



The Future Starts Now: Future of Work for New England Employers

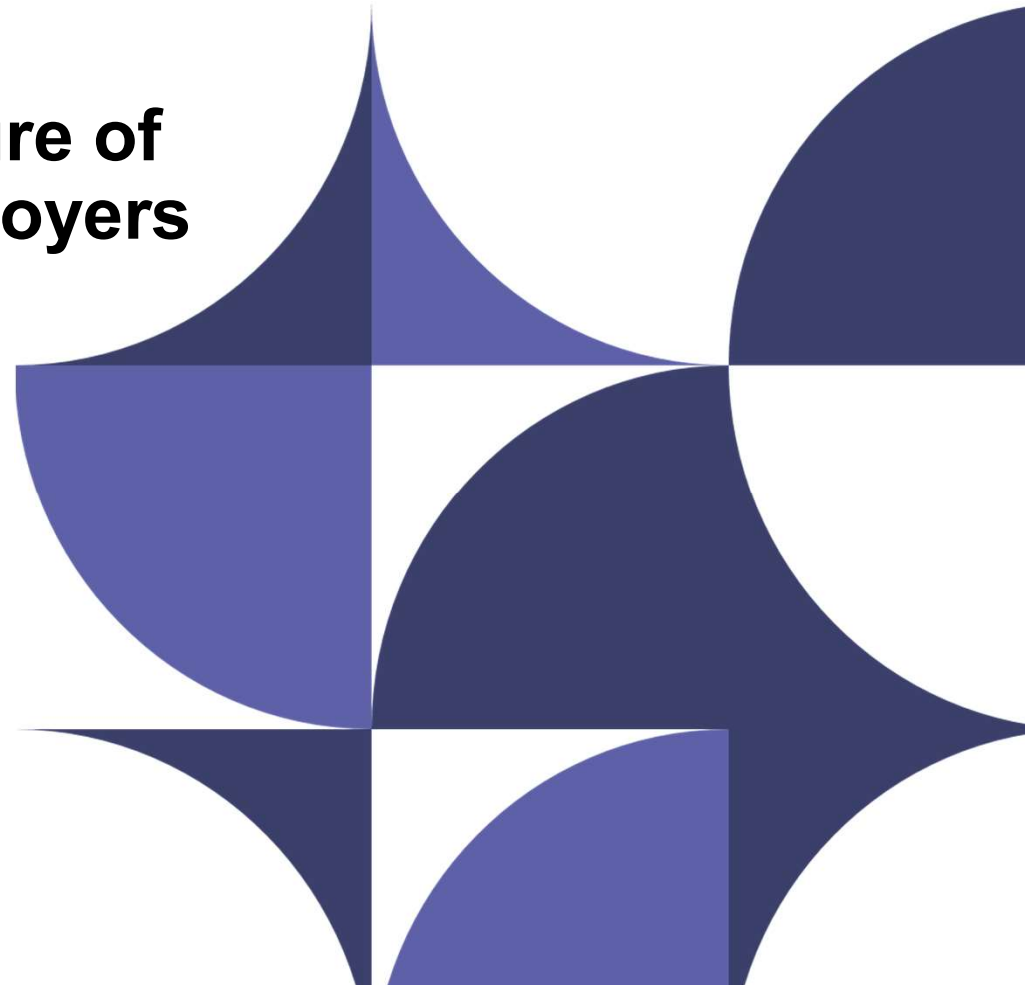
Part 3 – Impacts of Technology on Overtime Exemptions

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Agenda

- 01** Overview – The Impact of Technology on Work
- 02** Outside Sales Exemption
- 03** Administrative/Professional Exemptions
- 04** Executive Exemption
- 05** Computer Employee Exemption

Overview – The Impact of Technology on Work

- **Much wage/hour law is a vestige of the typewriter age**
 - Fair Labor Standards Act of 1938 (84 years ago)
 - First laptop invented in 1981
 - Computer Employee Exemption added to FLSA in 1990 (32 years ago)
 - FLSA Exempt Status Regs last substantially updated in 2004 (18 years ago)
 - iPhone launched in 2007
 - Residential Broadband Internet first available in 2008
 - Zoom launched in 2013
 - World turned upside down by pandemic in 2020



The FLSA's Overtime Exemptions

- The FLSA's exempt status regulations govern which categories of employees are exempt from overtime, as a matter of federal law, based on the aspects of the jobs they perform.
- Nearly all exemptions require a minimum salary level of \$684/week, or \$35,568/year.
 - Biden Administration intends to issue proposals relating to these exemptions, including likely a proposal to increase the salary threshold. Expected in October 2022, but has not been issued.
 - Obama Administration proposed in 2016 to raise it to \$921/week, or \$47,892 per year. Anticipate the new proposal to be along these lines.
- Unknown whether the Administration will also propose any changes to the definitions of who is exempt.
- For today – we are focused on the impact of technology on four of the current exemptions: Outside Sales, Executive, Administrative, and Computer Professional.



Outside Sales Exemption

Exemption requires primary duty of “making sales,” which must be undertaken “customarily and regularly . . . away from the employer’s place(s) of business”

- Travel and meetings increasingly replaced with Zoom, Teams, WebEx
- “Customarily and regularly” is a modest threshold, but not zero
- Basic premise of OSE eroded by modern technology

The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. . . . He works away from his employer’s place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman. *Jewel Tea Co. v. Williams* , 118 F.2d 202 (10th Cir. 1941)

- Who is “making sales” in an automated store?



Human Judgment in the Computer Age

- Administrative exemption: Primary duty is “office or non-manual work directly related to management or general business operations,” and involves “exercise of discretion and independent judgment with respect to matters of significance.”
 - Specialization and sub-specialization narrow the scope of many jobs
 - Routinization and process mapping of tasks and functions
 - Decision-making now supported by sophisticated job aids
- Professional exemption: Primary duty is “work which is primarily intellectual in character... requiring the consistent exercise of discretion and judgment.”
- Creative professionals, AI Stable Diffusion, ChatGPT, and “work requiring invention, imagination, originality or talent in a recognized field of artistic endeavor”

Executive Exemption in a Global Economy

- Requirements of the exemption (in addition to salary):
 - Primary duty is the management of the enterprise, or a currently recognized subdivision.
 - Must “customarily and regularly direct the work” of two or more employees
 - Must have the authority to hire or fire
- The exemption was not written to contemplate global workforces, with employees in different time zones who work off hours.
- Even the highest executives within a company can fail to meet the technical requirements of this exemption.
 - Supervision of employees can be relegated to artificial intelligence that measures productivity rather than the type of “directing the work” contemplated by the exemption.
 - Work that used to be performed by humans is increasingly relegated to robots and algorithms.
 - Use of AI in the hiring process can undermine the exemption where the power to hire previously involved the reading of resumes and selection of qualified candidates.
- Maintain the human component

Isn't everyone a "computer employee"?

- Requirements of the exemption (in addition to salary):
 - Employed as a computer systems analyst, computer programmer, software engineer "or similarly skilled worker in the computer field"
 - Primary duties must relate to systems analysis techniques/procedures, or the design/development of computer systems or programs
- Tempting to use this exemption to capture most traditional office workers
 - We troubleshoot, constantly adding and taking away shared network folders, reprogramming our computers to automatically save documents where we want them on our internal networks.
- But we expect to see courts limit this exemption to only the highest-level IT professionals within an organization.
 - 2006 DOL Report – IT Support Specialist not exempt (where duties involve installing and troubleshooting applications)
 - One court found that if an employee can resolve an issue by phone, they likely don't meet the exemption; focus is people who resolve issues that "take weeks or longer" to resolve. *Grills v. Hewlett-Packard Co.* (N.D. Ohio 2016)
 - Burden on the employer to demonstrate the exemption; use it narrowly



Thank You

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