

PROPOSED NEW FLSA EXEMPTION RULES

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On June 30, 2015, President Obama and Secretary of Labor Perez issued proposed changes to the “white collar” and related overtime exemption regulations.

Salary Levels

The Department of Labor (“DOL”) proposes to:

- Set the minimum salary required to qualify for the “white collar” exemption to the 40th percentile of weekly earnings for full-time salaried workers. By the time the final rule is issued in 2016, the DOL expects the 40th percentile will be \$970 per week or \$50,440 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 or \$122,148 annually from the current \$100,000 threshold; and
- Tie future increases to the salary levels to either inflation or percentile of weekly earnings.

The DOL is also considering whether nondiscretionary bonuses can be used to satisfy a portion of the standard salary requirement.

Duties Tests

The DOL is not currently proposing any changes to the duties tests to determine if an employee qualifies for an exemption under the Fair Labor Standard Act (“FLSA”) section 13. However, the DOL did request comments whether changes to the duties tests are warranted in light of the proposed salary adjustments. Specifically, the DOL seeks comments regarding the following issues:

- What, if any, changes should be made to the tests?
- Should the DOL look to California, where workers are required to spend at least 50% of their time on exempt duties to qualify for an exemption as a model?

- Is there a better threshold than 50% of an employee's time to determine if an employee qualifies for an exemption?
- Does the current single standard duties test for each exemption appropriately define the differences between exempt and nonexempt employees?
- Should the concurrent duties regulation for executive employees that allows them to perform both exempt and nonexempt duties concurrently be modified or is it working appropriately?

It should be noted that the DOL's failure to propose specific regulatory changes to the duties tests creates an argument that the DOL is precluded from making regulatory changes to the tests as part of this rulemaking. However, this will not necessarily prevent some modifications to the duties tests from appearing in the final regulations.

Caveat

It should also be noted that the proposed salary changes are not yet in effect, and employers are not required to take any immediate action. There has been a large outcry in the business community protesting these proposed changes. In response, it has been reported that any proposed changes might not be issued until late 2016 and won't take effect until 2017.

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