

Understanding the DOL's Proposed Update to Overtime Regulations

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Littler[®]

Compliance **HR**

Today's Webinar Presenter

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Who We Are



- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



Navigator Onboarding

Assemble and produce legally compliant onboarding documents



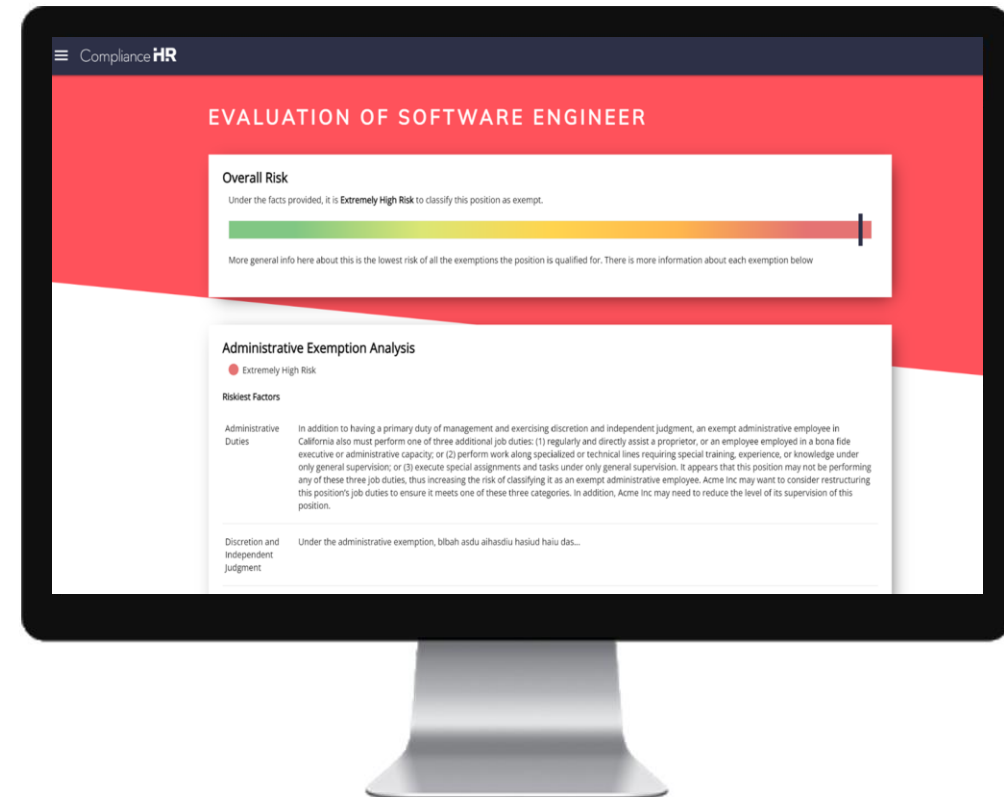
Navigator Leave

Reduce the risk and administrative burden of leave management



Navigator Overtime

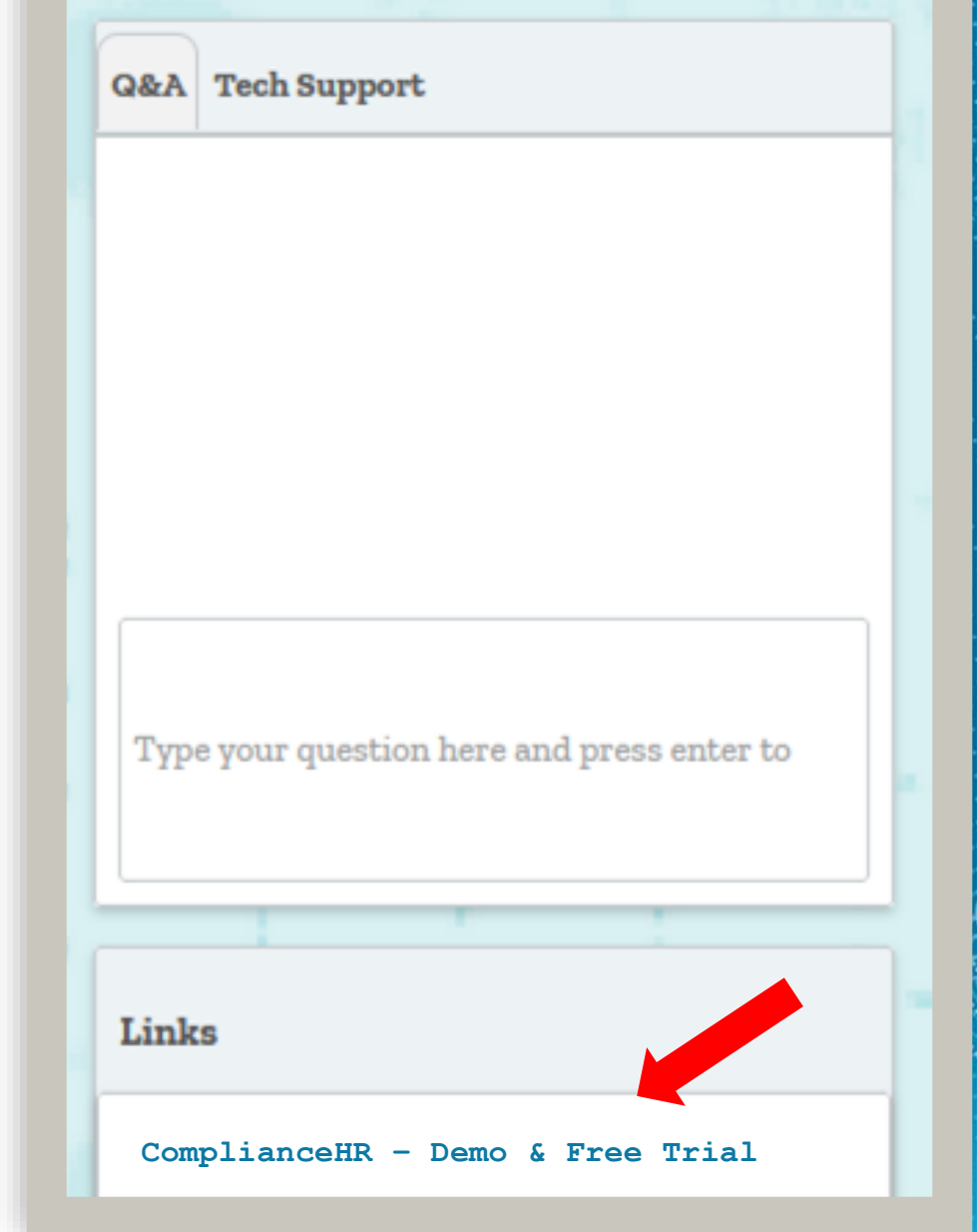
- Determines employee as exempt or non-exempt
- Applies all applicable federal and state tests
- Draws from a proprietary engine of 2,400+ reported court decisions and DOL opinion letters
- Delivers reasoned suggestions on how to lower the risk of misclassification
- Provides the risk result, a summary of relevant federal & state exemption standards, and a transcript of answers



Register for a Navigator Suite Demonstration and Free Trial

Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



Today's Webinar Presenter

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A Short History of the Regulations



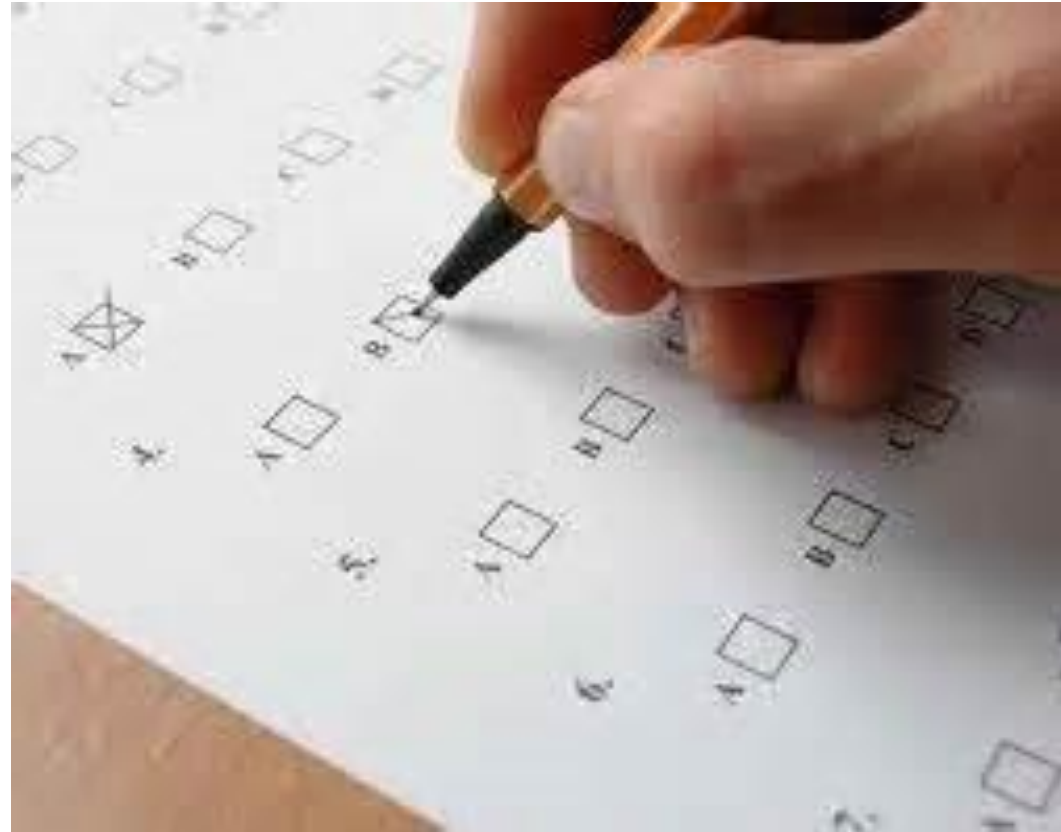
Fair Labor Standards Act

- Since it was passed in 1938, Section 13(a)(1) of the FLSA has included “white collar” exemptions from both the minimum wage and overtime requirements for:
 - Executive
 - Administrative
 - Learned Professional
 - Creative Professional
 - Computer
 - Outside Sales
- “as such terms are defined and delimited from time to time by regulations of the Secretary”



Three Tests for Exemption

- Salary Level
- Salary Basis
- Duties



Regulatory History – Salary Level

- From 1940 to 1975, DOL raised the minimum salary level for exemption every 5 to 10 years
- The 1975 salary levels remained in effect until 2004:
 - \$155 per week for executive/ administrative
 - \$170 for professionals
 - \$250 for the short test
- In 2004, DOL eliminated the “long” and “short” test, instead adopted a new test with a minimum salary of \$455



2016 Final Rule

- Increased the minimum salary for the “white collar” exemptions to nearly \$48,000 (\$913/week);
- Highly compensated employee (HCE) exemption increased to \$134,004
- Did not revise duties test;
- Allowed employers to use bonuses and commissions, paid quarterly or less frequently, to count towards 10% of the minimum salary level; and
- Provided for automatic increases to that salary level every three years.

Challenge to 2016 Final rule

- Littler obtains preliminary injunction, November 2016 (just days before final rule was to take effect)
- Court granted permanent injunction, August 2017
- Then...
 - DOL appeals to the Fifth Circuit
 - Fifth Circuit stays the appeal pending further rulemaking.



2019 Final Rule

- Significantly lowered salary threshold to \$684 (\$35,568 annualized)
- Up to 10% of the minimum salary level may be satisfied with non-discretionary bonuses, commissions and other incentive pay that are paid annually or more frequently
- HCE exemption: total annual compensation of \$107,432
 - Must include the minimum guaranteed weekly salary of \$684 (\$35,568 annualized)
- No indexing

Current NPRM

The background of the slide is a solid blue color. Overlaid on this background is a decorative pattern of small white dots. These dots are arranged in a series of concentric, overlapping arcs that create a sense of depth and movement, resembling a stylized wave or a digital signal. The pattern is most prominent in the lower right quadrant and fades towards the top and left.

Proposed Regulations

- Increase current salary level to 35th percentile in lowest census region
 - Currently, estimated at \$1,059 per week (\$55,068 annualized).
 - However, the DOL claims that the final rule will use the most recent data then available and by the first quarter of 2024, the salary threshold could be as high as \$1,158 per week (\$60,209 annualized).
- HCE exemption: increase current level to 85th percentile of nationwide average
 - Based on 2022 data would be set at \$143,988, but likely higher at time of implementation
- Automatic increases at same levels (35th percentile and 85th percentile) every 3 years
- No duties test changes

Proposed Regulations

- Apply increased salary level to employees in all territories that are subject to the federal minimum wage (including Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands, where the salary level is currently just \$455 per week).
 - Sets a special salary level for American Samoa, equal to 84% of the general salary level, up from the current \$380 per week threshold.
- Increases special exemption for motion picture producing industry from \$1,043 per week to \$1,617 per week.

Regulatory Process

- Notice of Proposed Rulemaking
- Comment Period (Currently ends 11/7/23)
- Final Rule (?)
- Effective Date (?)



Challenges?

- Will there be litigation?
- Could be subject to similar challenges
 - Subverts the duties test
 - Automatic increases require notice and rulemaking
- Issued without having a Senate confirmed Labor Secretary

What Should Employers Do Now?



Participate in the Regulatory Process

- Review the NPRM
- Support the efforts of your trade associations
- Visit and write to your Senators and Representatives
- Submit comments on the NPRM



Start Preparing for New Regulations



- Don't wait for the Final Rule
- Start reviewing exempt status of employees based on:
 - Salary increase to \$60,000 and \$143,000+ for HCE
- Assess whether to increase salary or reclassify?

Start Preparing for New Regulations

- The Reclassification Decision: Salary
- Pull salary and incentive pay data for all employees earning below the minimum
- Calculate the cost of increasing salary to the minimum
- Calculate the cost of overtime:
 - $(\text{Weekly salary} / 40) * 1.5 * \text{expected overtime hours}$
- Consider a cost-neutral solution
 - $\text{Weekly Salary} / (40 + (\text{OT Hours} * 1.5))$

Start Preparing for New Regulations

- The Reclassification Decision: Duties

Overall Risk and Transcript

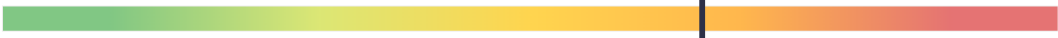
EVALUATION OF MANAGER A

Report Summary

This is an evaluation of **Manager A** in **California** based on the questionnaire submitted by **worth+ot@compliancehr.com**.

Overall Risk

Given the facts provided, it is **Moderately High Risk** to classify this position as exempt.



This is the lowest risk of all the exemptions the position is qualified for. There is more information about each exemption below.

Overall Compensation Requirements

Compensation Requirements Met

This position meets the relevant compensation requirements.

Questionnaire Transcript

Evaluation of Manager A - Submitted by **worth+ot@compliancehr.com**

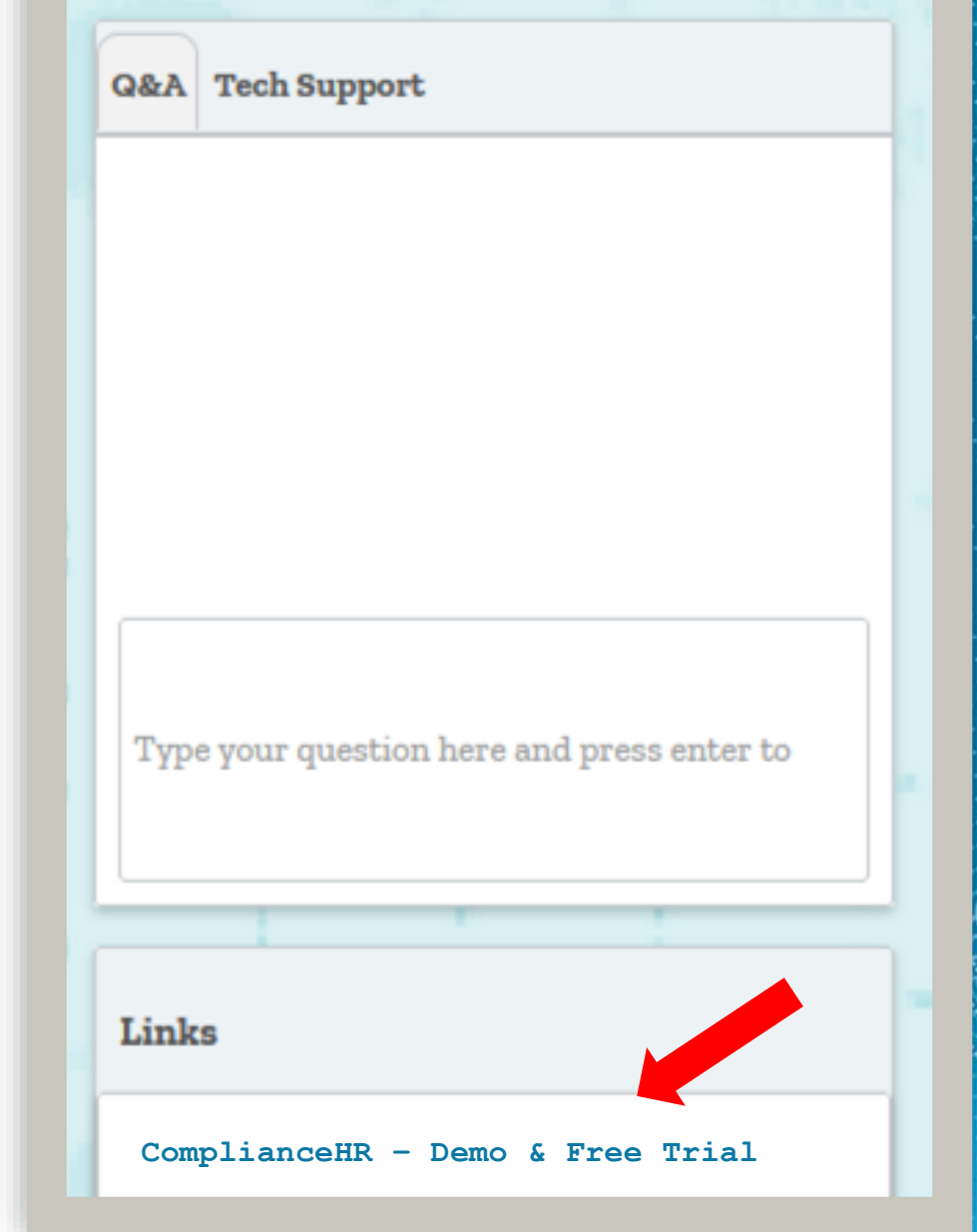
Answers Provided

Does this position perform work in a computer, software, or information technology field?	No
Does this position perform work in any of the following artistic or creative fields?	None of the above
Does this position sell the Company's products or services?	No
Does this position use any manuals, guidelines, or other established standard procedures (SOPs) in the performance of the job?	No
Has the salary for this position ever been reduced for reasons other than standard deductions for taxes, liens, or employee benefits?	No
How closely is this position supervised?	Moderately supervised
Is this position paid?	On a salary
How many employees does this position supervise?	3

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Questions?

Please add any additional questions to the Q&A box

Thank you!

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Did you know...



- 2500+ Federal and state statutes, regulations and cases on exempt/non-exempt
- Attorneys must read every case to identify the job duties performed by the employees discussed in the case, and whether the court found the employee exempt or non-exempt