

Urgent Alert: U.S. DOL Proposes Major Changes to Exempt Salary Status

Labor & Employment Law Update

By Jeffrey Risch and Sara Zorich on June 30, 2015

Today, the U.S. Department of Labor ("DOL") has announced that they are issuing a proposed rule to increase the minimum salary requirements under the Fair Labor Standards Act for exempt employees. The final proposed rule will be issued in the Federal Register and will provide a comment period for the public.

The proposed rule sets forth guidance and requests comment on the following proposed changes:

1. Set the minimum salary level to qualify for the white collar exemptions at 40% of the national weekly earnings for full-time salaried employees (\$921 per week or \$47,892 annually but expected to increase to \$970 a week and \$50,440 annually in 2016);
2. Increase the minimum salary for Highly Compensated Employees to 90% of the national weekly earnings of full-time salaried workers (\$122,148 annually);
3. Establish a mechanism for automatically updating the minimum salary to meet the exemption on a yearly basis. While the proposed rule sets forth different types of mechanisms for calculating the automatic update (using a fixed percentile of wage earnings or using the CPI-U (an economic indicator for measuring inflation)) they do not identify which mechanism will be utilized;
4. Increase the minimum salary level for exempt employees in American Samoa to \$774 per week; and
5. Change 29 CFR 541.709 to increase the current base rate for employees in the motion picture industry from \$695 to \$1,404 per week.

As stated, this is a proposed rule that is subject to a required comment period. The rule will not go into effect until the comment period has ended. However, employers MUST be cognizant of the proposed salary increases and begin contemplating how this is going to affect your current workforce.

Further, while not proposing any current rulemaking on the issues identified below, the proposed rule requests public comment on the following:

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1. Whether to allow non-discretionary, incentive bonuses and/or commissions to satisfy 10% of the standard salary requirement for the white collar exemptions and if such are allowed how often these bonuses/commissions must be paid (monthly or more frequently);
2. Whether changes should be made to the duties test for the white collar exemptions including:
 1. Whether employees should be required to spend a minimum amount of time performing work that is their primary duty for qualifying for the exemption and what that minimum amount should be, if any?
 2. Should the DOL follow the California state model and require 50% of an employee's time be spent performing the employee's exempt primary duty?
 3. Does the current duties test appropriately distinguish between exempt and non-exempt employees? Should the long/short tests be brought back?
 4. Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and non-exempt duties concurrently) working or should there be a limit on the amount of non-exempt work?
3. Whether the Department should add examples of additional occupations to provide guidance for employers in administering the exemptions?
4. Examples from employers in the computer and technology industries as to what additional occupational titles or categories should be included in the examples along with duties that would generally meet or fail the exemption.

These additional inquiries are indications that the DOL is looking to potentially make further revisions to the exemptions.

In Light of the Proposed Regulations, Employers Should Analyze the Following:

1. How many of your current employees will be affected by this new rule?
2. Is a salary increase for those who do not currently meet the salary requirement a plausible financial decision to the required increases?
3. Are there job positions that should now be reclassified as non-exempt and the employees will now be entitled to overtime if they work over 40 hours?
4. Tightening up policies regarding working overtime and working with management to limit the number of overtime hours worked for non-exempt employees.
5. Reviewing handbooks and policies regarding exempt and non-exempt status.
6. Reviewing benefits applicable to exempt and non-exempt employees and how a change in status may impact the benefits to your employees.

Employers have OPTIONS Regarding these Proposed DOL Changes:

1. Increase the employee's salary to that proposed in the new regulations so they continue to meet the exemption;
2. Keep the salary the same and pay the required overtime payments based on the employee's regular rate of pay;
3. Reduce the employee's salary or change the employee to hourly at a lower rate so the total earnings do not change after overtime is paid;
4. Eliminate the employee working any overtime hours; or
5. Some combination of the above options.

The attorneys at Amundsen Davis are here to assist employers in navigating these business changes.

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