

FLSA Overtime Exemptions Slated for Significant Change – Are You Ready?

By Jeana M. McCormick | September 2015

On June 30, 2015, the United States Department of Labor (DOL) published its much-anticipated proposed revisions to the Fair Labor Standards Act's (FLSA) minimum wage and overtime exemptions. The proposed rules focus on overtime exemptions for executive, administrative, and professional employees, and would require that these employees earn more than double the current minimum salary threshold in order to be considered exempt employees under the FLSA. Please note that the Notice of Proposed Rulemaking was published on July 6, 2015 in the Federal Register.¹ The proposed rules were open to public comment until September 4, 2015. The DOL estimates that final rules will go into effect in 2016.

Background

The FLSA was enacted 77 years ago in 1938. At that time, the federal minimum wage was set at 25 cents per hour and the work week was 44 hours.² In March 2014, President Obama issued an Executive Order directing the DOL "to propose revisions to modernize and streamline the existing overtime regulations" for executive, administrative, and professional employees.³ As mentioned above, bona fide executive, administrative, and professional employees are exempt from overtime pay under Section 13(a)(1) of the FLSA.⁴ This exemption is the most widely used exemption under the FLSA and is referred to as the "white collar exemption."

New Minimum Salary Level for White Collar Employees

The regulations governing minimum wage and overtime exemptions for white collar employees were last updated in 2004, and set the current salary threshold exemption at \$455 per week, or \$23,660 per year.⁵ The DOL proposes to set the standard salary level at the 40th percentile of weekly earnings

for full-time salaried workers, which would be approximately \$970 per week, or \$50,440 per year in 2016.⁶ Thus, if passed, the proposed rules would more than double the salary threshold for an employee to be considered exempt under the FLSA. It is important to note that even if an employee earns more than the threshold \$50,440 salary per year, the employee must still meet the duties test in order to be exempt.⁷ While the DOL raised a number of questions about the duties test and is soliciting comments about it, the DOL did not propose any specific changes to these tests.

New Minimum Total Annual Compensation Requirement for Highly Compensated Employees

In addition to increasing the salary threshold exemption, the DOL proposes to increase the total annual compensation requirement needed to exempt highly compensated employees from overtime and minimum wage requirements from \$100,000 per year to \$122,148 per year, which is equal to the annualized value of the 90th percentile of weekly earnings for full-time salaried workers.⁸ The DOL believes that this increase will continue to cover employees who are very likely to meet all of the other requirements for exemption.⁹

Automatic Annual Update for Minimum Salary and Compensation Levels

As the DOL has only increased the minimum salary and compensation levels seven times since 1938,¹⁰ it is still considering how to automatically adjust the threshold salaries for white collar employees and compensation levels for highly compensated employees on a going forward basis.¹¹ Specifically, the DOL is looking at whether the mechanism for automatically updating the salary thresholds should

be based on the Consumer Price Index or a fixed percentile of wage earnings for full-time salaried employees.¹² These issues will be addressed in the final rule.

Similarly, we anticipate that the DOL's final rules may change whether or not nondiscretionary bonuses count towards partial satisfaction of the standard salary threshold for the white collar employees.¹³ Under the current regulations, such bonus payments are only included in calculating compensation levels for highly compensated employees and are not considered in determining compliance with the standard salary threshold for other white collar employees.¹⁴ If nondiscretionary bonuses are ultimately counted towards the standard salary threshold for white collar employees, such a change would be quite noticeable in for a variety of businesses where salaried employees often earn a substantial portion of their salary through bonuses.¹⁵

Potential Impact on Maine and New Hampshire Employers

The White House estimates that the proposed salary threshold changes would entitle approximately 5 million additional employees to overtime. If the DOL implements the rules as drafted, Employers in Maine and New Hampshire are likely to be significantly impacted by the changes because salaries in northern New England are generally lower than other regions of the United States. Thus, if an accountant in Maine earns \$40,000 per year, but an accountant in California earns \$60,000 per year, the accountant in Maine would not meet the minimum salary threshold and would not be exempt from overtime under the FLSA. Although the rules are only proposals, employers should consider auditing their employees and identifying positions that might not meet the minimum salary threshold. If an employer has positions that are not going to meet the minimum salary threshold, the employer should consider reclassifying those positions from exempt to non-exempt or raising the salaries for those positions.

Endnotes

1. 80 FR 38515.
2. United States Department of Labor, Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage*, available at <http://www.dol.gov/dol/aboutdol/history/flsa1938.htm#1>.
3. Executive Office of the President, *Updating and Modernizing Overtime Regulations*, 79 FR 15209 (March 18, 2014), available at <https://www.federalregister.gov/articles/2014/03/18/2014-06138/updated-and-modernizing-overtime-regulations>.
4. Some computer employees are also exempt from overtime requirements under Sections 13(a)(1) and 13(a)(17).
5. 80 FR 38516.
6. 80 FR 38517.
7. *Id.*
8. 80 FR 38517.
9. 80 FR 38517-38518.
10. 80 FR 38524.
11. 80 FR 38518.
12. 80 FR 38587.
13. 80 FR 38523.
14. *Id.*
15. *Id.*



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