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# DOL Proposed Changes to FLSA Overtime Rules

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# Introduction

On June 30, 2015, the United States Department of Labor (DOL) released proposed regulations that would modify certain provisions of the Fair Labor Standards Act (FLSA). Specifically, the proposed regulations increase the minimum salary required to be earned by an employee in order for that employee to be exempt from the FLSA overtime requirements.

# Background

The FLSA generally requires covered employers to pay their employees at least the federal minimum wage (currently \$7.25 an hour) for all hours worked, and overtime premium pay of one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek.



# Background

However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Specifically the FLSA exempts from both minimum wage and overtime protection “any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman.”



# Background

The FLSA does not define the terms “executive,” “administrative,” “professional,” or “outside salesman.”

Since 1940, the regulations have generally required each of the following three tests to be met for the exemptions to apply:

# Background

1. The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”);
2. The amount of salary paid must meet a minimum specified amount (the “salary level test”); and
3. The employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the “duties test”).



# Background

On March 13, 2014, President Obama signed a Presidential Memorandum directing the DOL to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards.

# Salary Basis Test

There were no proposed changes to the requirement that workers be paid on a salary basis – that is, a pre-determined amount that cannot be reduced because of variations in the quality or quantity of the employee's work in the proposed regulations.



# Salary Level Test

Since 2004, the regulations stipulate that, in general, any employee earning less than \$455 per week (\$23,660 a year) is a “nonexempt” employee. Under the FLSA, a nonexempt employee is entitled to overtime pay when working over 40 hours in a workweek regardless of whether the employee is paid on an hourly or salary basis.



# Salary Level Test

The DOL proposes to increase the standard salary level to qualify for exemption from the FLSA minimum wage and overtime requirements as an executive, administrative, or professional employee from \$455 a week (\$23,660 a year) to \$921 a week (\$47,892 a year), based on 2013 data.



# Salary Level Test

The regulations also proposed a mechanism for annually updating the minimum salary and the DOL is seeking comments on one of two proposed mechanisms. If one of the annual update mechanisms is implemented, the DOL anticipates that the annual salary requirement in 2016 will be \$970 a week, or \$50,440 a year.

# Salary Level Test

The DOL, in the preamble to the regulations, noted that the current salary level threshold for exemption of \$455 per week, or \$23,660 annually, is below the poverty threshold for a family of four.



# Salary Level Test

In addition, the DOL stated in the proposed regulations that it is seeking comments on whether to permit nondiscretionary bonuses and incentive payments to count toward a portion of the standard salary level test for the executive, administrative, and professional exemptions. However, the DOL “is not considering expanding the salary level test calculation to include discretionary bonuses.”



# Duties Test

The proposed regulations released by the DOL on June 30 did not include any modifications to the duties requirements of Administrative, Executive, Professional or Outside Salesman that must be met in order for these individuals to be exempt from the FLSA overtime pay requirements. However, the DOL did state that it is seeking comments as to whether the duties tests should be updated.

Currently the duties tests are as follows:

# Duties Test

## **Administrative Employees**

- A primary duty of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- A primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance.

# Duties Test

## Executive Employees

- A primary duty of management of the enterprise in which the employee is employed or manages a customarily recognized department or subdivision thereof;
- Customarily and regularly direct the work of two or more other employees; and has
- Authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

# Duties Test

## Professional Employees

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character. Advanced knowledge must be in a field of science or learning, and such knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
- Work that is original and creative in a recognized field of artistic endeavor, or;

# Duties Test

## **Professional Employees (continued)**

- Teaching in a school system or educational institution, or;
- Work as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.



# Duties Test

For each of the categories above, the employee must perform work that requires the consistent exercise of discretion and judgment or “requiring invention, imagination, or talent in a recognized field of artistic endeavor.”



# Outside Sales Employees

- A primary duty of making sales of tangible or intangible items such as goods, insurance, stocks, bonds, or real estate or obtaining orders or contracts for services or the use of facilities; and
- Customarily and regularly work away from the employer's place of business in performing the employee's primary duty.



# Highly Compensated Employees

In 2004, the DOL issued final regulations that applied a minimal duties test for “highly compensated employees.” Those regulations provided that an employee earning at least \$100,000 in total annual compensation (with at least \$455 paid weekly on a salary or fee basis) would be exempt from overtime if the employee customarily and regularly spent time on one or more exempt duties and the employee did not engage in manual work.

# Highly Compensated Employees

The proposed regulations released by the DOL on June 30, 2015 propose increasing the required salary for “highly compensated employees” to \$122,148, indexed to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers.



# What's Next

The proposed regulations were published in the *Federal Register* on July 6, 2015.

For a copy of the DOL's proposed regulations, go to the link provided below:

<http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>

See also: Fact Sheet #17A for a detailed explanation of the exemptions for Executive, Administrative and Professional, Computer and Outside Sales Employees.

# What's Next

The DOL just sent the final rule to the White House's Office of Management and Budget (OMB). This is the final step before the rule is published and made public for all to see.

# What's Next

If the OMB follows its normal review timeline, it should be approved in four to six weeks.

So if it sticks to its normal schedule — and there's no reason to think it won't — employers should be able to get eyes on the final rule by early- to mid-May.



# What's Next

The fact that the rule is already in the OMB's hands means it's most likely to avoid an entanglement with the Congressional Review Act. In fact, the act may very well be the reason the rule was submitted for review much earlier than originally anticipated.

# What's Next

In a nutshell, the act allows Congress to disapprove “major” final rules promulgated by federal agencies — like the DOL. But the disapproval can be shot down by a presidential veto — meaning the FLSA changes were highly unlikely to be challenged during President Obama’s tenure.



# What's Next

However, the act states that if a major rule is submitted to Congress with fewer than 60 session days remaining on the legislative calendar, then the next Congress will have a similar 60-day period to consider the rule. And according to recent calculations by the Congressional Research Service, if the DOL's overtime rule isn't released by the OMB by May 16, the rule will be at the mercy of the next Congress and president.



# What's Next

Bottom line: The best chance the Obama administration — and the current DOL regime — have of making the FLSA-altering overtime rule stick was to get it on the books before May 16, a deadline they're now well on their way to beating.



# When Will it Take Effect?

Despite some back-and-forth about when it was going to submit the rule to the OMB, the DOL has remained steadfast about one thing: The rules were likely to take effect 60 days after being published, and that still appears to be the plan.

As a result, employers can expect to have to be in compliance with the rule this summer — most likely by the end of July (but possibly sooner).



# Why is This Such a Big Deal?

Salary buying power has declined. There are 21.4 million EAP exempt employees. The new arrangement targets 4.6 million workers that will become eligible for overtime unless employers raise salaries.

# What Should / Can You Do?

- Hire more full-time workers and part-time workers to avoid paying overtime
- Limit overtime
- Cut benefits
- Revise job descriptions
- Raise salaries



# What Should / Can You Do?

- Find out how many hours your exempt workers are actually working

## Employee Relations Issues

- Watch jobs like assistant managers in restaurant or retail industries.
- Exempt employees do not have experience at being hourly.
- Unpaid overtime claims?
- Who do you increase or decrease?
- Treat all employees in same class the same to avoid legal discrimination issues.



# Fallout

**Can you account for every hour worked?**

**Payroll issues galore!**

- Working on the road?
- Working from home – what about telecommuters?
- Start up and shut down?

# Rumors

- New rule should be out this week
- New salary level may be reduced to \$47,000 (\$904/wk) instead of \$50,400 (\$970/wk)
- Annual update to be based on CPI urban without adjustment for different parts of the country that have a COL less than West Coast or East Coast
- Duties Test may change to the current CA Duties Test
  - More than 50% of duties must be exempt work
    - Currently there is no requirement that it be that high



Stay tuned...

# Questions?

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