



Get Ready to Reclassify! – The Department of Labor’s Proposed Changes to FLSA’s Overtime Exemptions

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On July 6, 2015 the U.S. Department of Labor ("DOL") published proposed changes to the Fair Labor Standards Act's ("FLSA") overtime exemptions. The DOL's proposal would more than double the minimum salary required to qualify as an exempt executive, administrative, or professional employee. Importantly, after the end of the public-comment period, no further legislative action is required before the DOL implements the proposed rules.

Background and Current Law. The overtime requirement was one of the cornerstones of the FLSA when it was enacted by Congress in 1938. Requiring overtime pay was meant to serve two policy objectives. Congress sought to reduce unemployment by encouraging employers to hire additional workers rather than pay a premium to current workers for working long hours. Congress also sought to adequately compensate workers for the burden of having to work beyond the standard 40-hour workweek.

The FLSA exempted executive, administrative, and professional employees from the overtime requirement (commonly referred to as the "white collar" exemptions). The exemption was premised on Congress' belief that these workers would earn significantly more than minimum wage, enjoy greater benefits, and have better opportunities for advancement. These characteristics set exempt employees apart from those relying on the minimum wage and justified their exemption. Congress tasked the DOL with creating regulations to help define the scope of the white collar exemptions.

To determine which employees are exempt, the DOL created the now-familiar three-part test. First, the employee must be paid a fixed salary that is not subject to reduction because of variations in quality or quantity of work—the "salary basis test." Second, the employee must be paid a minimum weekly salary, currently \$455 per week or \$23,660 per year—the "salary level test." Finally, the employee must primarily perform duties that qualify for one of the exempt positions—the "duties test." In 2004, the DOL added an exemption for "highly compensated" employees, which it defined as those making at least \$100,000 per year and regularly performing at least one of the exempt duties of an executive, administrative, or professional employee.

In March 2014, President Obama directed the DOL to update the regulations defining which "white collar" workers are exempt from the FLSA's overtime requirement. The President noted that the current salary threshold was below the poverty level for a family of four. Moreover, as nonexempt employee wages have risen, the President reasoned that the current salary levels, which were last adjusted in 2004, no longer provided a reliable proxy for determining which employees likely performed primarily exempt duties.

Proposed Rules Changes. The DOL's proposed rules will make three major changes to the FLSA's white collar exemptions:

1. The DOL proposes setting the salary level test for all white collar exemptions to the 40th percentile of weekly earnings for full-time salaried workers. This would raise the minimum salary amount from \$455 per week (\$23,660 per year) to approximately \$970 per week (\$50,440 per year) at the time of implementation. In contrast, Washington's minimum salary amount for exempt status under the Minimum Wage Act remains set at \$250 per week.

2. The DOL proposes setting the salary threshold for highly compensated employees to the 90th percentile of all full-time salaried workers. This would raise the salary amount from \$100,000 to more than \$122,000 per year.
3. The DOL proposes establishing a mechanism for automatically updating the foregoing salary amounts on an annual basis. Specifically, the DOL has suggested the salary test could be updated each year to reflect the current 40th percentile of weekly earnings for full-time salaried workers or updated based on inflation by tying it to the Consumer Price Index. The DOL is seeking comments before deciding which methodology to adopt.

The DOL is also seeking comments on whether it should update the "duties test" for the white collar exemptions. Even though the DOL has not proposed changing the duties test, it seeks input on whether those tests have adequately screened bona fide white collar workers from workers whom the Department believes should be entitled to overtime. As many employers know, the "duties test" is often difficult to apply, and can lead to unintended liability if applied incorrectly.

Impact on State Laws. Many states passed their own minimum wage laws following passage of the FLSA. Employers are required to follow both laws and ensure that employees are paid at the most favorable wage rates. Under the proposed new rules, the FLSA may surpass many state laws as the more employee-favorable system. Consequently, all employers could be affected when the rules become final.

Preparing for the New Rules. These rule changes are designed to give more employees overtime protections and will require many employers to make significant changes to their policies and practices. In fact, the DOL estimates that in the first year alone, 4.6 million currently exempt workers will no longer qualify for the exemptions. Employers are encouraged to submit comments so that the DOL understands the true impact of the proposed rule before adopting a final rule. Employers can read the entire proposed rule and submit comments by going [here](#) until September 4, 2015.

In addition to submitting comments, employers should begin preparing for the new rules. This will require consideration of many issues, including how to communicate changes to employees; whether to update or expand timekeeping systems; additional training for supervisors, payroll personnel and other affected employees; revising compensation structures and timekeeping policies; planning for annual automatic increases to the salary test levels; and other related issues. Employers should also consider reviewing their current list of exempt employees to determine what changes will need to be made when the final regulations take effect. If you have any questions about how the new rules might affect your company, please do not hesitate to contact us.

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