

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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STARTING AT THE BEGINNING . . .

WAGE & HOUR LAW

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.

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“EXEMPT”

STARTING AT THE BEGINNING . . .

WAGE & HOUR LAW

Non-exempt employees = eligible for overtime

Exempt employees = ineligible for overtime

SO WHICH EMPLOYEES ARE “EXEMPT”?

- for most employees, whether they are exempt or non-exempt depends on:
 - how they are paid
 - how much they are paid
 - what kind of work do they do

STARTING AT THE BEGINNING . . .

WAGE & HOUR LAW

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SO WHICH EMPLOYEES ARE “EXEMPT”?



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

HOW DID WE GET HERE??

March 13, 2014 Presidential Memorandum to the Secretary of Labor

- The “white collar” exemption regulations are outdated.
- Millions of Americans should be paid overtime and are not because the regulations are outdated.

*“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??



DOL went to work
and 15 months later (on June 30, 2015) . . .

The ***proposed*** changes to the FLSA regulations on
the “white collar exemptions” were published.

295-page Notice of Proposed Rulemaking (NPRM)
Find on DOL’s webpage or www.regulations.gov RIN
1225-AA11

WHAT CHANGES DID THE DOL PROPOSE?

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?

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?

Remember, exemption depends on three tests:

1. How employees are paid

- employees

Must satisfy ALL THREE of these tests to be exempt from overtime.

-

2. How

-

Paying salary alone is not enough!

3. What

- employees

Salaried employee is not the same as "exempt" employee.

EXECUTIVE, ADMINISTRATIVE & PROFESSIONAL DUTIES TEST

Employees must have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more employees)

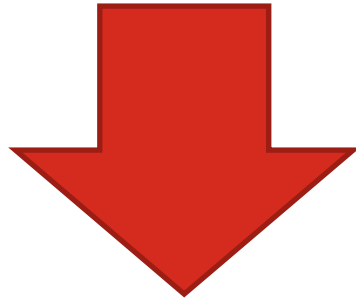
WHAT CHANGES DID THE DOL PROPOSE?

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 & Professional have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more employees)

WHAT CHANGES DID THE DOL PROPOSE?

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

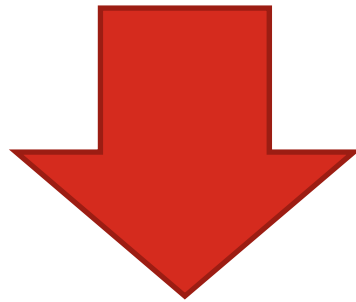


The new proposed salary threshold for exemption is \$50,440 (\$970 per week)!

- 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

WHAT CHANGES DID THE DOL PROPOSE?

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

WHAT IS INCLUDED IN THE \$50,440?

- **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

AND THERE'S MORE . . .

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.

SUMMARY OF PROPOSED CHANGES

1. Increase of salary level test
 - to 40th 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 90th 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

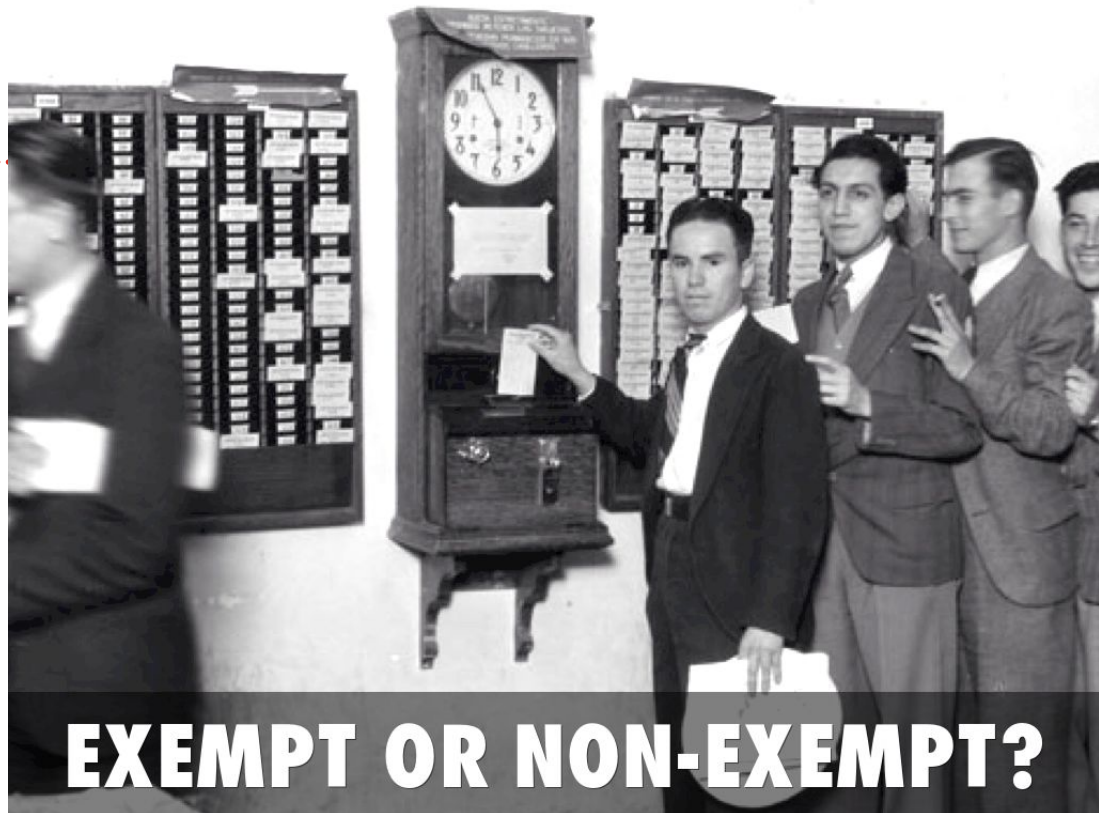
WHAT DOES THIS MEAN?

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

- 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

DO AFFECTED EMPLOYEES NEED TO BECOME HOURLY EMPLOYEES?

- 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.



EXEMPT OR NON-EXEMPT?

SO WHAT HAPPENS NOW?

WHAT IS THE PROCESS NOW?

- “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.
 - 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 & Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave, NW, Washington, DC 20210.
 - Comments will be public records.

WHAT ABOUT THE JOB DUTIES?

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

- Also whether they should require exempt employees to spend a specified amount of time performing their primary duty (e.g. California's 50% rule).
- 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.
 - Unlikely. We will likely see another proposed change addressing the duties test next year.

WHAT IS THE PROCESS NOW?

After comment period ends, DOL will either:

- proceed with the proposed changes (issue a Final Rule);
- issue a new or modified proposal (this will include a new comment period); or,
- take no action on the proposed rule.

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MOST LIKELY

expect Final Rule will be published and go into effect in
early 2016

PRACTICAL IMPACT

- More employees entitled to overtime
 - DOL estimates almost 5 million employees will become non-exempt under the new regulations
- 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
- Expect increase in number of DOL audits



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



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

IMPORTANT CONSIDERATIONS

- Which employees will possibly be re-classified?
- How many work hours is the organization currently receiving for the compensation?
 - “hidden overtime” - even if the position is scheduled for less than 40 hours/week, are you confident the employee is performing no duties outside working hours (e.g. answering e-mails, reading work materials, etc.)?
- Time tracking mechanism

IMPORTANT CONSIDERATIONS

- Any currently “exempt” positions where you will now have both “exempt” and “non-exempt” employees?
 - are you going to make partial day deductions (i.e. for tardiness or leaving early) for the non-exempt employees (can’t for the exempt employees without threatening exemption)?
 - will there be a morale or other issue if some of the employees in the same job position are having to keep track of hours while others do not?

IMPORTANT CONSIDERATIONS

- Issues with morale and perception:
 - Employees will often see reclassification as a “demotion”
 - Many employees prefer being overtime-exempt. It means they don’t have to track their hours—and have more flexibility over when and where they work.
 - May resist keeping time records or accumulate “hidden” overtime.
 - Plan for how this re-classification will be communicated to affected employees.

IMPORTANT CONSIDERATIONS

- 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?
 - are you going to limit the non-exempt duties “off-duty” work? do you need policy changes? (e.g. email curfew)

WHAT DO WE DO NOW???

Can do nothing and wait

- 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 (in the prior 2004 change the DOL gave 120 days from the publication of the final rule; it's possible this effective date of the final regulation will be much shorter)

WHAT DO WE DO NOW???

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”

ALL IS NOT LOST

- 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.

STAY TUNED

BAKER DONELSON will keep you updated with alerts and follow-up webinars. Make sure you are on our mailing list!



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Our Footprint

