

Legislative Blast **June 2015***

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FAIR LABOR STANDARDS ACT OVERTIME REGULATIONS UPDATE

The Department of Labor's (USDOL) proposed changes to the overtime regulations under the Fair Labor Standards Act (FLSA) have been officially released. The USDOL has issued a "Fact Sheet":

"The Department is proposing to update the regulations governing which executive, administrative, and professional employees (white collar workers) are entitled to the Fair Labor Standards Act's minimum wage and overtime pay protections. The Department last updated these regulations in 2004, and the current salary threshold for exemption is \$455 per week (\$23,660 per year). With this proposed rule, the Department seeks to update the salary level required for exemption to ensure that the FLSA's intended overtime protections are fully implemented, and to 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 Notice of Proposed Rulemaking (NPRM) focuses on updating the salary and compensation levels needed for white collar workers to be exempt. Specifically, the Department proposes to:

- set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers (\$921 per week, or \$47,892 annually);
- 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.

According to the USDOL: The Department's proposal to set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers represents the most appropriate line of demarcation between exempt and nonexempt employees. This salary level 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. As proposed, this would raise the salary threshold from \$455 a week (the equivalent of \$23,660 a year) to about \$970 a week (\$50,440 a year) in 2016.

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Also according to the USDOL: The Department is also proposing to automatically update the standard salary and HCE total annual compensation requirements to ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers. Experience has shown that the salary level test is an effective measure of exempt status only if it is up to date.

According to SHRM, which has an HR Policy Action Center on its website at www.shrm.org:

Significant Impact. Employees and employers across every industry and sector will be impacted. Most employers covered by the FLSA will need to analyze employee classifications and make other changes, by a likely 2016 effective date which will be established in the final rule. According to DOL, 11 million employees will be impacted.

Salary Level Will Increase. To be exempt currently, workers must make more than \$455/week (\$23,660 annually). The proposed rule sets the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers, which for 2013 was \$921 per week, or \$47,892 annually. If the 40th percentile approach is adopted, the 2016 level is projected to be \$970 a week, or \$50,440 annually. This will impact all sectors but it will disproportionately affect the non-profit and service sector industries as well as certain geographic areas of the country.

For the First Time Ever, DOL Proposes to Automatically Raise the Salary Level. The Department is proposing to automatically update the salary level (including for highly compensated employees) on an annual basis, either based on percentiles of earnings for full-time salaried workers or based on changes in inflation.

Changes to Highly Compensated Employees (HCE). The Department is proposing to set the HCE annual compensation level equal to the 90th percentile of earnings for full-time salaried workers (\$122,148 annually), or based on changes in inflation. Currently, in order to come within this exemption an employee must earn at least \$100,000.

Feedback Sought on Duties Test and Nondiscretionary Bonuses. While no changes have been proposed yet, the regulation acknowledges challenges associated with the duties test and seeks additional examples regarding specific occupations. Similarly, the Department wants to hear from employers about the possibility of including nondiscretionary bonuses to satisfy a portion of the standard salary requirement.

State Law Application. Employers in states with wage and hour laws that are more restrictive in their application (for example, California) will need to review their coverage requirements under federal law in light of these proposed changes.

Workplace Flexibility Reduced. Changes will require employers to reclassify a significant number of employees from exempt to non-exempt status, requiring tracking of hours worked, resulting in the loss of workplace flexibility.

SHRM has created a special section on its [“HR Policy Action Center”](http://www.shrm.org) website dedicated to content and advocacy efforts surrounding the upcoming overtime regulations (www.shrm.org).

Source: USDOL; SHRM