

## **U.S. Department of Labor's Proposed Rule on Overtime**

### **Overview**

At the direction of President Obama, on June 30, 2015, the U.S. Department of Labor (DOL or Department) issued a proposed rule that would change federal overtime exemptions for administrative, executive, professional, and computer professional employees, the so-called "white collar" worker classifications that have long been exempt from being paid time-and-one-half for working hours over 40 per week. The public is given 60 days to comment on the proposed rule.

The last previous revision to these exemptions occurred in 2004, during the Bush Administration. Prior to those revisions, the criteria for the overtime exemptions had not changed significantly in 50 years. Today's proposed changes to the overtime exemptions will touch almost every employer in the country, including the construction industry. If the changes become final, it will be much more difficult for employers to treat mid-level managers and professionals as exempt from overtime pay, thereby forcing employers to make hard staffing and economic choices in the workplace. DOL's proposal is expected to face strong opposition from many business groups and is likely to be challenged in Congress and the courts.

### **The Current Federal Overtime Exemptions for White Collar Employees**

The Fair Labor Standards Act (FLSA) has long required all covered employers to pay time-and-one-half the regular hourly rate to all non-exempt employees who work more than 40 hours in a week. The Act expressly exempts employers from having to pay overtime to any employees employed as bona fide executive, administrative, professional and outside sales employees, along with computer professional employees. To qualify for this "white collar" exemption, employees generally must meet certain tests regarding their job duties and must be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status.

DOL's regulations further state that highly compensated employees performing office or non-manual work who are paid total annual compensation of \$100,000 or more are exempt from overtime if they customarily and regularly perform just one of the duties of an exempt executive, administrative or professional employee as defined in the regulations.

The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. DOL's current rules state that non-management employees in construction trades (as well as production and maintenance jobs) are not exempt no matter how highly paid they might be, if they spend significant time working with their hands and tools in the field, as opposed to supervising other workers.

### **DOL's Proposal To Narrow The White Collar Exemptions**

DOL's proposed rule will affect both public and private work by all employers covered by the FLSA, which includes the vast majority of construction contractors, subcontractors and suppliers. The proposal includes increasing the minimum salary level to the 40<sup>th</sup> percentile of

weekly earnings for full time salaried workers, which the Department estimates at \$50,440 for 2016. The Department also considered several other alternative salary thresholds, including:

- ‘Adjusting the current level—which was set in 2004—for inflation, which would be \$29,172. This equals approximately the 15<sup>th</sup> percentile of earnings for all full time salaried workers and is a 23 percent increase over the current threshold.
- Applying the same formula used to update the salary in 2004, which was set to the 20<sup>th</sup> percentile of earnings for full time salaried employees in the South and retail. This would result in a minimum salary threshold of \$30,004. This equals approximately the 15<sup>th</sup> percentile of earnings for all full time salaried workers and is a 27 percent increase over the current threshold.
- Setting the new minimum threshold at median earnings for all wage and salaried workers combined, which is \$40,352. This median provides a “rough dividing line between the generally lower paid hourly workers, who are overtime protected and the generally higher-paid salaried workers who may be exempt. This equals approximately the 30<sup>th</sup> percentile of earnings for all full time salaried workers and is a 71 percent increase over the current threshold.
- Adjusting the 1975 “short test” level for inflation, which would be \$56,316. This equals approximately the 50<sup>th</sup> percentile of earnings for all full time salaried workers and is a 138 percent increase over the current threshold

DOL also proposes to automatically update the salary and compensation levels on an annual basis to the 40<sup>th</sup> percentile or by indexing the \$921 number to the Consumer Price Index for all Urban Consumers (CPI-U). DOL is considering whether to allow nondiscretionary bonuses, such as certain production or performance-based bonuses, to satisfy a portion of the standard salary test requirement. The proposal does not make any changes to the standard duties test; however the Department is seeking comment on whether the current tests are working as intended to screen out employees who are not bona fide white collar exempt. For more information on the proposal visit: <http://www.dol.gov/whd/overtime/NPRM2015/>