PRESENTATION

THE NEW OVERTIME RULES ARE COMING SOON

ARE YOU READY??

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BAKER DONELSON

EXPAND YOUR EXPECTATIONS℠

OVERTIME – THE FUNDAMENTALS

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FLSA – Wage & Hour Law

The Fair Labor Standards Act (FLSA) requires that most employees be paid:

- at least the federal **minimum wage** for all hours worked and
- **overtime pay** (at time and one-half the ***regular rate of pay***) for all hours worked over 40 hours in a workweek.

The FLSA is an employee protection act and employees are generally presumed entitled to overtime. Strict record-keeping requirements.

The FLSA, however, provides an exemption from both minimum wage and overtime pay for certain **"white collar"** workers.

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“WHITE COLLAR” EXEMPTIONS

Categories of “white collar” employees that may be exempt from both minimum wage and overtime requirements of the FLSA:

- Executive
- Administrative
- Professional
- Outside Salespersons
- Highly Skilled Computer Employees
- Highly Compensated Employees

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FLSA - WAGE & HOUR LAW

Non-exempt employees = eligible for overtime

Exempt employees = ineligible for overtime

SO WHICH EMPLOYEES ARE "EXEMPT"?

- for most employees whether they are exempt or non-exempt depends on:
  - how they are paid
  - how much they are paid
  - what kind of work do they do

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WHAT CHANGES DID THE DOL PROPOSE?

Remember, exemption depends on three things:

1. How employees are paid

2. How much they are paid

3. What kind of work do they do

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WHAT CHANGES DID THE DOL PROPOSE?

Remember, exemption depends on three things:

1. ***How*** employees are paid → **SALARY BASIS**
   - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
   - no partial day deductions

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1. How employees are paid ⇒ **SALARY BASIS**
   - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
   - no partial day deductions
2. ***How much*** they are paid ⇒ **SALARY LEVEL**
   - currently this is $455/week or $23,660 per year

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   - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
   - no partial day deductions
2. How much they are paid → **SALARY LEVEL**
   - currently this is $455/week or $23,660 per year
3. What ***kind of work*** do they do → **JOB DUTIES TEST**
   - each category of exemption – Executive, Administrative & Professional - has different required job duties as set forth in the regulations (ex. regularly supervises 2 or more full-time employees)

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WHAT CHANGES DID THE DOL PROPOSE?

Remember, exemption depends on three things:

1. How employees are
   - emp… is
   - … or
2. H…
   - …
3. W…
   - e… – Executive, Administrative & P… have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more full-time employees)

Must satisfy ALL THREE of these tests to be exempt from overtime.

Paying salary alone is not enough!

Salaried employee is not the same as "exempt" employee.

…DUTIES TEST

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HOW DID WE GET HERE??

THE PROCESS

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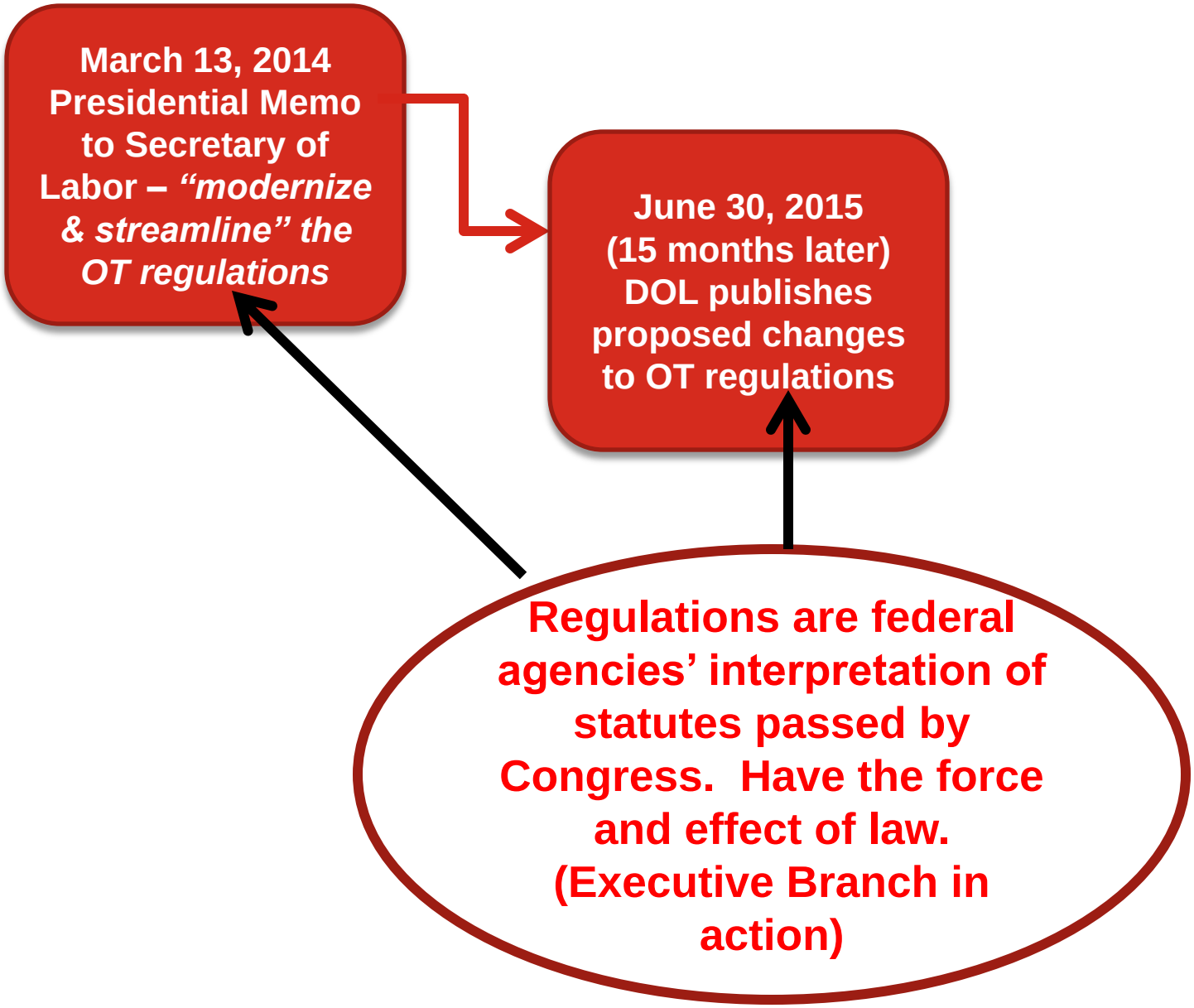

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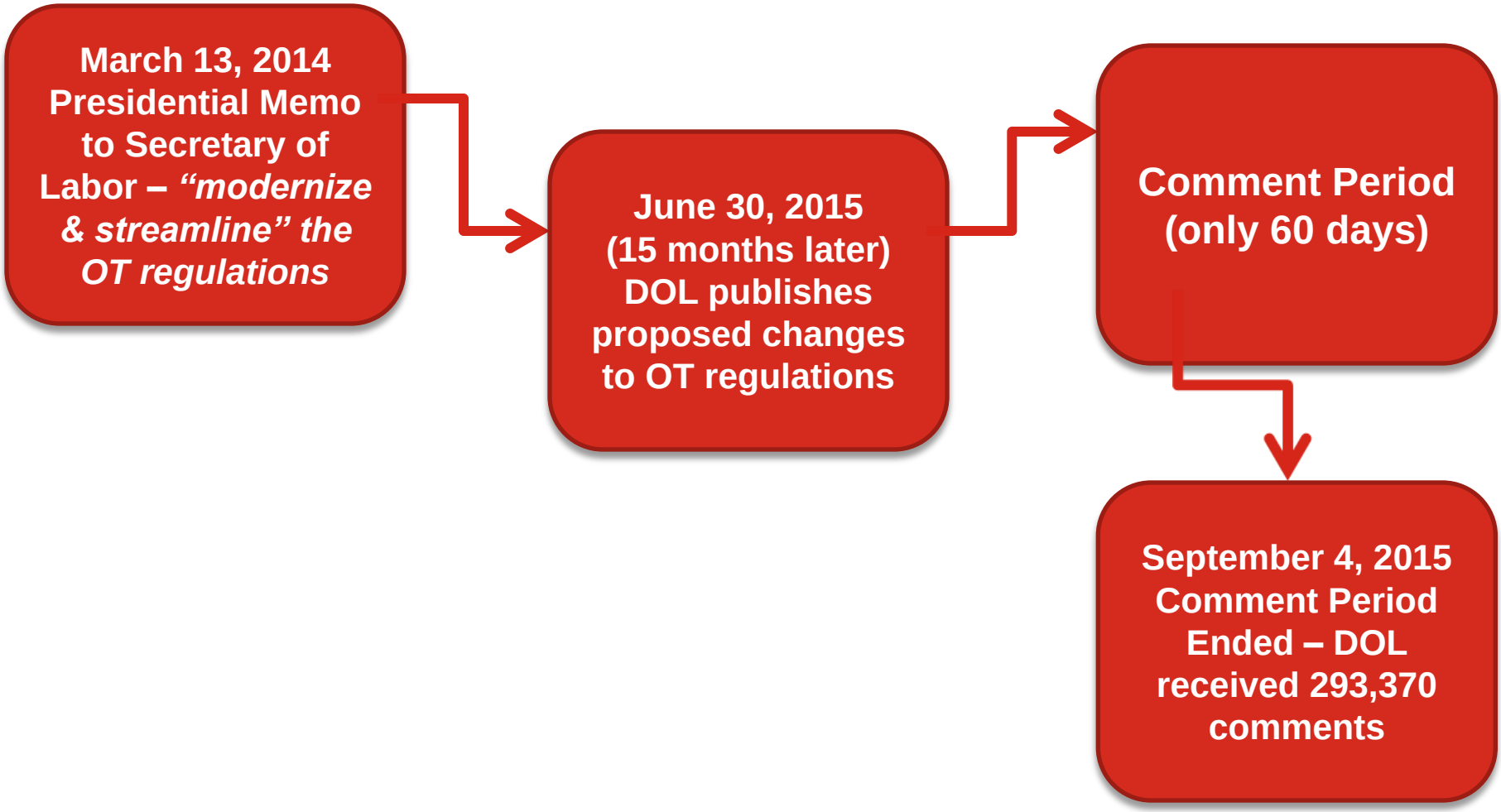

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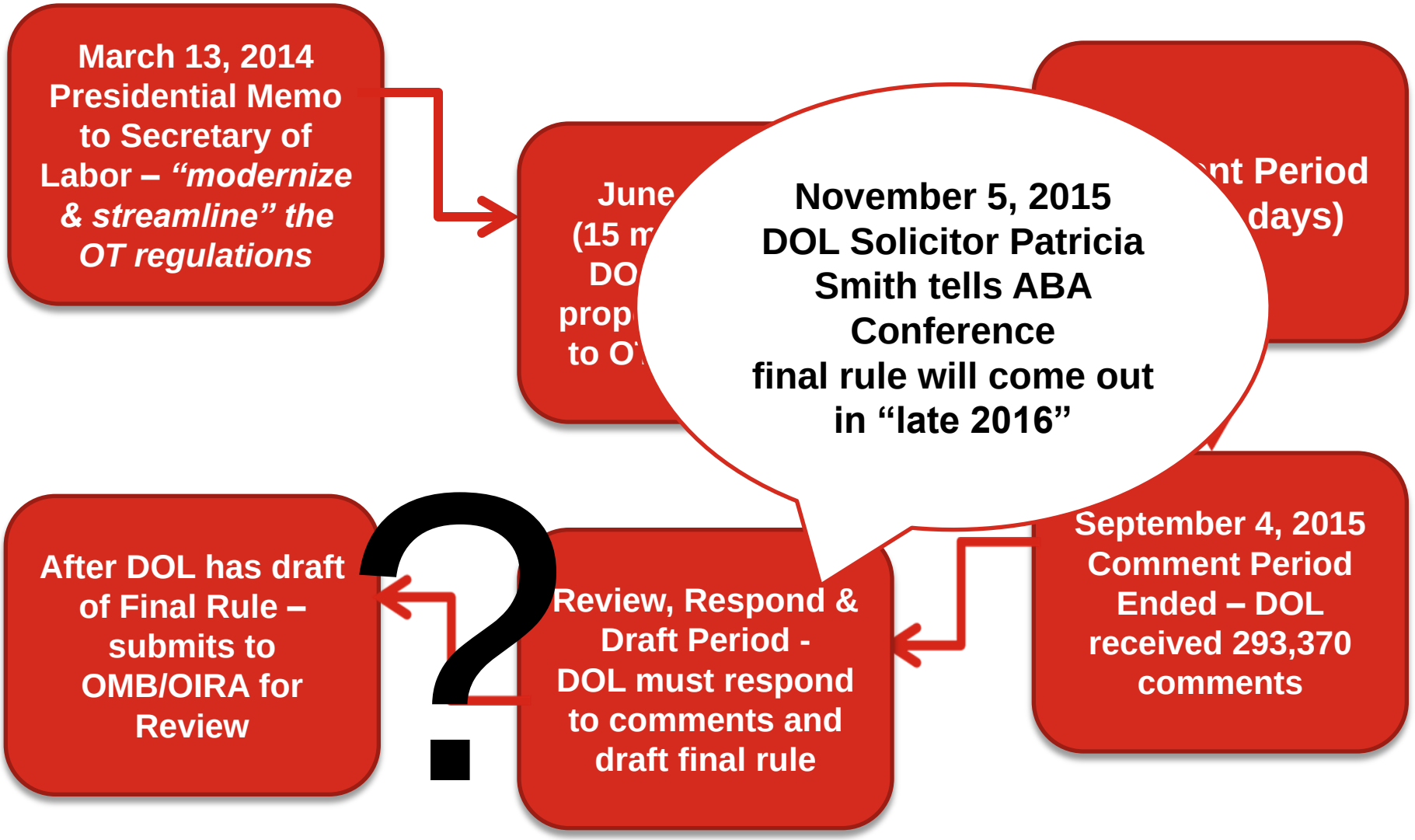

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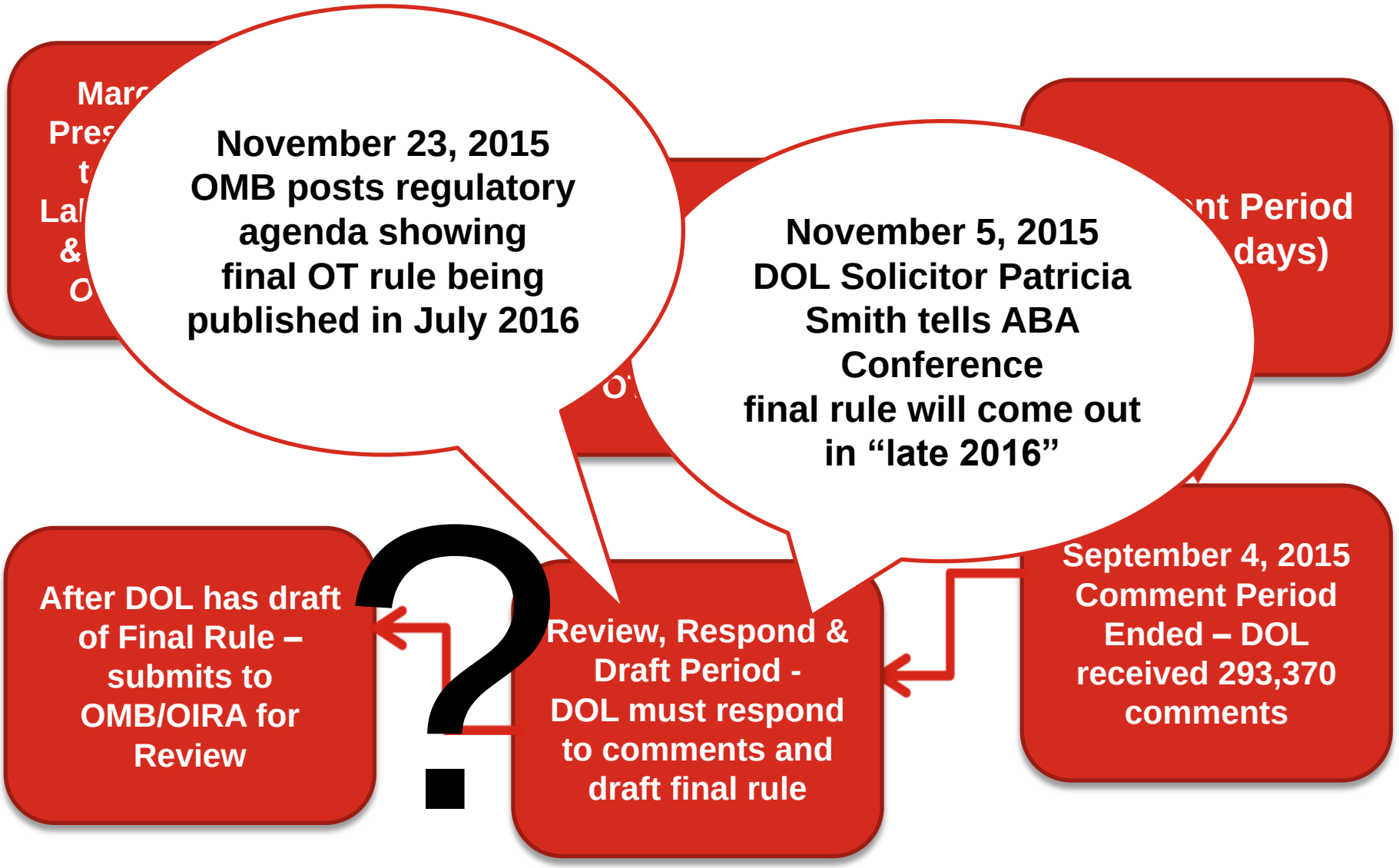

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November 23, 2015
OMB posts regulatory agenda showing final OT rule being published in July 2016

November 5, 2015
DOL Solicitor Patricia Smith tells ABA Conference final rule will come out in "late 2016"

December 16, 2015
DOL Secretary Thomas Perez states in an interview that he was "confident" that the final rule would be "out by the Spring of next year."

Review, Respond & Draft Period - DOL must respond to comments and draft final rule

After DOL has draft of Final Rule – submits to OMB/OIRA for Review

?

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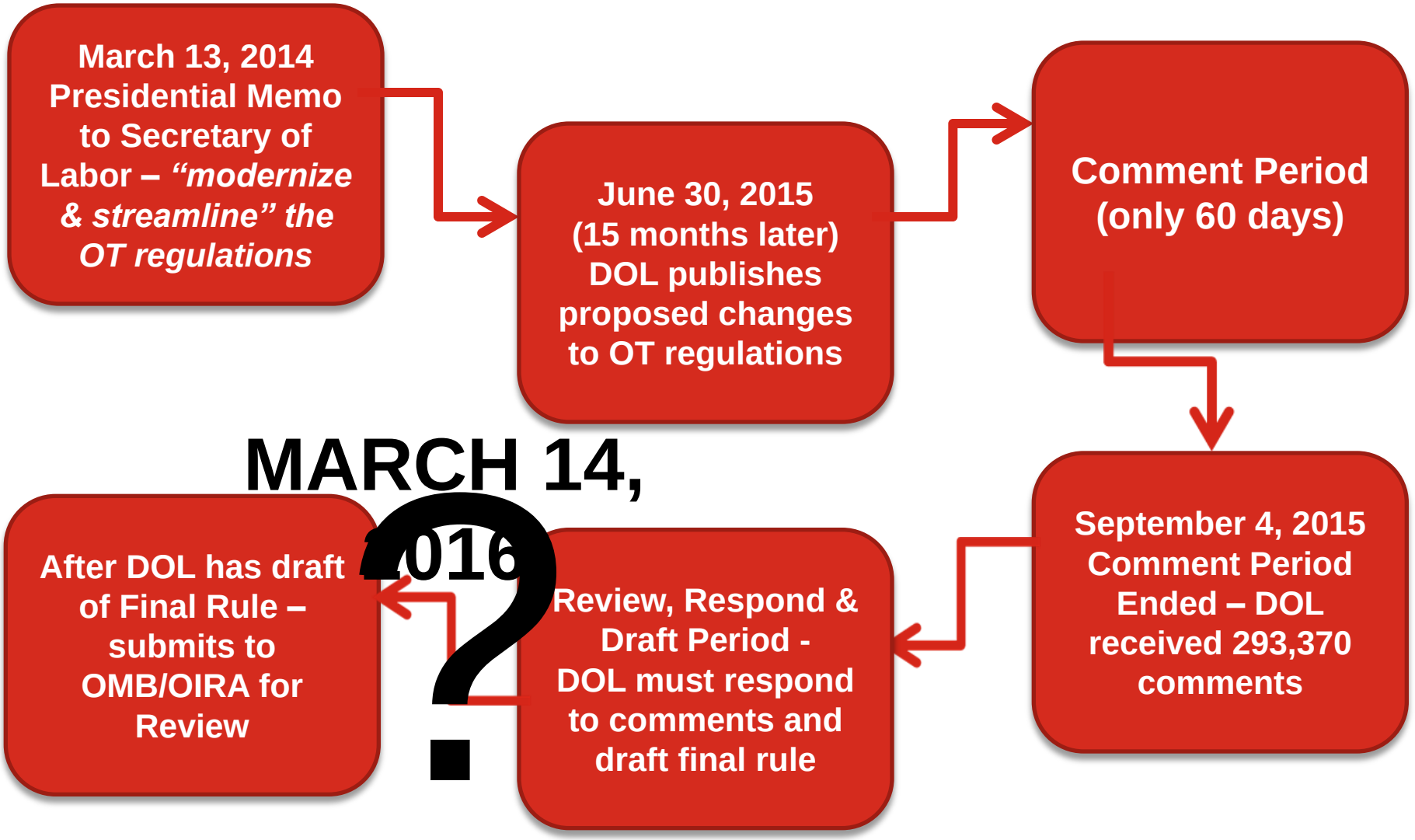

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OIRA/OMB REVIEW

- OMB reviews final rules that are “significant”
  - OIRA classified the OT rules as “economically significant” – i.e. having an annual effect on the economy of $100 million or more (www.reginfo.gov)

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OIRA/OMB REVIEW

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  - OIRA classified the OT rules as "economically significant" – i.e. having an annual effect on the economy of $100 million or more (www.reginfo.gov)
  - OIRA review includes final analysis of estimated costs and benefits and consideration of public comments
  - 90 days is the maximum period of review, but there is no minimum time of review (may request extension if needed)
- After OMB/OIRA review, final rule is published in *Federal Register*
  - "Economically significant" rules cannot go into effect until at least 60 days after publication (can be longer but not less)
    - during those 60 days Congress may review the rule under the **Congressional Review Act**

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CONGRESSIONAL REVIEW ACT

- During the 60-day period, any member of Congress can introduce a “resolution of disapproval” which has the effect of nullifying the rule
  - It must be offered as a joint resolution, subject to a potential presidential veto, passed by a simple majority in both houses
  - If vetoed, a two-thirds vote in both houses is needed to override the veto . . . **NOT LIKELY**
- The earlier the final rule is issued, the less vulnerable it will be to a CRA challenge
  - Under the CRA calculations . . . final rules submitted to Congress **after May 16, 2016** may be subject to an extended review period in 2017 by a new President and a new Congress.

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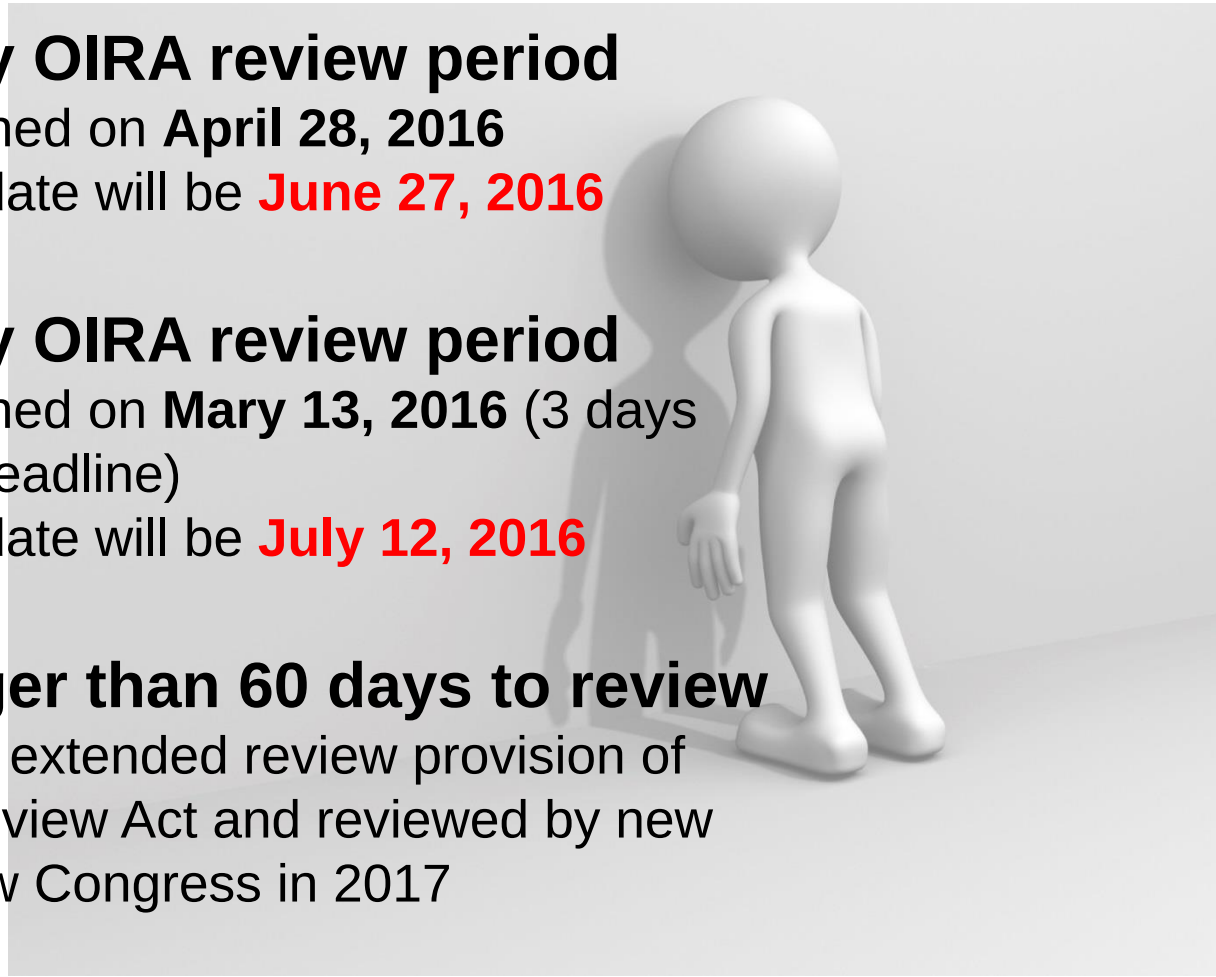
SO WHEN IS THE RULE GOING TO BE FINAL???

- if there is a **45-day OIRA review period**
  - rule will be published on **April 28, 2016**
  - earliest effective date will be **June 27, 2016**

- if there is a **60-day OIRA review period**
  - rule will be published on **Mary 13, 2016** (3 days before May 16th deadline)
  - earliest effective date will be **July 12, 2016**

- if OIRA takes **longer than 60 days to review**
  - may be subject to extended review provision of Congressional Review Act and reviewed by new President and new Congress in 2017



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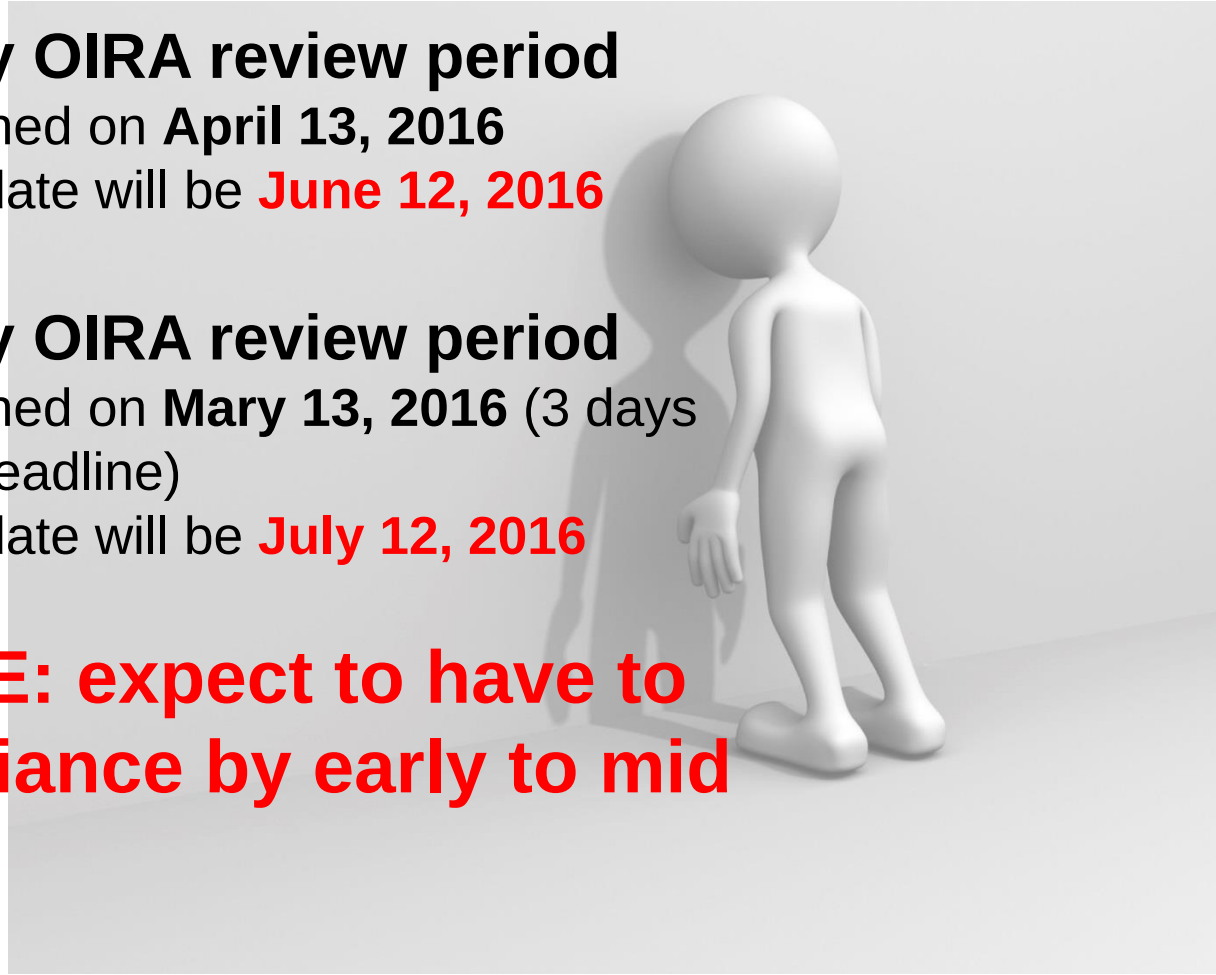
SO WHEN IS THE RULE GOING TO BE FINAL???

- if there is a **30-day OIRA review period**
  - rule will be published on **April 13, 2016**
  - earliest effective date will be **June 12, 2016**

- if there is a **60-day OIRA review period**
  - rule will be published on **Mary 13, 2016** (3 days before May 16th deadline)
  - earliest effective date will be **July 12, 2016**

BOTTOM LINE: expect to have to be in compliance by early to mid summer



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CHALLENGES TO THE REGULATION

Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773) would:

- Nullify the proposed rule.
- Require the DOL to first conduct a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofit organizations and public employers.
- Prohibit automatic increases in the salary threshold. Require that any future changes to the duties test must be subject to notice and comment.
  - Introduced 3 days after rule went to OMB (March 17)
  - www.govtrack.us predicts there is a 7% chance of the bill passing

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THE NEW OT RULE

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WHAT CHANGES DID THE DOL PROPOSE?

Remember, exemption depends on three things:

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2. ***How much*** they are paid → **SALARY LEVEL**
   - currently this is $455/week or $23,660 per year
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   - each category of exemption – Executive, Administrative & Professional have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more employees)

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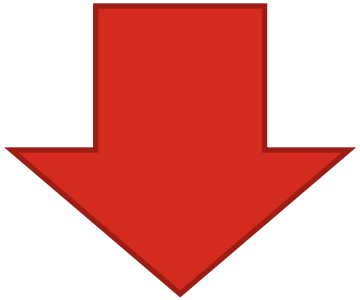
WHAT CHANGES DID THE DOL PROPOSE?

To currently qualify for exemption, employees be paid on a **salary basis** at not less than **$455 per week ($23,660.00 annually).**



The new proposed salary threshold for exemption is $50,440 ($970 per week)!

- More than two times the current salary basis
- 40th percentile of weekly earnings for full-time salaried workers nationwide
  - compared to 2004 – looked at 20th percentile of salaried employees in South and retail industry

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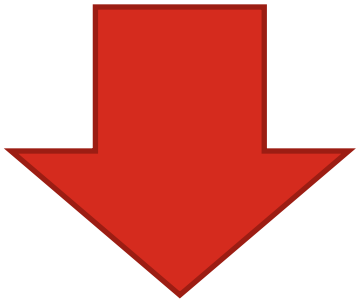
WHAT CHANGES DID THE DOL PROPOSE?

To currently qualify for exemption as a highly compensated employee (HCE), the salary level is $100,000 annually.



The new proposed salary threshold for exemption for HCE is $122,148.

- 90th percentile of earning for full-time salaried workers

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WHAT CHANGES DID THE DOL PROPOSE?

DOL also proposed to include a mechanism to **automatically update** the salary and compensation thresholds annually using a fixed percentile of wages or the Consumer Price Index.

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STILL QUESTIONS ABOUT FINAL RULE

- Did the DOL lower the $50,440?
  - **highly unlikely**
- Did the DOL adjust the job duties test?
  - **highly unlikely**
  - might make the rule vulnerable to a Court challenge under the Administrative Procedures Act

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STILL QUESTIONS ABOUT FINAL RULE

- What did DOL include in the $50,440?
  - Bonuses or Incentive Pay?
    - **possibly**
      - no “catch up” payments
      - non-discretionary
      - “strictly limit[ed]” – 10%?
      - tied to productivity, profitability and/or specified performance metrics
      - paid frequently “employees would need to receive the bonus payments monthly or more frequently”
  - Commissions?
    - **highly unlikely**

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IMPACT AND TIPS FOR RECLASSIFICATION

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FIRST STEPS

1. Identify employees who will need to be reclassified – i.e. currently exempt but paid less than $50,440.00 annually

2. Determine hours the employee works
   - Suffered or Permitted (even if not requested)
   - Waiting Time
   - On-Call Time
   - Meal and Rest Periods
   - Training Time
   - Travel Time
   - “Hidden” OT

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FIRST STEPS

3. Model potential costs based on possible response
   - e.g. raise pay to new threshold level, reclassify as nonexempt and pay overtime, or lower pay to offset overtime requirement)
4. Review job descriptions and tasks of impacted positions
   - determine if certain exempt tasks may be reassigned or maintained with the current position
5. Consider how pay changes or other changes in job assignments may impact your organization
6. Develop administrative implementation plans including payroll and HRIS systems, in order to ensure compliance when the regulations become official

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IMPACT OF NEW OT REGULATIONS

Financial Impact

- impact on personnel costs
  - salary increases to keep exemption?
  - increase overtime costs?
- hiring additional staff (full-time, part-time, seasonal)
- modifications to benefits (such as leave or travel policies)
- wage compression issues

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IMPACT OF NEW OT REGULATIONS

Organizational Impact

- productivity analysis
- restructuring of positions
- ability to recruit and retain talent
- staffing plan/career progression plans
- process or structural changes
  - pay practices/timekeeping/policies to accommodate increase number of employees becoming non-exempt
  - job descriptions
  - workload distribution

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IMPACT OF NEW OT REGULATIONS

Morale, Communication & Training

- employees may consider the re-classification as a demotion
- training for supervisors and re-classified employees
- may resent being classified as hourly and resist keeping time records

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KEY ISSUE: MIXED CLASSIFICATION POSITIONS

- There may be a positions that contains both exempt and non-exempt employees based solely on their salary
  - same duties and responsibilities but salaries create different classifications
  - requirements of timekeeping and possible resistance
  - monitoring “off the clock” work – including remote work
    - if employee is manager, who will do the monitoring?
  - partial-day deductions
  - benefit differentiation (exempt v. non-exempt)
  - morale issues

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KEY ISSUE: TIMEKEEPING

- It is the **employer's obligation** that non-exempt employees record their time accurately
  - if time records are inaccurate (e.g. repeating 8s), the DOL will ask the employee how many hours they worked and presume that is correct even if the employee exaggerates their hours
- what is going to be your time keeping mechanism for newly classified employees?
- who is going to monitor those time records?
  - recommend monitoring newly classified employees' records regularly at first
  - require verification

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CALCULATING OT: REGULAR RATE

- Overtime is calculated at one and a half times **regular rate -** “all remuneration for employment paid to, or on behalf of the employee”

- Regular rate Is determined by **dividing total earnings in the workweek by the total number of hours worked** in the workweek

- May not be less than the applicable minimum wage

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CALCULATING OT: REGULAR RATE

- Included in regular rate:
  - wages or salary
  - non-cash wages in form of goods, boarding & lodging
  - pay differentials and premium pay for hazardous work
  - non-discretionary bonuses
  - commissions
  - other incentive payments based on hours worked, production or efficiency

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CALCULATING OT: REGULAR RATE

- NOT Included in regular rate:
  - Sums paid as gifts
  - Payments for time not worked (paid leave)
  - Reimbursement for expenses
  - Discretionary bonuses
  - Profit sharing plans
  - Retirement and insurance plans
  - Overtime premium payments
  - Stock options

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CALCULATING OT: REGULAR RATE

Step 1: Total Straight Time Earnings (Minus Statutory Exclusions) Divided By Total Hours Worked = Regular Rate

Step 2: Regular Rate x .5 = Half Time Premium

Step 3: Half Time Premium x Overtime Hours = Total Overtime Premium Due

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EXAMPLE: HOURLY RATE + PRODUCTION BONUS

Total Hours = 48
Hourly Rate = $9.00
Bonus = $10

48 hours x $9.00 = $432.00
Bonus + $10.00
Total = $442.00

$442.00/48 hrs = $9.21 (Regular Rate)
$9.21 x 0.5 = $4.61
$4.61 x 8 hrs = $36.88 (Overtime Due)

TOTAL COMP FOR WEEK: $422.00 + $36.88 = $458.88

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EXAMPLE: DIFFERENT HOURLY RATES

Total Hours = 47
Janitor Rate = $8.50, Janitor Hours 21 hours
Cook Rate = $9.00, Cook Hours 26 hours

21 hours x $8.50 = $178.50
26 hours x $9.00 = $234.00
Total = $412.50

$412.50 / 47 hours = $8.78 (Regular Rate)
$8.78 x 0.5 = $4.39
$4.39 x 7 hours = $30.73 (Overtime Due)

TOTAL COMP FOR WEEK: $412.50 + $30.73 = $443.23

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EXAMPLE: PIECE RATES

Piece Rate Earnings = $391.00 46 hours
Waiting Time Rate = $7.25 4 hours
Production Bonus = $12.50

46 hours = $391.00
4 hours x $7.25 = $29.00
Production Bonus = $12.50
Total = $432.50

$432.50 / 50 hours = $8.65 (Regular Rate)
$8.65 x 0.5 = $4.33
$4.33 x 10 hours = $43.30 (Overtime Due)

TOTAL COMP FOR WEEK: $432.50 + $43.30 = $475.80

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EXAMPLE: WEEKLY COMMISSION

Hourly rate = $10
Hours worked - 50
Weekly Commission = $100

50 hours x $10 = $500.00
Commission = $100.00
Total = $600.00

$600.00 / 50 hours = $12.00 (Regular Rate)
$12.00 x 0.5 = $6.00
$6.00 x 10 hours = $60.00 (Overtime Due)

TOTAL COMP FOR WEEK: $600.00 + $60.00 = $660.00

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EXAMPLE: FIXED SALARY FOR FLUCTUATING HOURS

Fixed Salary $420.00 (for all hours worked)

Week 1 Hours Worked 49
Regular Rate $8.57 ($420 / 49 hours)
Additional Half-Time Rate $4.29

Salary Equals = $420.00
9 hours x $4.29 = $38.61 (Overtime Due)
Total Due = $458.61

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EXAMPLE: FIXED SALARY FOR FLUCTUATING HOURS

Fixed Salary $420.00 (for all hours worked)

Week 2 Hours Worked 41
Regular Rate $10.24 ($420 / 41 hours)
Additional Half-Time Rate $5.12

Salary Equals = $420.00
1 hour x $5.12 = $5.12 (Overtime Due)
Total Due = $425.12

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CALCULATING OT: FIXED SUM?

- Can you pay an employee a lump sum weekly to cover OT hours without regard to the number of OT hours work?
  - NO. Even if the amount of money paid is equal to or greater than the sum owed on a per-hour basis, this is not allowed.

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CALCULATING OT: SALARIED NON-EXEMPT?

- Can you pay fixed salary for workweek exceeding 40 hours? (no hourly deductions)
  - YES, but the hours need to be consistent and you still need to calculate the OT premium.
  - e.g. an employee may be hired to work a 45 hour workweek for a weekly salary of $405
    - the regular rate is $405/45 = regular rate of $9
    - the employee is entitled to the half-rate ($4.50) for the additional 5 hours ($4.50 x 5=$22.50)
    - total compensation for the week
      - $405 + $22.50 = $427.50

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NOW IS THE TIME TO CLEAN HOUSE!

Audit all of your exemptions and make any necessary changes.

- especially where you have a mixed classification position
- also take a look at independent contractor relationships, time-keeping methods, off-the-clock work

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KEY ISSUE: AUDIT REMAINING EXEMPT POSITIONS

EXECUTIVE

In order for an employee to be considered exempt as an executive, all of the following 3 criteria must be met:

1. Primary duty: manages enterprise, department or subdivision. Managing includes activities such as:

- Interviewing, selecting, training and disciplining employees
- Setting and adjusting pay and work hours
- Planning and apportioning work among employees
- Maintaining production or sales records
- Appraising employee' productivity and efficiency
- Handling employee complaints and grievances

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KEY ISSUE: AUDIT REMAINING EXEMPT POSITIONS

EXECUTIVE

In order for an employee to be considered exempt as an executive, all of the following 3 criteria must be met:

1. Primary duty: manages enterprise, department or subdivision. Managing includes activities such as:
   - Determining the techniques to be used; the type of materials, supplies, machinery, equipment or tools to be used
   - Planning and controlling the budget
   - Monitoring or implementing legal compliance measures
2. Customarily and regularly direct the work of at least 2+ full-time employees (FTEs)

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KEY ISSUE: AUDIT REMAINING EXEMPT POSITIONS

EXECUTIVE

In order for an employee to be considered exempt as an executive, all of the following 3 criteria must be met:

3. Hires or fires employees, or whose recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.
   - It does not include occasional suggestions.

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KEY ISSUE: AUDIT REMAINING EXEMPT POSITIONS

ADMINISTRATIVE

In order for an employee to be considered exempt as an administrative employee, the following 2 criteria must be met:

1. Primary duty: performs office or non-manual work directly related to management or general business operations of the employer or the employer's customers.
   - Work must be directly related to assisting with the running or servicing of the business.

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KEY ISSUE: AUDIT REMAINING EXEMPT POSITIONS

ADMINISTRATIVE

In order for an employee to be considered exempt as an administrative employee, the following 2 criteria must be met:

2. Primary duty includes exercise of discretion and independent judgment with respect to matters of significance and implies that the employee has authority to make an independent choice, free from immediate direction or supervision.

- Carries out major assignments in conducting the operations of the business
- Performs work that affects business operations to a substantial degree
- Authority to commit the employer in matters that have significant financial impact

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KEY ISSUE: AUDIT REMAINING EXEMPT POSITIONS

ADMINISTRATIVE

In order for an employee to be considered exempt as an administrative employee, the following 2 criteria must be met:

2. Primary duty includes exercise of discretion and independent judgment with respect to matters of significance and implies that the employee has authority to make an independent choice, free from immediate direction or supervision.

- Authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation
- Authority to negotiate and bind the company on significant matters
- Investigates and resolves matters of significance on behalf of management

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IMPORTANT CONSIDERATIONS

- Issues with morale and perception:
  - Employees will often see reclassification as a "demotion"
    - many employees prefer being overtime-exempt. It means they don't have to track their hours—and have more flexibility over when and where they work.
    - may resist keeping time records or accumulate "hidden" overtime.
  - Plan for how this re-classification will be communicated to affected employees.

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IMPORTANT CONSIDERATIONS

- Training newly classified non-exempt employees (and their supervisors) on:
  - Timekeeping records and procedures
  - Complying with meal/rest break requirements
  - Restrictions on working outside normal work hours, travel time, and other compensable time issues
  - Deductions for partial-day absences
- Do policies need to be updated or re-written?
  - are you going to limit the non-exempt duties “off-duty” work? do you need policy changes? (e.g. email curfew)

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DOL WILL BE KNOCKING!

- DOL's FY2017 budget proposes spending **$277 million on Wage and Hour Division enforcement**
  - $50 million more than 2016
- WHD Newsletter this week:
  - It has assisted more than 1.7 million employees since 2009.
  - It has recovered approximately $1.6 billion since 2009.
  - It recovered more than $246 million in back wages in 2015 alone for more than 240,000 workers.
  - In 2015, the Division found violations in 79% of its investigations.

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STAY TUNED

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