

Changes to FLSA Overtime Laws Now Predicted For Late 2016

by Claire Silverman, Legal Counsel, League

Last July, the United States Department of Labor (DOL or Department) proposed updating the Fair Labor Standards Act (FLSA) regulations governing the application of minimum wage and overtime pay requirements to executive, administrative, and professional employees (commonly referred to as the “white collar” worker exemptions).

These regulations were last updated in 2004. Experts originally predicted the new rules might take effect as early as January 2016. Following a public comment period which generated almost 250,000 comments, new predictions anticipate any new regulations won't take effect until late 2016 which gives employers additional time to prepare for the changes.

GENERAL BACKGROUND

Unless exempt, employees covered by the FLSA must receive overtime pay for all hours worked over 40 in a work-week at a rate not less than one and one-half times their regular rates of pay. The FLSA's white collar exemptions exclude certain executive, administrative and professional employees from federal minimum wage and overtime requirements. Certain computer professionals and outside sales employees are also excluded from these requirements.

Currently, to qualify for exemption, a white collar employee generally must:

1. be salaried, meaning that they are 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. be paid at least a specific salary threshold, which is currently \$455 per week (the equivalent of \$23,660 annually for a full-year employee) (the "salary level test;") and
3. primarily perform executive, administrative, or professional duties, as provided in the Department's regulations (the "duties test.") Current regulations contain a relaxed duties test for certain “highly compensated employees (HCE) who receive total annual compensation of \$100,000 or more and are paid at least \$455 per week.

Certain professionals are not subject to either the salary basis or salary level tests (for example, doctors, teachers, and lawyers).



The Department's proposed rule seeks to update the salary level required for exemption and simplify the identification of nonexempt employees, thus making the executive, administrative and professional employee exemption easier for employers and workers to understand and apply.

KEY PROVISIONS OF THE PROPOSED RULE

The Department's proposed rule mainly focuses on updating the salary and compensation levels needed for white collar workers to be exempt and establishing a mechanism for automatically updating the salary level. Specifically, the Department has proposed the following:

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- set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers (\$921 per week, or \$47,892 annually using 2013 data). The Department estimates that if the final rule sets the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers, a 2016 level may be about \$970 a week, or \$50,440 a year. FAQs on the Department's web site explain that the Department believes that the 40th percentile of weekly earnings for full-time salaried workers represents the most appropriate line of demarcation between exempt and nonexempt employees because this amount "effectively distinguishes between employees who may meet

the duties requirements of the white collar exemptions and those who likely do not, without necessitating a return to the more detailed "long" duties test that existed before 2004" and "minimizes the risk that employees legally entitled to overtime will be subject to misclassification based solely on the salaries they receive, without excluding from exemption an unacceptably high number of employees who meet the duties test."

- increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers (\$122,148 annually); and

establish a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption. The Department has proposed two different methodologies for updating the standard salary and HCE total annual compensation levels. One method would keep those levels pegged to the 40th and 90th percentiles of earnings for full-time salaried workers, respectively. The other method would adjust the standard salary and HCE compensation amounts based on changes in inflation, as measured by the Consumer Price Index for all Urban Consumers (CPI-U).

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