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## **Department of Labor Proposal Would Make More Employees Eligible for Overtime**

**By Bryan A. Stillwagon**

On June 30, 2015, the Department of Labor released its long-awaited Notice of Proposed Rulemaking that focuses on updating the minimum salary requirement for the Fair Labor Standard Act's white collar exemptions. In March 2014, President Obama directed the Department to update the FLSA's regulations with the goal of simplifying the exemption tests and bringing millions of workers under the FLSA's overtime protections.

To be excluded from the FLSA's overtime requirements, white collar employees (e.g., executive, administrative, and professional employees) must meet three tests:

1. **salary basis test** (employee must be paid a predetermined and fixed salary),
2. **salary level test** (employee's salary must meet a minimum specified amount),  
and
3. **duties test** (employee performs executive, administrative, or professional duties, as defined by the regulations).

### **Salary Tests**

Perhaps the most anticipated proposal is the new and increased level of the standard salary test, which was last updated in 2004. The current proposal significantly raises the required salary level from \$455 per week (\$23,660 annually) to \$921 per week (\$47,892 annually). The new threshold is equal to the 40th percentile of earnings for full-time salaried workers. Notably, that threshold is based on the 40th percentile in 2013. If the Final Rule adopts the 40th percentile level, the Department would likely rely on data from the first quarter of 2016, which is projected to be \$970 per week (\$50,440 annually). The Department also seeks to update those salary levels automatically either by maintaining the levels at a fixed percentile of earnings (e.g., 40th percentile) or by linking the minimum levels to changes in the Consumer Price Index for All Urban Consumers (CPI-U).

Similarly, the Department proposes increasing the salary level required to meet the FLSA's Highly Compensated Employee exemption. Currently, covered employees must earn at least \$100,000 in total annual compensation, perform office or non-manual work, and customarily and regularly perform at least one of the exempt duties of an

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exempt executive, administrative, or professional employee. If the Proposed Rule takes effect, the HCE salary test will rise to the 90th percentile (\$122,148 annually in 2013), which would also update automatically. If the Department relies on first quarter 2016 data, the minimum salary level will be around \$125,000 annually. Note that many states with state-level FLSA equivalents do not incorporate, or even expressly exclude, the HCE exemption. The Proposed Rule will further narrow the exemption's utility.

### **Duties Tests**

Although the Proposed Rule does not identify specific proposals to modify the duties tests, the Department is seeking comments on the tests' effectiveness. The Department is concerned that "the current tests may allow exemption of employees who are performing such a disproportionate amount of nonexempt work that they are not EAP [exempt executive, administrative, or professional] employees in any meaningful sense." That suggests that the Department is receptive to implementing something along the lines of a 50 percent rule.

Under the current federal test, the employee's "primary duty" must merely fall within the exempt duties; there is no time requirement associated with it. With a 50 percent rule—which is the standard under California state law—the employee must be "primarily engaged" in exempt work, meaning over half of the employee's work time must be spent performing exempt work.

### **What It Means**

Many employees currently classified as exempt from overtime will likely become non-exempt because of the increased salary level test. The Department estimates that 4.6 million currently exempt workers earn more than \$455 but less than \$921 per week and would, if the Proposed Rule takes effect, become entitled to overtime pay. Even more employees—including those earning over \$50,000 per year—will be affected if the duties tests change.

Employers can expect to incur significant costs if the Proposed Rule takes effect. Those include direct costs, such as regulatory familiarization, adjustment, and managerial costs, as well as income transfer from the employer to employees in the form of higher earnings. Although the Department claims employers may benefit from a reduction in litigation costs, only time will tell.

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