

FEDERAL OVERTIME LAW

THOUGHT LEADER FORUM

GOING INTO OVERDRIVE ON OVERTIME

NEW REGULATIONS PLACE NEW DEMANDS ON EMPLOYERS

The federal government is bumping up the salary threshold for exempt employees – big-time – making an estimated 4 million workers suddenly eligible to earn overtime when they work more than 40 hours in a week. It's a huge change. The Portland Business Journal recently brought together three experts to discuss how businesses are approaching the overtime change, what employers and employees need to know, and how the regulation is likely to play out in the months and years ahead.

Pete Danko, Moderator: We're on the verge of major change in the rules on overtime – how did we get here?

Chrys Martin, Davis Wright Tremaine: This started in 2014 with President Obama, who issued instructions to the regulatory agency to update the FLSA standards, particularly with respect to overtime. These standards have been around for decades and hadn't been updated for years. The agency embarked upon rulemaking and had more than 250,000 comments. There was a lot of concern because the salary standard was initially proposed at \$50,000, was going into effect quickly and there would be changes in the duties

test. The rule finally came out this May, and DOL delayed the effective date, reduced the amount slightly and didn't change the duties test.

Danko: How does the duties test fit into this?

Amy Robinson, Jordan Ramis: To be exempt from the overtime rules, you have to meet two tests. First, you have to be paid a salary of a certain amount, which used to be \$455 a week. That's the salary test. And secondly, you have to meet certain duties requirements (the duties test), which are much more fact-specific and comprehensive than the salary test. So the rule that came out, with no change to the duties test, was frankly

an easier solution than what had been discussed. The duties test can be very cumbersome and confusing. So they changed the salary amount to \$913 a week, for now, and will update it on a three-year basis going forward.

Martin: There are still a ton of companies out there who think all you have to do to avoid overtime is pay somebody a salary without regard to the duties test. Not so, and I think that's a message we need to get across even though the duties test didn't change. There are really only five exemptions: professionals – doctors, lawyers; managers who actually manage two or more people over 50 percent of their time; outside

sales, literally a traveling salesperson; administrative staff, which is a very narrow exemption that rarely applies; and then certain systems design computer professionals.

Danko: Do these regulations apply to all companies, regardless of size?

Robinson: There are some exceptions, but practically speaking, it's everybody.

Danko: Are these rules vigorously enforced?

Andrew Welch, Boly:Welch: And where is the oversight going with the new threshold?

CONTINUED ON PAGE 23

SPONSORED BY

**Davis Wright
Tremaine LLP**
DEFINING SUCCESS TOGETHER

boly:welch
CELEBRATING THIRTY YEARS

**JORDAN
RAMIS PC**
ATTORNEYS AT LAW



CHRYN MARTIN
PARTNER, DAVIS WRIGHT TREMAINE

Chrys Martin focuses her practice on employment law and employee benefits issues. She offers her clients over 34 years of experience in complex employment and ERISA litigation, including class actions. Chrys applies her depth of knowledge in litigation to counseling employers and training management in pragmatic risk avoidance. Her practical approach to difficult employment issues is also grounded in prior hands-on management and human resources experience. Chrys has been recognized as one of “America’s Leading Lawyers for Business” in Employment by Chambers every year since 2005, and as one of the “Top 25 Women Super Lawyers” by Thompson Reuters since 2008.



ANDREW WELCH
PRESIDENT, BOLY:WELCH

From Boly:Welch offices in the venerable Public Service Building, Andrew leads the company’s multigenerational staff of 42 recruiters, administrative, and operations staff in their efforts to help clients hire talent, retain employees, and invest in their success. Through specialty areas in Executive Search, Recruiting, Staffing, and HR Consulting, Boly:Welch employees are connected to their clients through a shared commitment to excellence.

Andrew began his career with the firm in the 90’s, but left to pursue education and experience internationally. He learned to incorporate a people-first, solutions-based approach to business, leading to successes at a variety of organizations. Training with a world-class search industry leader rekindled his interest in returning to Boly:Welch and his home in Portland. In 2011 he rejoined the firm as an individual contributor in the Executive Search division and in 2013 was named as a key member of the company’s Board of Directors.

Andrew Welch’s transition to President of Boly:Welch in July 2015 was designed to align the agency’s vision to maintain local ownership, a unique culture, and reputation for excellence with a sustainable future.



AMY A. ROBINSON, JD, SPHR, SHRM-SCP
SHAREHOLDER, JORDAN RAMIS PC

Amy Robinson is a shareholder at Jordan Ramis PC and focuses her practice on employment law. She has deep experience in advising employers on the full range of workplace issues, and represents public and private employers in judicial and administrative proceedings in Oregon, Washington, and Alaska. Prior to her legal career, Amy worked as a human resources professional in a variety of industries. She regularly speaks and provides training for HR professionals, managers, and employee and professional organizations on a variety of legal and human resource related topics.

WE ARE WHERE OUR CLIENTS ARE

AMY ROBINSON
Employment Lawyer

PETER HICKS
Employment Lawyer

CAROLYN PEARSON
Employment Lawyer

Jordan Ramis PC is a full-service law firm with employment lawyers in Lake Oswego, Bend, & Vancouver

JORDANRAMIS.COM

LAKE OSWEGO, OR
2 Centerpointe Drive
Suite #600
Lake Oswego, OR 97035

BEND, OR
360 SW Bond Street
Suite #510
Bend, OR 97702

VANCOUVER, WA
1499 SE Tech Center Place
Suite #380
Vancouver, WA 98688

REAL ESTATE INC.

KEEP UP WITH THE SKYLINE

Real Estate Inc. delivers the latest real estate news, information and insights straight to your inbox.

SIGN UP FOR FREE:
j.mp/REInewsletter

THOUGHT LEADER FORUM:
FEDERAL OVERTIME LAW

CONTINUED FROM PAGE 21

Martin: The federal agencies, pretty much all of them, have added thousands of investigators and auditors. So there's just been a national mood toward more enforcement generally, but also within DOL who will enforce these new regulations.

Robinson: Not to mention it's a really popular claim right now for plaintiffs to pursue. What happens is, if an employer misclassified somebody as exempt from overtime, they are typically paying them on a pre-set monthly salary basis for all time worked, and not paying them overtime. Because they are considered exempt, the employees are typically then not required to track their time as they would if they were hourly. That means that the employer has no record of what hours are actually worked by this employee. So if, as is often the case, the employee's own recollection of the time worked is significant, the employer has no record to disprove that. In that case, the employer can be dealing with a significant overtime claim, which is a wage claim, which has additional penalties associated with it that can make the damage even more costly.

Danko: So you're leaving yourself vulnerable.

Robinson: Absolutely. But most often, folks who are getting it wrong aren't doing it out of ill intent. They're doing it because there's a perception that exempt employees have some additional prestige or recognition from the company, and with that often corresponding autonomy. So it's usually with perfectly good intentions and often it's the employee who is driving it.

Welch: You see it from both sides, from the employer who provides different benefits packages available to exempt employees vs. hourly employees, and also as Amy mentioned, just the general sense of an employee feeling that a role is more important because of the exemption.

Danko: Focusing in on the salary standard, how should employers go about dealing with that?

Martin: It's not one size fits all. The employer has to analyze their culture and their finances. If they've got a bunch of salaried people who really qualify to be exempt salaried and they're pretty close to that \$47,476, they're probably going to bite the bullet and give them a raise. But in other situations, the employer might switch them to hourly, but then you've got to figure out what the right hourly rate is, given what hours they usually work in a week. You can eliminate positions. You can change some of those positions to more working positions, instead of manager positions since you're going to have to pay them hourly.

Welch: You can also add workers to cover the time.

Robinson: A key thing to keep in mind is it's coming soon: This is effective December 1 this year, so one of the practical tips that I've been using is that's right around the Thanksgiving break which is a good time to make the shift. So people should be starting to plan for it now.

Welch: If companies haven't started doing the analysis to see how much overtime their exempt employees are actually working, they need to start. That's going to determine what the cost is going to be to find alternative solutions like putting

off the clock, I've taken all my breaks, my lunch periods, these records are accurate.

on other hourly workers to cover the time or actually paying the overtime. If you've got somebody who doesn't meet the salary requirement but isn't working an inordinate amount of overtime, there may not be a cost issue, just the perception issue of the employees.

Danko: Staying with you, Andrew, what's your experience with this so far as a recruiter?

Welch: We've found this has given us another opportunity to talk to our clients about the issues and educate them as much as possible. We tell them this isn't our decision to make, it's your decision to make. Just like it's not our liability if you misclassify an employee and you have a DOL audit. These are the facts, this is what you should be considering, and this is how you need to be making the decision for yourself.

Danko: So does this mean that everyone making less than \$47,000 has to punch a clock now?

Welch: Employers need to have a record of the hours worked. So if you have a flexible schedule or if you have a set schedule, so long as you're only tracking a variance from the schedule that does qualify. At the end of every week an employee confirms the schedule they worked, signs a piece of paper and that document qualifies for the records retention for the hours worked.

Danko: So no time clock, necessarily, but records.

Martin: Missing meals and break periods can be big traps. So we're suggesting clients implement things like having time-sheet affirmations so the employee signs and affirms nobody has asked me to work

off the clock, I've taken all my breaks, my lunch periods, these records are accurate.


Robinson: This is where messaging can be so important, to make sure folks are on the same page, the employee and their supervisor, about why the business needs this information going forward. It's really not about employers wanting to "micromanage," which is the term we get all the time--this is truly about making sure employers are complying with these technical requirements.

Danko: What about people who are now hourly employees who are accustomed to doing things like checking email at home?

Robinson: That's a great example of the kind of thing that needs to be addressed. The employer needs to be very proactive about setting policies and enforcing those policies. That's a big shift for workers who felt, okay, my time was always lumped into that salary and now I've got to account for it and I've got to be paid accordingly. From the employer's perspective, they'll need to be able to manage those costs and understand when someone is or isn't working, so they can pay them accordingly.

Welch: The regulation doesn't say you can't have people working overtime. The regulation doesn't say you can't have people working flex schedules. The regulation simply says that as long as somebody doesn't meet the duties test and the salary requirement, then you have to pay them for the overtime that you ask them to work. So the spirit of the law is that either people who are under this salary level are going to be compensated


CONTINUED ON PAGE 24



Seeing the possibility
in people

boly:welch

Executive Search | Recruiting | Staffing | HR Services
(503) 242-1300 bolywelch.com




PORTLAND

AS MOBILE AS YOU ARE

Whether it's a discrimination claim, a wage & hour question, or new issues around social media or marijuana, employers who need immediate access to a deeply experienced team turn to the Portland employment lawyers at **Davis Wright Tremaine**. We provide fast answers for the modern workplace, helping our clients define success through pragmatic counsel and aggressive defense at trial.

DWT.COM/EMPLOYMENT

Anchorage | Bellevue | Los Angeles | New York | Portland
San Francisco | Seattle | Shanghai | Washington, D.C.

 **Davis Wright Tremaine LLP**
DEFINING SUCCESS TOGETHER



THOUGHT LEADER FORUM: FEDERAL OVERTIME LAW

CONTINUED FROM PAGE 23

for the overtime hours that you as their employer are asking them to work, or you're not going to ask them to work those hours.

Martin: Manager training is really important here. The managers are all of a sudden supervising a bunch of people who are now hourly instead of salaried, and it's the manager who might ask them to work through breaks or to skip lunch today. It's going to be a major impact on how businesses do their work.

Danko: Say you have an employee who was exempt, made \$40,000 a year, typically worked more than 45 to 50 hours a week. As an employer, what do you do?

Martin: You can't just take that total salary and divide it and come out with an hourly salary because now they're going to get overtime. You're going to have to figure out does this person usually work 45, 50 or 60 hours a week, then what is their hourly rate equivalent to get them about the same amount of money with overtime pay. So you're going to have to reduce their hourly wage so that with overtime it's still going to equate to about \$40,000 a year.

Welch: And that strategy is probably going to have the largest impact on employee morale. You're telling them that not only are we making you an hourly employee, but we're going to reduce your hourly pay to compensate for you continuing to work the overtime hours.

Robinson: Many of these employees just haven't needed to track their time so they aren't aware if they are really working overtime. Managers might also be very unaware. If you asked the manager, they're saying, oh, that worker's getting everything done in 40 hours, we don't need to plan for overtime. Then you find out no, the person's working 45 hours. So it's really an opportunity to get better information and be proactive about communication.

Danko: Have we been fooling ourselves, or looking the other way, regarding how much people are really working?

Welch: I think our culture is to be engaged in work pretty constantly. You see people on their smartphones, they're stepping away from the dinner table to finish the work they didn't finish during the hours. That's time that's not tracked, generally.

Danko: Nor, quite often, is time at the office that might not be spent working. Will that be tracked more carefully now?

Robinson: Yes.

Welch: I suspect that will be the result.

Martin: I think the other shift we're going to continue to see is, over the last 10 to 15 years there's been a real move to flatten organizations and take out layers of middle management. So it's those middle managers who were maybe exempt, maybe not, who weren't making \$47,000, and now we might just eliminate those positions.

Danko: What about if we get a new

president in the next six months who doesn't like this, who wants to reverse it?

Martin: There are a couple of bills in Congress to either do away with it or phase it in. I don't think that any of those bills would pass. An incoming president who disagreed with it could order new rulemaking, but that whole rulemaking process, well, it took two years this time.

Robinson: One thing I will say is that even with some of the negative opinions on this, I think it's a fairly common impression that the salary standard did need updating. People were really worried about the department coming out with a new duties test, which was going to be more of a nightmare.

Martin: The \$23,000 was arguably out of date. More than doubling it? That's a huge hit for most clients to take. I think it would have been better to phase it in, less negative impact on the economy if it could have been phased in a little bit. But definitely it needed to be updated given the value of the dollar.

Welch: The impact is going to be very different depending on the industry you're in and what the status quo is. So in retail or restaurants, or manufacturing where you utilize an assistant manager or manager for production, the low threshold allowed you to have more flexibility in your labor budgeting and assumptions. Some industries are going to be hit much harder than others.

Danko: Does this mean titles will have to change if there was a "manager" or "assistant manager" position that was salaried, but now it's going to be hourly?

Welch: No, the titles don't have to change. And let's remember that they don't have to go to hourly just because they're non-exempt. One strategy is to say you're still salaried, we're not changing your salary, your title is still "manager" – but we no longer want you to be working any overtime hours without prior approval.

Martin: And you have to require rest and lunch breaks! But if you do that and keep them at the same hourly level as their salary was and they do work overtime, that's when you're going to get hit. So that's why I think most employers, because they can't afford to pay that salary and pay overtime, are going to have to change the salary to an hourly component that is less than the former hourly equivalent.

Welch: I'm wondering about the people who are working overtime because they don't have time in their daily schedule to complete their tasks. Maybe they aren't doing it with the approval of their manager. How does that piece work and how would it be viewed in court, if an employee says that the expectation of overtime was implied?

Robinson: The standard is "suffer or permit to work" under the law. So if it's worked, whether you approved it or not, it has to be paid.

Martin: You have to pay them for unauthorized overtime. You can discipline them for it, so I think we're going to see more discipline of employees who work

unauthorized overtime.

Robinson: Again it's about communication, having a policy that says here's what getting authorization means for getting overtime. It's not just creating some protocols for that. Both the supervisor and the employee have to know if something needs to be signed, when they're really authorized, when they're not, so that you're not stepping into those traps.

Martin: My clients, their policies say written preauthorization for the overtime.

Danko: It sounds like having a policy is one step, but then making sure it's well promulgated is another.

Martin: What an employer should do is make sure their managers are trained, and have a hotline directly to HR so that employees know that if they've got any questions who to call. And then I think HR needs to be double-checking time sheets and making sure there aren't corrections made by a supervisor without an employee signing off on them.

Welch: Another issue worth talking about is the misuse of comp time and flex time. Makeup time within a week is allowed. But then there's comp time, where an employee works more than an eight-hour period and is compensated by paid time off in another pay period. I think a lot of people think this works, but it is illegal, correct?

Martin: You have to do it in the same work week. If I work two extra hours on Monday but you let me go two hours early on Friday, I never worked more than my 40 hours.

Danko: Is this new standard a long-term burden for employers, or one that most will get accustomed to quickly?

Martin: Well, it's a huge burden right now – I mean a huge burden. It's going to take a year or so for this to settle down.

Robinson: I just think the education piece is so important, especially for small businesses or startups that don't have the robust HR. The importance of alerting businesses to this can't be overstated. Most of what we're dealing with isn't new. The threshold is changing, but it's all existing law. But I think people have kind of disengaged or made false assumptions about what it requires so this is an opportunity to kind of plug in and get it right.

Martin: The threshold was so low it just wasn't a factor.

Robinson: And now it is. It's a different world now. I think one of the reasons it hasn't hit the market yet is we have a lot of change fatigue. We've had a lot of changes locally in the last several years. We've got sick time, we've got the minimum wage changes, we've had the Affordable Care Act that is going, isn't going.

Welch: There is regulatory change fatigue but there's also economic change fatigue when you look at it from the perspective of the worker. I think, in general, people are scratching their heads about where this is heading and how it's going to work. Even before this, we were talking about whether the restaurant and hospitality industry was going to be able to figure out this economic puzzle. So it is a challenging time and this is sort of a cherry on top of the sundae.

Robinson: I think so many companies are just overwhelmed with how much is changing.

Martin: They don't understand that they have choices and it's going to take some analysis and some real in-depth calculations to figure out what works. A lot of employers just think they've got to pay everybody \$47,476 and there's no other alternative, or that they have to switch everybody to hourly. But there are alternatives, as we talked about. Whatever you do, you really need to sit down and do some thinking with HR, your CFO, your inside or outside employment law counsel. You can pay your attorney a little bit now to do it right or a lot later to defend a multimillion dollar lawsuit class action by your employees for wage violations.



**For more information
on Thought Leader
Forums:**

Contact **Anne Van Gordon** at **503-219-3406** or **avangordon@bizjournals.com**.
Future topics to include mergers & acquisitions, data centers, and business resilience.