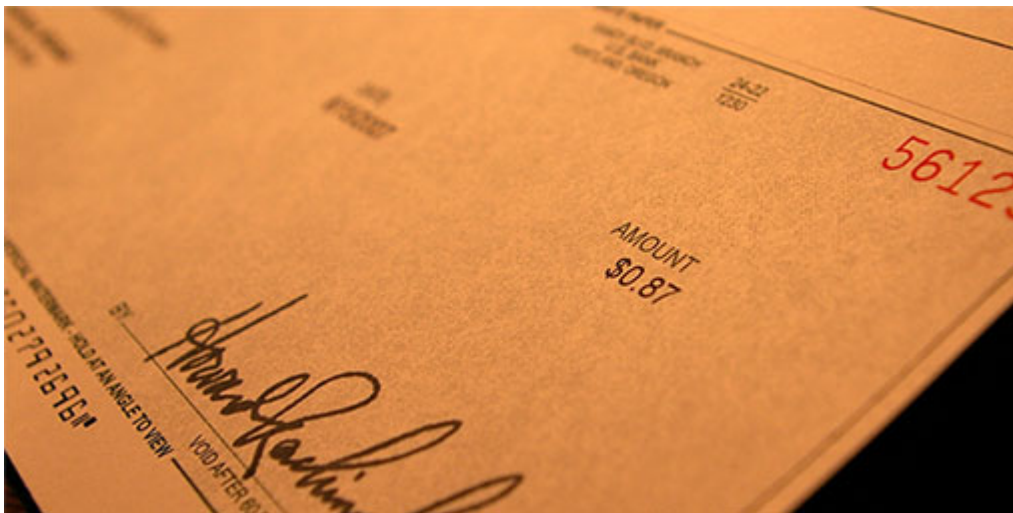


Department of Labor Issues Long-Anticipated Rule Increasing Salary Level Test Applicable to White Collar Exemptions Under the FLSA

July 01, 2015



On June 30, the Department of Labor's Wage Hour Division (WHD) issued its long-anticipated proposed rule and request for comments concerning recommended changes to the Fair Labor Standards Act (FLSA) white collar exemptions from overtime requirements. The proposed rule was issued in response to President Obama's March 13, 2014 memorandum to the Secretary of Labor asking the WHD to analyze, overhaul, and streamline the exemptions, ostensibly to increase the number of employees who are eligible for overtime pay. Since 1940, the regulations implementing the white collar exemptions have generally required that an employer pay employees overtime for hours worked in excess of 40 unless the employer could establish that: 1) it paid the employee a predetermined and fixed salary; 2) the amount of the salary met a specified level ("salary level test"); and, 3) the employee's job duties primarily involved executive, administrative, and professional duties defined by the regulations. The proposed rule change impacts the "salary level test" and increases the minimum salary level,

currently \$455 per week, to a projected \$970 per week (or \$50,440 per year) in 2016, when the rule is expected to be finalized.[1] The standard salary level was determined by looking at the 40th percentile of earnings for fulltime salaried workers from nationwide salary and wage data from the Current Population Survey, jointly administered by the Census Bureau and the Bureau of Labor Statistics. The salary level test has not been amended since 2004, and is currently below the poverty level threshold for a family of four. Simply put, if adopted in its present form, employers will be required to pay overtime to any currently exempt executive, administrative, or professional employee who is not paid the proposed minimum salary level, regardless of the employee's job duties and responsibilities. The Department estimates that roughly 4.6 million employees will be affected in 2016. The proposed rule also proposes automatic annual increases to the salary test to guarantee that exemption requirements keep pace with increasing wages overall, to be published annually in the Federal Register. Contrary to press and Bar predictions , the proposed rule does not presently recommend any changes to the duties tests in the current regulations. The Department believes that the proposed salary level change is "the simplest method for securing the effectiveness of the salary level as a bright-line for ensuring that employees entitled to the [FLSA's] overtime protections are not exempted." In other words, the salary level proposed is considered sufficient to keep those jobs that may be on the fringe of the exemption based on job duties from possibly being misclassified as exempt because the salary level will serve as an objective disqualifier. The Department though is still seeking comments as to whether the current duties tests meet the purpose of the exemptions, specifically asking for input into 1) whether non-exempt work should be limited either by percentage or other bases; and, 2) whether additional examples should be provided in the regulations to more fully explain the duties tests. In addition to increased wage costs for employers, the proposed rule may also increase employer record keeping obligations under the FLSA, as the number of employees subject to daily records retention obligations will increase. Conversely, the Department proposes that FLSA litigation will decrease as the increased salary level test will provide for less ambiguity because failure to meet the salary threshold will render any evaluation of the subjective duties requirements of the exemptions unnecessary. Interested persons have 60 days from the rule's publication in the Federal Register to provide comments. Although not yet final, given that the current salary test has not been changed since 2004, it is unlikely that the salary level set in the Final Rule will be far off the current proposal, if changed at all. You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA11, by either of the following methods: Electronic Comments: Submit comments through the Federal eRulemaking Portal <http://www.regulations.gov>. Follow the instructions for submitting comments. Mail: Address written submissions to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington D.C. 20210. ___ [1] The proposed rule also increases the

minimum salary threshold for the highly compensated employee exemptions from \$100,000 per year to \$122,148 per year. *Image source: michael kooiman*

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