

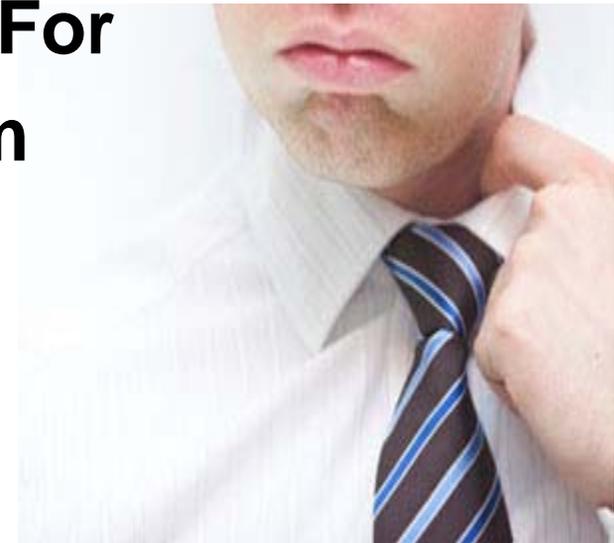
# THE DOL'S PROPOSED SALARY REGULATIONS

## How to Fight Them, Plan For Them and Live With Them

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# STARTING AT THE BEGINNING . . .

## WAGE & HOUR LAW

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The Fair Labor Standards Act (FLSA) is the federal law that governs wage and hour. The FLSA has three basic requirements:

- Employees must be paid at least federal **minimum wage** (\$7.25) for all hours worked;
- Employees must be paid an **overtime premium** (at time and one-half the regular rate of pay) for all hours worked over 40 hours in a workweek; and,
- Record keeping.

# STARTING AT THE BEGINNING . . .

## WAGE & HOUR LAW

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**Non-exempt employees** = eligible for overtime

**Exempt employees** = ineligible for overtime

### SO WHICH EMPLOYEES ARE “EXEMPT”?



- Executive
- Administrative
- Professional
- Outside Salespersons
- Highly Skilled Computer Employees
- Highly Compensated Employees (HCE)

# WHAT CHANGES DID THE DOL PROPOSE?

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Remember, exemption depends on three things:

1. How employees are paid
2. How much they are paid
3. What kind of work do they do



# WHAT CHANGES DID THE DOL PROPOSE?

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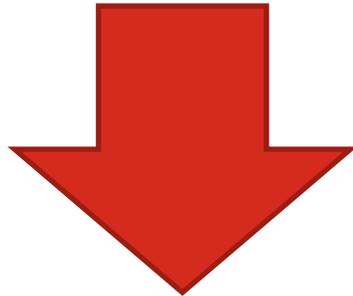
Remember, exemption depends on three things:

1. How employees are paid **➡ SALARY BASIS**
  - 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. How much they are paid **➡ SALARY LEVEL**
  - currently this is \$455/week or \$23,660 per year
3. What ***kind of work*** do they do **➡ JOB DUTIES TEST**
  - each category of exemption – Executive, Administrative and Professional - has different required job duties as set forth in the regulations (ex. - regularly supervises two or more employees)

# WHAT CHANGES DID THE DOL PROPOSE?

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



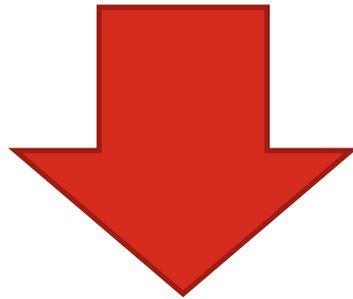
**The new proposed salary threshold for exemption is \$50,440 (\$970 per week)!**

- 40<sup>th</sup> percentile of weekly earnings for full-time salaried workers nationwide

# WHAT CHANGES DID THE DOL PROPOSE?

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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.**

- 90<sup>th</sup> percentile of earning for full-time salaried workers

# WHAT IS INCLUDED IN THE \$50,044?

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- **Bonuses or Incentive Pay??** probably . . . but
  - no “catch up” payments
  - non-discretionary
  - “strictly limit[ed]” – 10%?
  - tied to productivity, profitability and/or specified performance metrics
  - paid frequently “employees would need to receive the bonus payments monthly or more frequently”
- **Commissions?** doubtful but seeking comments
- **Other paid benefits?** no



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# SUMMARY OF PROPOSED CHANGES

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1. Increase of salary level test
  - to 40<sup>th</sup> percentile of weekly earnings for full-time salaried worker (\$50,440/year for 2016)
2. Increase total compensation requirement for highly exempt employees (HCE)
  - to 90<sup>th</sup> percentile of weekly earnings for full-time salaried worker (\$122,148/year for 2016)
3. Establish a mechanism for automatically updating the salary and compensation levels annually.
  - percentage or tied to CPI

## WHAT DOES THIS MEAN?

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Any of your salaried "exempt" employees (i.e. currently ineligible for overtime pay) that make less than \$970 per week or \$50,440 annually **would be re-classified as non-exempt and entitled to overtime** if the current proposal is incorporated into the final rule.

- also required to comply with the DOL's **record keeping** requirements for non-exempt employees:
  - hours worked each day
  - total hours worked each week
  - daily/weekly straight time earnings for the workweek
  - overtime earnings for the workweek

# WHAT ABOUT THE JOB DUTIES?

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The DOL is seeking comments on whether to revise the duties test.

- Also whether they should requiring exempt employees to spend a specified amount of time performing their primary duty There is speculation on whether change in the duties test will be included in this proposed change to the regulations after the DOL receives comments.

# DO AFFECTED EMPLOYEES NEED TO BECOME HOURLY EMPLOYEES?

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- NO. Hourly is not the same as “non-exempt.”
  - when properly done, non-exempt employees can be paid a salary
- Employers can pay a non-exempt employee any way they want (e.g. hourly, piece rate, salary, commission) **as long as:**
  - the employee receives at least the equivalent of minimum wage for every hour worked in the workweek; *and*,
  - the employee receives overtime pay for any hour worked in excess of 40 in the workweek.

# HOW TO OPPOSE THE PROPOSED RULE

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1. Comment
2. Litigate
3. Legislate

# HOW TO OPPOSE THE PROPOSED RULE

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- “Notice and Comment” Rulemaking
  - 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](http://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](http://www.regulations.gov)
    - or by mail to Mary Ziegler, Director of Division of Regulations, Legislation & Interpretation, Wage & Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave, NW, Washington, DC 20210.
  - Comments will be public records.

# HOW TO OPPOSE THE PROPOSED RULE

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- Litigate
  - Business groups
  - Litigation against NLRB rules will provide a roadmap
- Basis for litigation
  - Regulation exceeds statutory authority
  - Regulation was implemented by flawed process (noncompliance with Administrative Procedures Act).

# HOW TO OPPOSE THE PROPOSED RULE

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- Legislate
  - Congressional Review Act
  - DOL must notify congress of the new rule.
  - Congress can pass a “joint resolution of disapproval”
  - Any passed legislation would have to override a veto by the president.

# HOW TO PLAN FOR THE PROPOSED RULE

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1. Identify affected employees.
2. Assess financial and nonfinancial impact.
3. Create Implementation Plan

# HOW TO PLAN FOR THE PROPOSED RULE

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- Identify affected employees
  - All employees currently treated as exempt who make less than \$50,440.
  - Determine whether to make changes based on compensation or based on position.
    - It is possible to have exempt and nonexempt employees in the same position.

# HOW TO PLAN FOR THE PROPOSED RULE

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- Assessing financial and nonfinancial impact.
  - Determine how to treat affected employees going forward:
    - Option # 1 – Divide current salary by 52 weeks and then by 40.
    - Option # 2 – Raise employee to \$50,440.
    - Option # 3 – Reverse engineer regular rate to account for OT assumptions.

# HOW TO PLAN FOR THE PROPOSED RULE

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- Hypothetical Employee
  - Joe
  - HR Generalist
  - \$40,000 Salary
  - Generally works from 8 a.m. to 5:30 p.m. Monday Through Friday with a 30 minute lunch break.
  - 45 hours per week

# HOW TO PLAN FOR THE PROPOSED RULE

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- Joe – Option # 1
  - \$19.23/hr regular rate
    - ( $\$40,000/\text{year} \div 52 \text{ weeks} \div 40 \text{ hours}$ )
  - \$28.85/hr OT rate
    - ( $\$19.23 \times 1.5$ )
  - \$ 913.45 per week
    - ( $19.23/\text{hr} \times 40 \text{ hours} + \$28.85/\text{hr} \times 5 \text{ hours}$ )
  - \$47,499.40
    - ( $\$913.45 \text{ per week} \times 52 \text{ weeks}$ )

# HOW TO PLAN FOR THE PROPOSED RULE

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- Joe - Option # 2
  - Joe is paid an annual salary of \$50,440
  - Remember that the salary test is indexed, so in order to maintain the exemption you will need to raise Joe's salary every year by at least as much as the increase in the salary test (which will likely be tied to CPI).

# HOW TO PLAN FOR THE PROPOSED RULE

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- Joe - Option # 3
  - \$40,000 = \$769.23 per week (52 weeks)
  - \$16.20/hr regular rate/\$24.30 OT rate
    - $(\$16.20 \times 40) + (\$24.30 \times 5) = \$769.50$
    - $\$769.50 \text{ per week} \times 52 \text{ weeks} = \$40,014$
  - If Joe works over 45 hours in a week, you would need to pay additional OT

# HOW TO PLAN FOR THE PROPOSED RULE

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- Planning – Non-financial considerations
  - Partial day deductions
  - Hidden OT (smartphones, e-mail, after hours events)
  - Time tracking
  - Morale issues
  - Communication/Training/Rollout
  - Updating policies

## Litigation Risks

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- Cultural resistance to paying OT for tasks that were previously expected
- Make sure that everything that you are counting toward the salary threshold is allowed to be counted
- Employees not understanding the math
- Misclassification risks if duties test changes
- Retaliation claims

# WHAT DO WE DO NOW???

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## AUDIT!

- **Self Audit** – identifying affected employees and possible impact issues
  - gathering data for compensation analysis
  - reviewing policies on pay practices, leave, etc. and impact on newly classified non-exempt employees
- **Outside Audit**
  - ***privileged***
  - assist in compiling data and providing legal alternatives on re-classification
  - golden opportunity to analyze and correct *any* misclassification . . . “The law made us do it”