



What Podiatric Physicians Need to Know About the New Overtime Rules

Are you prepared for these regulations that begin December 1st?

BY MARK TERRY

In May 2016, the U.S. Department of Labor (DOL) made changes to the rules regarding overtime pay under the Fair Labor Standards Act (FLSA). The new rules will go into effect on Dec. 1, 2016. Although they won't affect podiatrists and whether they get paid overtime—sorry, guys, you're still exempt—they will potentially affect any podiatrists who have employees.

According to the DOL, "The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments."

Basics

The primary changes revolve around how exempt or non-exempt employees are classified. What exempt comes down to, in this case, is

that an exempt employee is not eligible for overtime pay, which is typically one-and-a-half-times the regular pay, i.e., time-and-a-half.

Since the audience for this article is podiatric physicians, let's get the professional exemption out of the way first, before getting into



John Leardi

of those professions, it really doesn't matter how many hours you work, you're not going to get paid time-and-a-half and/or overtime pay. Other exemptions include outside sales employees, some people in specific computer-related occupations, administrative personnel in

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the nitty-gritty of the changes. John Leardi, Esq., a healthcare attorney with Buttaci, Leardi & Werner LLC in Princeton, New Jersey, says, "There are three categories of learned professionals where the rate of pay doesn't matter: physicians, lawyers, and teachers."

What that means is: if you're one

academic situations, certain seasonal amusement or recreational establishments, some small newspapers, seamen employed on foreign vessels, fishing operations, farmworkers under many circumstances, and casual babysitters and people who are hired to act as companions for the

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elderly or infirm. The list goes on, with some being exempt from minimum wage and overtime pay and some just exempt from overtime pay. [https://www.dol.gov/whd/regs/compliance/hrg.htm]

The Department of Labor, in what feels like a dramatic understatement, says, “Because exemptions are generally narrowly defined under the FLSA, an employer should carefully check the exact terms and conditions for each. Detailed information is available from local Wage and Hour Division (WHD) offices.”

Prior to the changes, employees were exempt who earned \$455 per week (\$23,660 per year) or were in jobs that were executive, administrative or professional, or who were paid on salary. The primary changes made are for that range. They have been raised to \$913 per week, or an annual salary of \$47,660.

If you’re non-exempt, you’re entitled to at least time-and-a-half,” says Leardi, “any time you work more than 40 hours in a week. There’s really three tests that have to be satisfied in order to qualify as an exempt employee. The first is the salary basis test, and it’s really the

hours, it doesn’t matter. That’s just not true.”

If employees are non-exempt and they are paid a salary and they work more than 40 hours in a week, they still have to be paid a prorated time-and-a-half rate.

Three Tests

As mentioned above, the first test is the salary basis test. The DOL

duty is to act as a “bona fide” executive, administrative or professional employee. State and federal laws have very specific definitions of those terms:

Executive Employees: high-level workers who manage the overall operations of the business or a customarily recognized department or subdivision. They usually are re-

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states: “To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least \$455 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour.”

Leardi says, “The second test is what was changed by this rule, and that’s the salary level test. Basically

quired to customarily and regularly direct the work of at least two full-time workers. And a significant part of their duties involve managing, as opposed to supervision or carrying out day-to-day business operations or production activities. Under this definition, foremen, team leaders, and production supervisors don’t typically qualify as “executives.”

Administrative Employees: These high-level employees perform office or non-manual work related to implementing and administering management policies, as opposed to supervision or day-to-day business operations. As above, working foremen, team leaders and production supervisors are not usually classified as “administrators.”

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one that everybody understands. If you’re going to be an exempt employee, you’re paid a salary. Not hourly, not per diem, you have a salary. It doesn’t go up and down depending on how many hours you work,” says Leardi.

This leads some employers to think that the way around this is to just pay their staff on salary. Leardi says, “Say you have a billing person and you pay them \$40,000 per year. You’ve satisfied that first test. Unfortunately, many practices think this is the end of the issue. You pay them a salary, you don’t pay by the hour, so if they go more than 40

it used to be that if you were paid a salary, you passed the first test. The second test would be the level of your salary. Previously it was \$455 per week. And that’s a major change with this rule. It changed it from \$455 to \$913 per week. You get to a point where somebody making \$455 per is making about 1.6 times the federal poverty level. This takes it to three times the federal poverty level.”

The original figures were long overdue for a change, having been set around 1970.

The third test is the duties test. That has essentially two major components. The employee’s main job

Professional Employees: These employees have “advanced” knowledge in a recognized field of learning or science. That usually means they have participated in academic instruction of a specific length, and earned a college degree in a specific area, such as law, medicine, engineering, architecture, or accounting. What can complicate this is that mechanical or technical trades don’t usually qualify for this exemption.

Leardi says, “So if you take a podiatry practice, it’s probably the office manager or practice manager. Somebody with direct reports under them, at least two employees, they

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have a great deal of autonomy to deal with certain things and there's a kind of protocol with the doctor on what to deal with and what not to, the hiring and firing of their staff members, for example. I think this is an area that's very affected by this rule, because there are a lot of office managers that will satisfy that duties test, but maybe their compensation previously was set below \$40,000. If that's the case, they would no longer qualify unless that practice adjusted their compensation accordingly."

As Leardi points out, with a lot of practices across the country becoming larger with multiple physicians, you might even find someone like a billing manager who has two or three direct reports, or the front office manager. "These folks might qualify for that managerial exemption, but not unless their pay is adjusted. Now you have to pay them just under \$48,000 to qualify."

Things to Consider

It's fairly clear that the overtime rules are somewhat complicated, tangled up even more by a number of



Dr. Guiliana

John Guiliana, DPM, MS, a Managing Partner with Collaborative Practice Solutions, says, "From my experience as a consultant, I have seen some unfortunate misunderstandings about the Fair Labor Standard Act. For example, some employers think if an employee is salaried, it doesn't matter if an employee works over 40 hours per week. And of course, we know that's false. Wheth-

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Another area that can complicate things is employees who take work home. Guiliana says, "Taking work home has to be monitored and governed because that counts towards

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work. If it goes over 40 hours and they're not exempt, they could be due back overtime pay."

Steps to Take

So, first, as mentioned above, clarify job descriptions and determine if the employee is exempt or non-exempt. Both Guiliana and Leardi put an emphasis on using timecards or, as is often the case with office practice management software or electronic medical records, a time clock is built in when the employee logs in and out of work. This provides confirmation regarding the actual number of hours worked.

On a broader basis, here are six recommended steps:

1) Designate a person or work group to aid in complying with the new laws. That could be an office manager, your payroll service, a consultant, a managing partner, or someone else.

2) Review your staff's classifications and your practice's overall compliance with wage and hour laws.

3) Go over your employee handbooks—you have one, right?—and policies as they apply to overtime.

4) Immediately assess how much overtime you've paid employees, per employee, total overtime, and who is exempt or non-exempt.

5) Make the necessary changes.

6) Budget for the changes.

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put an emphasis on using timecards or, as is often the case with office practice management software or electronic medical records, a time clock is built in when the employee logs in and out of work.

exceptions and carve-outs. It would be tempting to encourage podiatrists to discuss the issue with a labor attorney, but Leardi, an attorney, notes that, "If you hire a lawyer for all your HR issues, you're going to go broke. It's not very cost-efficient. Most physicians outsource their payroll to companies like ADP and Paychex. These companies have wonderful HR platforms that can really help you with your HR compliance."

can't call someone an office manager when they truly don't have the job description of an office manager. That's why job descriptions are so important."

And when asked whether it was possible to hire someone and make a deal with them regarding not paying overtime, Leardi says, "No, you can't contract around federal law. You can tell them you're scheduled 40 hours a week and they are not authorized

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Leardi says, “The new rule has created a lot of questions, and it has triggered a conversation that has led to some information being brought up to identify some issues, to say the least. I don’t know if the law will change the impact, but maybe it’s a wake-up call to the profession to know the risk that’s out there that can affect your practice on a day-to-day basis.”

And a Couple More Things...

The Department of Labor added one more significant aspect to this rule. Having basically let the pay rate sit for over 50 years, it now will be adjusted every three years. So be prepared for evaluation of employees’ wages, exemption status, and overtime wages to become a fairly regular item on your practice’s agenda.

Business owners don’t have a

ton of options regarding this. As a *Business News Daily* article, “What You Need to Know About the New Federal Overtime Rules” says, “The obvious answer is to keep your employees at 40 hours per week or less, even if they were previously working longer hours. Similarly, the other option is to simply pay time-and-a-half for overtime, although those costs are bound to add up quickly. And, of course, employers also have the option to raise employees’ salaries beyond the new threshold, in which cases those workers would no longer qualify for the overtime protections.”

David Reid, the CEO of EaseCentral, an HR and benefits company, indicated to *Business News Daily* that he expects business will change salaried employees to hourly wages. This would presumably be done with the goal of keeping an employee’s annual overtime wages under the difference between the new \$47,476 bar

and the staffer’s previous salary.

Valerie Samuels, a partner with the law firm Posternak, Blankstein & Lund LLP, told *Business News Daily*, “I think employers need to sit down with their employment counsel and take a hard look at all their employees to make sure they are properly classified. If not, they have to address that, because they’ll have a liability.” And in some states, the penalty for not paying required overtime is triple the damages. **PM**



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