

# Department of Labor Proposes New Overtime Regulations

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On June 30, 2015, the Department of Labor (the “DOL”) released proposed modifications to its overtime exemptions under the federal Fair Labor Standards Act (the “FLSA”). The proposed revisions increase the minimum salary levels necessary to exempt certain white collar employees and highly-compensated employees from overtime pay under the FLSA. The regulations were last revised in August 2004; the long-awaited proposed revisions were prompted by President Obama’s March 2014 call to “modernize and streamline” the regulations. The DOL estimates that nearly 5 million currently exempt workers will now be entitled to overtime pay under the new rule, if it goes into effect following the required public comment period.

The FLSA, enacted in 1938, established overtime and minimum wage requirements for private sector and government employees. Under the FLSA, employers must pay non-exempt employees overtime pay (generally at the rate of one and one-half times the employees’ regular hourly rate) for all hours worked in excess of 40 hours per work week. Under Section 13 of the FLSA, certain white collar employees are exempt from overtime pay if (i) their salaries are predetermined and not adjusted for variations in quality or quantity of work (the “salary basis test”); (ii) their “primary duties” conform to the duties set forth in the “Executive,” “Administrative” or “Professional” exemptions as defined in the regulations (the “duties test”); and (iii) their salaries exceed a minimum threshold of \$455 per week (\$23,660 per year) (the “salary level test”). The proposed modification to this overtime exemption would increase the salary threshold for these exemptions to equal the 40<sup>th</sup> percentile of earnings for full-time salaried workers as of the date that the final rule goes into effect (which was \$951 per week or \$49,452 per year in the first quarter of 2015, and projected by the DOL to be \$970 per week or \$50,440 per year in the first quarter of 2016). The new rule also incorporates annual updates to the salary threshold to match the 40th percentile of earnings for full-time salaried workers as a cost-of-living adjustment.

The FLSA also provides for a special rule for “highly compensated employees” whose total annual compensation is \$100,000 or more. Such employees will be considered exempt from overtime pay if their primary duties include performing office or non-manual work and they customarily and regularly perform at least one of the exempt duties required for the “Executive,” “Administrative” or “Professional” exemptions (whereas non-highly-compensated employees have to meet all of the duties requirements of the applicable exemption). The proposed revisions increase the highly compensated exemption salary threshold to the 90th percentile of earnings for full-time salaried employees, which is \$122,148 (based on 2013 figures and to be updated as of the date that the final rule goes into effect). The proposed regulations similarly incorporate annual cost-of-living adjustments to the salary threshold for highly compensated employees.

The DOL has not yet proposed changes to the current “duties test” used to determine the above-noted white collar overtime exemptions. The DOL views the current duties test as “difficult to apply” and is considering revisions to simplify its application. Of particular concern are the number of exempt employees who perform a disproportionate amount of nonexempt work. Revisions being considered by the DOL include requiring exempt employees to spend a certain portion of their time performing their primary duty or limiting the amount of non-exempt work they may perform, as well as including additional examples of how the exemption applies to specific occupations.

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Employers must also already comply with applicable state rules for the white collar exemption, which may differ from the federal rules in significant ways. For example, in New York, the minimum salary required for the Executive and Administrative exemptions is \$656.25 per week (\$34,125 per year) through the rest of 2015 and \$675.00 per week (\$35,100 per year) effective December 31, 2015. The salary threshold in California is currently \$720 per week (\$37,440 per year), increasing to \$800 per week (\$41,600 per year) on January 1, 2016. The current salary thresholds in New York and California are higher than the current federal salary threshold but lower than the proposed new federal threshold. In addition, neither New York nor California have a “highly compensated employee” exemption analogous to that in the FLSA. The duties test also differs in California: rather than relying on what an employee’s most significant or important duties are to determine the employee’s “primary duties,” as has been the FLSA’s approach, California uses a purely quantitative approach such that to be exempt an employee’s exempt job duties must take up more than 50% of his work time.

Employers will have to determine whether their employees are exempt using the more stringent of the FLSA or applicable state tests for each aspect. For example, if the revisions to the FLSA salary level test go into effect but the FLSA primary duties test remains unchanged, a “white collar” employee in California in 2016 would be exempt from overtime only if her salary is greater than \$49,452 (or projected \$50,440) per year (the FLSA threshold) *and* if her exempt duties, no matter how important or central those duties are to her job, take up more than 50% of her work time (the California test).

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