

TIGHT AROUND THE “WHITE” COLLAR THE *PROPOSED* NEW OVERTIME REGULATIONS

How to Plan, Budget and Prepare for the Impending
Changes to the White Collar Exemptions



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FLSA – Wage & Hour Law

The Fair Labor Standards Act (FLSA) requires that most employees be paid:

- At least the federal **minimum wage** (\$7.25) for all hours worked, and
- **Overtime premium** (at time and one-half the regular rate of pay) for all hours worked over 40 hours in a workweek.

The FLSA provides an exemption from both minimum wage and overtime pay for certain **“white collar”** workers.

- The regulations governing white collar exemptions have not been revised since 2004

How Did This Happen?

March 13, 2014 Presidential Memorandum to the Secretary of Labor: Updating and Modernizing Overtime Regulations

“[R]egulations regarding exemptions from the Act's overtime requirement, particularly for executive, administrative, and professional employees (often referred to as “white collar” exemptions) have not kept up with our modern economy. Because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage.

Therefore, I hereby direct you to propose revisions to modernize and streamline the existing overtime regulations. . . and simplify the regulations to make them easier for both workers and businesses to understand and apply.”

How Did We Get Here?

- On June 30, 2015, the 295-page Notice of Proposed Rulemaking (NPRM) was published for public comment
 - NPRM is the official document that announces and explains an agency's plan to address a particular problem or accomplish a particular goal
 - The proposed rule must be published in the Federal Register to notify public and give them opportunity to comment
 - This is a **PROPOSED** rule – it is not finalized or effective yet
 - Expect final rule to be published in early 2016 (with a compliance period)
 - Generally the rule is effective no less than 30 days after date of publication in the Federal Register but can be as much as 120 days

How Did We Get Here?

- Practical impact:
 - More employees entitled to overtime
 - DOL estimates 4.7 million employees
 - More overtime claims and lawsuits
 - From 2004 (date of last revision) to 2007 the number of new FLSA suits rose 40% and there was a 98% increase in collective actions
 - Expected dramatic increase in number of DOL audits



“White Collar” Exemptions

Categories of “white collar” employees (EAP) that may be exempt from both minimum wage and overtime requirements of the FLSA:

- Executives
- Administrative
- Professionals
- Highly Skilled Computer Employees
- Outside Salespersons
- Highly Compensated Employees (HCE)



“White Collar” Exemptions

Three tests an employee must meet to qualify for exemption:

1. Salary Basis: the employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.

- no partial day deductions

2. Salary Level: the amount of the salary paid must meet a minimum specified amount.

3. Duties Test: the employee's job duties must primarily involve exempt duties as defined by the FLSA regulations.

“White Collar” Exemptions

Salary Level: the amount of the salary paid must meet a minimum specified amount.

“by reducing the number of workers for whom employers must apply the duties test to determine exempt status, the proposal is responsive to the President’s request to simplify the exemption”

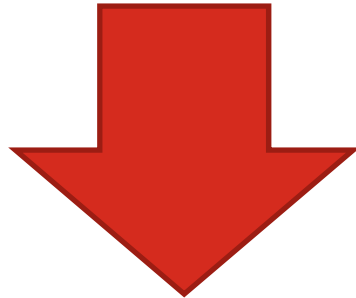
“ready method of screening out obviously nonexempt employees”

“best single test of exempt status”

“completely objective and precise measure which is not subject to differences of opinion or variations in judgment”

Salary Level

To currently qualify for exemption, employees be paid on a **salary basis** at not less than **\$455 per week** (**\$23,660.00 annually**).

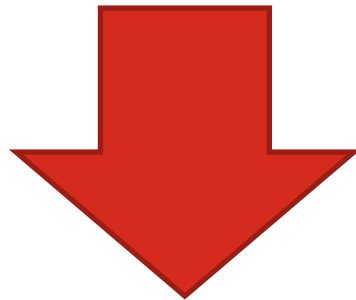


The new proposed salary threshold for exemption is \$50,440 (\$970 per week)!

- More than two times the current salary basis
- 40th percentile of weekly earnings for full-time salaried workers nationwide
 - compared to 2004 – looked at 20th percentile of salaried employees in South and retail industry

Salary Level

To currently qualify for exemption as a highly compensated employee (HCE), the salary level is \$100,000 annually.



The new proposed salary threshold for exemption for HCE is \$122,148.

- 90th percentile of earning for full-time salaried workers

Salary Level

DOL is also proposing to include a mechanism to automatically update the salary and compensation thresholds annually using a fixed percentile of wages or the Consumer Price Index.

Outside Sales Exemption


NO SALARY BASIS/LEVEL TEST!

- The employee's primary duty is to make sales or obtain orders or contracts for services.
- The employee is customarily or regularly engaged away from the employer's place of business in performing his or her primary duty.



- So far, not affected by the proposed regulations
- In DOL outreach sessions, employer representatives argued distinction between inside sales and outside sales in the application of the exemption “does not reflect the realities of the modern workplace.”
 - DOL noted that since the FLSA specifically exempts “any employee employed . . . in the capacity of outside salesman,” the Department does not have the authority to expand the regulations to exempt inside sales employees

Highly Skilled Computer Exemption

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field
 - Job duties include highly skilled computer work such as:
 - application of systems analysis techniques and procedures
 - design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - design, documentation, testing, creation or modification of computer programs related to machine operating systems
 - Current regulations say these employees must be paid at least \$455 per week OR can pay them hourly at a rate not less than \$27.63/hour
 - Salaried computer workers must now meet the new salary level of \$970 per week
 - Hourly computer employees who earn at least \$27.63 per hour and meet the job duties test are still exempt and “were excluded from analysis because they are paid hourly and will not be affected by this proposed rulemaking.”
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What Is DOL Also Considering?

- Whether revisions to the duties tests “are necessary in order to ensure that these tests fully reflect the purpose of the exemption”
 - Requiring exempt employees to spend a specified amount of time performing their primary duty (e.g. California’s 50% rule)
- Whether to include additional examples of occupations to provide guidance in administering EAP exemptions, particularly in the computer-related positions

What Is DOL Also Considering?

- Whether “to allow nondiscretionary bonuses and incentive payments to satisfy some portion of the standard salary level test.”
 - Currently, only included in calculating total annual compensation for HCE
 - For HCE allowed to make a “catch up” payment at or shortly after end of year to reach compensation requirement (still have to meet weekly salary requirement of \$455/week)
 - DOL rejects this idea for other EAP exemptions: “Department believes it is important to strictly limit the amount . . . that could be satisfied through payment of nondiscretionary bonuses and incentive pay.”

What Is DOL Also Considering?

- Whether “to allow nondiscretionary bonuses and incentive payments to satisfy some portion of the standard salary level test.”
 - Considering nondiscretionary bonuses that are tied to productivity, profitability and/or specified performance metrics
 - DOL suggests limiting bonus payments to satisfy only 10% of the weekly salary level
 - to get the 10% credit, “employees would need to receive the bonus payments monthly or more frequently.”
 - DOL is NOT considering inclusion of discretionary bonuses, board or lodging

**WHAT NOW?
All is Not Lost!
We Have a Plan!**



**DON'T GET HOT UNDER THE
WHITE COLLAR**

WHAT DO WE DO NOW???

1. Do nothing and wait it out.

- These regulations are not final . . . but waiting is missing an opportunity to use this time to analyze and prepare *before* the final regulation is published
- Risk of short compliance period (prior change gave 120 days, possibility this effective date of the final regulation will be shorter)

2. Self audit.

- Positive first step – identify affected employees and possible issues
 - Budgetary effects
 - Workforce effects (job/compensation restructuring)
 - Time keeping mechanism
 - Effect mix classification position (i.e. do you now have a managerial position that has both non-exempt and exempt employees?)
- Analysis of overtime hours
 - Note of caution: risk to questioning current exempt employees on OT hours worked

WHAT DO WE DO NOW

3. **Privileged** audit and analysis of how the proposed regulations will affect your workforce.

- Survey of affected exempt employees to compile data on overtime hours worked, including “hidden” overtime
- Analyzing impact of re-classification on payroll budget, time keeping mechanism, overtime, employee morale, policy and job structures.
- Pay and/or work hour restructuring for converted employees.
 - Providing alternatives on re-classification within the scope of FLSA regulations and the organization’s culture, concerns and budgetary issues.

4. **GOLDEN OPPORTUNITY** to analyze and correct *any* misclassification. “The law made me do it.”

FAQ: *Can we keep paying the affected employees a salary?*

- Yes . . . ***BUT***
 - This employee is now non-exempt so now you are **legally required to keep time records (DOL Fact Sheet #21)** and **pay overtime** for any hours worked over 40
 - “Hidden overtime”
 - Even if the position is scheduled for less than 40 hours, are you confident the employee is performing no duties outside working hours (e.g. answering e-mails, reading work materials, etc.)?
 - If the employee is kept at status-quo (i.e. continue paying current salary without deductions for missed work) does your payroll budget allow for the additional overtime expense?
 - Fluctuating Workweek – salary can cover all hours worked but still need to pay overtime premium (half of regular rate) for hours over 40

DON'T GET HOT UNDER THE WHITE COLLAR

- No employer is required to guarantee overtime work.
- No employer is required to pay an employee more compensation as a non-exempt employee than what the employee was earning as an exempt employee.
- The changes to the exemptions do not have to affect your labor costs. Can “back into” an hourly rate . . . must take into account overtime and “hidden” overtime.
 - As a legal matter, employers can configure the hourly wage and the anticipated overtime pay such that the employee’s total compensation is approximately the same as when the employee was paid on a salary basis.
 - Options such as fluctuating workweek/day rates.

DON'T GET HOT UNDER THE WHITE COLLAR

- Be prepared for issues with morale and perception:
 - Formerly exempt employees will often see reclassification as a “demotion”
 - May resent being classified as non-exempt and resist keeping time records or accumulate “hidden” overtime
 - Plan for how this re-classification will be communicated to affected employees

DON'T GET HOT UNDER THE WHITE COLLAR

- Training newly classified non-exempt employees on:
 - Timekeeping records and procedures
 - Complying with meal/rest break requirements
 - Restrictions on working outside normal work hours, travel time, and other compensable time issues
 - Deductions for partial-day absences
- Do policies need to be updated or re-written?

Public Comment

- **Comments are due before 11:59 p.m. on September 4, 2015.** (60 days after publication of NPRM in the Federal Register)
www.regulations.gov.
- Comments must be identified by Regulatory Information Number (RIN) 1235-AA11.
- Can be made either:
 - electronically through the Federal eRulemaking Portal
www.regulations.gov
 - or by mail to Mary Ziegler, Director of Division of Regulations, Legislation & Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave, NW, Washington, DC 20210.
- Comments will be public records.

Public Comments – Salary Level

- DOL invites comments on the proposed salary level (including for HCE) and on any alternative salary level amounts or methodologies for determining salary level.
- DOL invites comments on the effectiveness of the proposed salary level to:
 - Limit number of exempt white collar employees because they do not meet salary level test; AND
 - Reduce number of employees who fail the duties test but are subject to possible misclassification by their employers

Public Comments – Job Duties

DOL invites comments on:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?
- Should the Department look to the State of California's law (requiring that 50% 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% a better indicator of the realities of the workplace today?

Public Comments – Job Duties

- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties tests?
- 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?

Public Comments – Bonus Payments

DOL invites comments on:

- Whether the Department should permit nondiscretionary bonuses and incentive payments to count toward partial satisfaction of the salary level test.
- The Department seeks information on what industries commonly have pay arrangements that include nondiscretionary bonuses and incentive payments, what types of employees typically earn nondiscretionary bonuses and incentive payments, the types of nondiscretionary compensation employees receive, and to what extent including nondiscretionary bonuses and incentive payments as part of the salary level would advance or hinder that test's ability to serve as a dividing line between exempt and nonexempt employees.

Public Comments – Bonus Payments

- Whether payment on a monthly basis is the appropriate interval for such nondiscretionary compensation that will be credited toward the weekly salary requirement, and whether 10% is the appropriate limit on the amount of the salary requirement that can be satisfied by nondiscretionary bonuses and incentive payments (with the remaining 90 percent paid on a salary or fee basis in accordance with the regulations).

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REPEAT WEBINAR on Tuesday, July 14th at 10:30 Central/11:30 Eastern



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Our Footprint

