

The DOL Proposes Dramatic Expansion in Number of Employees Eligible for Overtime

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The DOL's proposed amendments to the white collar exemptions of the Fair Labor Standards Act are predicted to eliminate the exempt status of approximately 21.4 million employees. Employers should take steps now to ensure their exempt employees will continue to qualify under the amended regulations.

In March 2014, President Obama directed the U.S. Department of Labor (DOL) to update its regulations defining which white collar workers are protected by the minimum wage and overtime standards of the Fair Labor Standards Act (FLSA). A little over a year later, in June 2015, the DOL issued its proposed amendments to the FLSA's "white collar" exemption tests for executive, administrative, and professional employees (located in 29 CFR Part 541). The DOL proposed revising the salary basis and salary level tests, but did not propose amending the duties portion of the tests. However, the DOL has suggested it may revisit the issue of the duties tests, and the proposed amendments solicited responses to questions regarding the tests. The DOL estimates its proposed regulations will eliminate the exempt status of approximately 21.4 million employees — increasing financial and regulatory burdens on employers throughout the United States.

Salary Threshold Increased

The proposed rule more than doubles the annual salary required for an employee to be considered exempt from overtime under the white collar exemptions. In the past when setting the salary level threshold for the exemptions, the DOL relied on weighted data, which minimized the impact on depressed regions and industries. However, in the proposed regulations the DOL uses Bureau of Labor Statistics data related to the compensation of all American salaried employees — without regard to low-wage regions or low-wage industries.

To qualify for the white collar exemptions under the current regulations, employees must be paid a salary of at least \$455 per week (\$23,660 annually) and perform certain exempt duties. The current threshold for the "highly-compensated" exemption is an annual salary of over \$100,000. The proposed amendments increase the salary basis test from \$455/week to \$970/week (\$50,440 annually) beginning in 2016, representing the 40th percentile of earnings for all full-time salaried workers throughout the United States. Similarly, the salary threshold for the "highly-compensated" exemption would increase from \$100,000 to \$125,148 annually, which is tied to the 90th salary percentile. Unlike the 2004 regulations, these amounts are not stagnant but will be automatically updated each year to the 40 percent or 90 percent thresholds. This automatic update could require employers to modify their payrolls each year to ensure their employees are properly classified as exempt.

Duties Requirements

Rather than proposing any specific changes to the duties portion of the test, the DOL solicited comments in response to specific questions:

1. What, if any, changes should be made to the duties tests?
2. Should employees be required to spend a minimum amount of time performing work that is their primary duty to qualify for exemption? If so, what should that minimum amount be?
3. Should the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?
4. Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider its decision to eliminate the long/short duties tests structure?
5. Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?

Response to Proposed Amendments

In response to the proposed amendments, the DOL received over 260,000 comments, many of which were submitted by business owners, companies, employees, or others with a particular interest in the legislation. Comments ranged from support of the proposed changes to severe criticism. However, several concerned employers commented on the proposed rule's broad applicability across regions, explaining that regional differences in the cost of living play a major role in the compensation of employees across the country. The DOL will review the comments it received and determine whether to make any changes to the final rule before implementing it.

Impact of Proposed Amendments

Unless the DOL changes position and uses weighted compensation data in the final rule, it will have a disproportionate impact on certain regions and industries for obvious reasons. In addition, the DOL has explicitly stated that an increased salary basis test "will accomplish the goal of setting a threshold that adequately distinguishes between employees who may meet the duties requirements . . . and those who likely do not, without necessitating a return to the more detailed long duties test." Through this statement, the DOL implicitly asserts that if employers do not agree with the 40 percent standard, it may revert to a lower percentage standard in exchange for a higher duties requirement – the long test that was eliminated in 2004. If the DOL does this, employers in every state may be required to review the exempt status of their employees, analyzing what percentage of work performed each workweek comprises exempt versus nonexempt duties.

We anticipate that the rule, in its final form, will be implemented in early 2016. Once implemented, it will go into effect quickly. Employers should begin their internal analysis of exempt positions now and identify their options to minimize negative impacts on employee relations, direct payroll costs, indirect administrative costs, and general operations. Issues employers should consider now are:

1. The cost/benefit of increasing salary to meet new salary threshold.
2. Revising duties and job descriptions to demonstrate that an individual's primary duty involves performing exempt duties over 50 percent of the time.
3. Ensuring that in practice exempt employees are actually performing exempt duties over 50 percent of the time.

We strongly recommend employers conduct this classification analysis under the guidance of an experienced wage and hour attorney due to the complexity of potential issues and the availability of the attorney-client privilege to protect candid discussions involving legal advice and risk management.

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