

PUBLICATION

A Wolf in Sheep's Clothing? The Department of Labor's Proposed Changes to the White Collar Exemptions

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On June 29, 2015, the Department of Labor published its long-anticipated proposed rule and request for comments on changing the "white collar" exemptions for the executive, administrative and professional exemptions under the Fair Labor Standards Act.¹ Employers are scrambling to determine the impact and implications of the rule while employees are touting it as a victory for the average worker. The DOL proposed a dramatic increase to the threshold salary level needed to qualify for the white collar exemptions from \$455/week (\$23,660.00/year) to \$970/week (\$50,440.00/year).² The DOL wants to "update the salary level to insure that the FLSA's intended overtime protections are fully implemented, and to *simplify* the identification of nonexempt employees, thus making the [white collar exemptions] *easier* for employers and workers to understand." The DOL also proposes to automatically update the salary level (by either a fixed percentage or at the Consumer Price Index) annually to prevent the level from becoming outdated. Lastly, and most importantly, the DOL is also considering changing the duties test of the white collar exemptions.

The DOL commented that the duties test for the white collar exemptions is a core requirement for the exemption. It is concerned about employees in lower level management positions who may be classified as exempt, and thus ineligible for overtime pay, even though they are spending a significant amount of their worktime (in some cases more than 50 percent) performing non-exempt work. It cites California's requirement for white collar exemptions where employees must spend at least 50 percent of their time performing their primary exempt duty to qualify for exemption, and excluding time during which nonexempt and exempt work is performed concurrently.

The proposed new salary level is purported to be based upon the 40th percentile of the salaries of all full-time salaried workers as estimated by the Bureau of Labor Statistics. Between 1949 and 2004, the white collar exemptions included two versions of the duties test. The so-called "long" test, which involved a more rigorous set of duties criteria, was paired with a lower salary level. In contrast, the "short" test imposed fewer duties requirements and came with a higher salary level. In 2004, the DOL replaced the two-test structure with a single "standard duties test" for each category. The DOL contends that the \$970 weekly proposed salary level test, is *less than* the salary of a standard duties test which would come with a higher salary level. A standard duties test would be the equivalent of the pre-2004 "short" duties test, which would have less duties requirements and a higher salary level. According to the DOL, because the standard duties test was intended to work with a higher salary level (as per the pre-2004 "short" test) and because the current proposed salary level is *below* the historic average for the short test salary, "a salary level significantly below the 40th percentile would necessitate a more robust duties test to insure proper application of the exemption."

While the DOL is not proposing specific regulatory changes to the duties test at this time, it is seeking additional information on the duties test for consideration in the final rule. Specifically, the DOL seeks comments on the following issues concerning the duties test:

What, if any, changes should be made to the duties test?

Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, what should that minimum amount be?

Should the DOL look to the state of California's law (requiring that 50 percent of an employee's time is spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the work place today?

Does a single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the DOL reconsider its decision to eliminate the long/short duties test structure?

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 non-exempt employees into the exemption? Alternatively, should there be a limitation on the amount of non-exempt work? To what extent are exempt lower-level executive employees performing non-exempt work?

While the DOL proposal addresses other matters, by far the most drastic current proposal is the more than double increase of the salary level. If imposed, this change alone will alter the way many employers do business. A change in the duties test for the white collar exemptions also seems to be in the works. While no such rule was proposed, the DOL seemed biased in favor of a change. One thing is clear in the proposal, the DOL is seeking to increase the number of employees that qualify for overtime pay. By asking for comments, could the DOL be attempting to back-door the rule-making process and impose a new duties test? If so, will it re-implement the long and short duties tests of years ago? Or will it enact the California rule? If white collar employees were required to work 50 percent of their time in their primary duty to be exempt, the legal landscape would change even more drastically than by just increasing the salary level. Either way, expect a drastic change leading to an increase in litigation over this issue and more cases being decided by a jury as opposed to a summary judgment. If this occurs, it would not exactly be simpler nor easier for employers to understand.

During the short 60-day comment period (comments are due no later than September 4, 2015), employers should immediately contact their employment attorney for the purpose of assisting them in making comments to the DOL about its veiled attempt to change the duties test.

¹ The outside sales exemption and computer exemption were discussed as well.

² This amount is expected in 2016 when the regulation would likely become effective.