.

14. Now is a Good Time to Update HR Policies and Procedures.

Another important tool in tackling these topics is to have updated HR policies and procedures that address these issues. Clearly written policies that are regularly reviewed can be both an effective employee relations tool and a good defense against employee lawsuits. In contrast, policies that are out-of-date or improperly applied can have exactly the opposite effect.

Clubs should ensure their policies reflect any new laws, regulations, and court cases that affect either policy language or how you implement the policies. Most experts suggest both a thorough review at least once a year and the use of a notification service or publication to keep you posted during the interim. Of course, if any Club policies are revised, Clubs should distribute and thoroughly explain the changes to all employees and obtain acknowledgements back from them.