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Experts outline how to prepare for overtime changes

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While business owners throughout the country scrambled to get their ducks in a row before the update of federal labor laws, South Florida business leaders gathered to make sense of the changes ahead.

A diverse group of banking, law, human resources, accounting and management experts from various rungs of the business ladder broke down the facts, myths, and the do's and don'ts of the Fair Labor Standards Act, a complex set of laws governing payment thresholds for employees that have been revised, effective Dec. 1.

“Critical Conversations: Overtime” took place July 28 at the *Business Journal*'s Miami office. Editor-in-Chief [Mel Meléndez](#) moderated the discussion, probing panelists with questions that uncovered misinformation, yielded insight and guided preemptive steps for compliance with the new regulations. More than 40 people were on hand for the discussion, which is part of the *Business Journal*'s ongoing series examining key issues in business. Accounting and human resources firm Randstad Professionals sponsored the panel.

Among the topics discussed were how the laws will impact businesses' bottom line, the potential consequences of noncompliance and which industries are most vulnerable to the shakeup the updated laws could bring.

Better safe than sorry: Experts outline how to prepare for overtime changes

If the motto of real estate is “location, location, location,” the lingo of labor professionals is “audit, audit, audit.”

It was the echoing refrain as panelists instructed businesses on how to prepare in the coming months for updates to the Fair Labor Standards Act that the Obama administration mandated in 2014. FLSA regulations will be updated every three years.

The U.S. Department of Labor was tasked with modernizing regulations that govern exemption of certain employee subsets from the minimum wage and overtime pay protections. Come Dec.

1, companies big and small across the U.S. will potentially redefine employees' roles, tinker with their salaries, and adjust their hours and benefits.

Currently, salaried workers with some managerial duties who make between \$23,660 and \$47,476 are typically "exempt" from overtime pay. However, these managers will be reclassified as "non-exempt" and must be compensated for work that spills beyond the 40-hour work week.

In Florida, that's about 2.4 million people, according to Akerman lawyer [Eric Gordon](#), who chairs the firm's Labor & Employment Practice Group.

"That's the danger zone," he said. "Use this opportunity to conduct an audit."

The importance of the task is amplified when one takes into account the additional specificities laid out by the FLSA update. Rules can vary across industries, companies and employees.

"You have to identify what your exposure [to the new regulations] are," said [Jana Aristizabal](#), senior manager with public accounting firm Marcum. "It's important to identify what your potential issues are and quantify them and see what your options will be."

It all begins with a dedicated HR department, panelists said. However, some companies — whether a small business with 12 staffers or a startup that employs 30 people with dynamic roles — don't have those resources. The best practice would be to outsource for help.

"That's a very difficult place to be in, and the worst thing you can do if you don't know is not ask the questions and move forward," Gordon said.

The difficulties are particularly widespread for small companies, he added.

For big companies, guidelines are more straightforward. But make no mistake: Large corporations are not off the hook, Gordon said. A call center that employs tens of thousands of people chose not to pay certain employees more. Today, the company has Akerman on retainer to tackle a multimillion-dollar companywide lawsuit it now has on its hands.

Panelists concluded that best practices include assuming new regulations apply to your business and auditing your company with a trained professional. And implementing an HR line of defense is only the first step to preparing for oncoming legislation. Backtracking is the next.

[Jonathan Ross](#), practice director with Randstad Professionals, suggests reviewing job descriptions of all employees who fall in the salary "danger zone," then comparing those against the work they habitually perform. Ultimately, the goal is to ensure salary accurately reflects work contributed, per the updated regulations.

Ross and Gordon reiterated that not assuming is the best strategy to ensuring compliance. (That includes assuming nonprofit organizations are shielded from the updated regulations. They are not.)

“Don’t assume that a salaried employee is exempt. Don’t assume that, just because something has a management word in it, they’re exempt. Don’t assume the job description, which sounds exempt, is exempt. Don’t assume the duties outlined for the employee are actually the duties of the employee,” Gordon said. “Ask them and update the description. Just don’t assume.”

Problems arise when companies do the opposite; they assume they are exempt until told otherwise.

“That’s where companies get into trouble. Then they’re sued or receive a letter from a plaintiff’s attorney,” Ross said. “Just assume that it applies to you on all aspects until your lawyer or accountant tells you otherwise.”

According to Gordon, wage lawsuits are big business in Florida. The Sunshine State has led the nation in Fair Labor Standards Act litigation for the past 15 years.

“We are No. 1 in the nation! Go us!” he said, laughing.

Administrative employees represent a practical example of the potential risks to assuming.

“Look at admins,” Ross said. “From what I understand, they’re paid anywhere from \$35,000 to \$75,000. Those employees, you may assume, are exempt because you think they meet the litmus test outlined by the FLSA update – but you may have to re-evaluate.”

Gordon suggests a few quick fixes.

“Some people close to the salary threshold can just be bumped up a little, so they can maintain exempt status,” he said. “Maybe you can spread out work more evenly so you can keep individuals under the 40-hour threshold.”

Salaries are also available for adjustment to ensure compliance.

“If anybody’s up for a raise that would get them over the threshold, that is something you could implement,” said Anne Sylvester, director of payroll compliance for Oasis Outsourcing.

However, quick fixes won’t always be a go-to. Sales personnel pose a hurdle to such solutions, as their salaries may be bolstered by commission, and curtailing hours potentially hinders their pay and overall contribution to the company. In that situation, Gordon points again to outsourcing within the company.

“If there is any part of their job that can be given to a non-salesperson, do that so all 40 hours of their job can be dedicated to sales,” he said.

There are additional intricacies to salespeople that must be taken into account, the panelists noted. The updated regulations lay out distinctions between inside sales and outside sales personnel.

“Most people you know are not outside sales,” Ross said. “Best I can tell, 99 percent of the time, you’re still going to have to meet the threshold. You’ve still got to come up with the \$47,477.”

On top of specific differences between inside and outside salespeople, there are also exceptions.

“Computer professionals — such as developers and programmers — are the only ones who can be paid on an hourly basis,” he said. “But an IT person who works for the company is not exempt.”

Additional hurdles to shifting employee hours can also include impacting company morale.

“You can’t let the tail wag the dog. You change an employee’s hours to only 35 per week to comply and risk losing that great employee,” Aristizabal said. “You have to look at things from a business perspective, too, not just a dollar perspective.”

One strategy to restructuring that should be approached with caution is benefits reductions.

“Is that really where you want to cut? Good employees are hard to find and keep, and we don’t have any intention of touching benefits,” said Christopher Perry, executive VP of human resources at Bank United. “Benefits are a whole separate conversation, so if it’s something you have to touch, OK. But if you’re a smaller company, I wouldn’t suggest it.”

Ross heeded Perry’s warning, speaking from the perspective of a corporate recruiter.

“As someone who is privy to employment negotiations every day, all day, I say don’t do it. Employees didn’t use to talk about vacation, 401(k) matching nearly as much as they do now,” Ross said. “It used to be all about good work environment and good pay. Now, we finish negotiating salary and, at the 11th hour, potential employees come in and say, ‘Wait, they don’t match 401(k)? I don’t know.’”

The moral of the lesson, he said, is if you can afford to stick with current benefits packages, do that.

Aristizabal also urges employers to avoid reclassifying non-exempt employees as independent contractors.

“Please, please don’t do that,” she said. “It’s an IRS determination, and it’s very difficult to show that you have an outside contractor. And they could come in and show that you do have control of what they’re doing and when they’re coming and there’s that level of control, so they’re deemed an employee. It is not something that I would suggest as an option.”

Ross echoed that sentiment, adding: “If you think the Department of Labor is bad, wait until the IRS shows up at your door.”

Also absolutely off limits in the coming months is the blanket statement “I won’t pay for overtime.”

“If someone works overtime, you have to pay overtime,” Sylvester said.

Employees whose overtime toil begins to cause financial disarray can be disciplined. But it is important to note that the issue of company culture is at stake.

“Do you want an employee constantly so worried about doing those 41 hours that you end up losing culture in your business?” Ross said. “When you’re choosing this solution, from a legalities standpoint, you need to make sure it fits your culture because your company has to survive and your company is there to make money.

“Whatever you choose, you need to make sure employees aren’t motivated not to work, like, ‘Ah, it’s been 40 hours and there’s more work to do, but I gotta go. It’s not done, but you’re gonna penalize me if I work overtime!’”

Maintaining company culture also requires communication. Adjustment of employee roles, hours or salaries calls for thoughtful conversation, Perry said.

“It may feel like a step back in their career if they go from being salaried to being an hourly employee,” he said. “It feels like punishment. But if you get in front of them so you can have that discussion, most people are fair and reasonable.”

The redefinition of employees’ roles and hours highlights the importance of closely maintaining and updating company records. It facilitates restructuring when overhauls are required and, perhaps, provides defense if legal action is taken against an employer.

“When it comes down to it, if you don’t have that documentation and controls in place for overtime, supervisors are handicapped in measuring and quantifying exposure to new regulations or lawsuits,” Marcum’s Aristizabal said. “Controlling when people are incurring overtime and ensuring that they are required to have permission from a supervisor enables companies to better protect themselves and have documentation in place.”

Q&A: The legal pitfalls of updated overtime regulations

With a barrage of information pertaining to new labor regulations, employers must dodge numerous landmines that lie ahead. Akerman lawyer [Eric Gordon](#), who chairs the firm’s Labor & Employment Practice Group, breaks down the challenges companies could face should they fail to play by the rules.

If an employee is reclassified as non-exempt under the new regulations, what is the recommended method to determine if back wages are owed? The \$47,000 threshold doesn’t take hold until Dec. 1. They were probably correctly classified before then. But if they were incorrectly classified, review past pay and try to compensate. Some employers will ignore that advice and sweep it under the rug and hope for the time to pass and the statute of limitations to run out.

What are the legal ramifications of noncompliance? Lawsuits are a vehicle made widely available to employees, or plaintiffs.

How often do private lawsuits and others like it occur? These are popular because plaintiff's lawyers caught on that there is a "prevailing plaintiff standard," so it's very easy for a plaintiff to get attorney's fees returned.

What is the likelihood that a company will, in its lifetime, be implicated in this sort of litigation? If you haven't gotten sued yet, you will, I'm sorry to say. And you might very well be the person who does not get sued, but someone may show up at your door one day and say: "Let me check your books."

How destructive can litigation be? Take one employee who is owed \$10,000 in wages, add liquidation, attorney's fees, then multiply that by 10 employees – or 50 employees or even 1,000 employees – and that's where we're seeing a lot of collective actions. That can truly bankrupt you.