

News & Types: Employment, Labor & Benefits Update

# Proposed Rule Would Require Overtime Pay For All Workers Earning Less Than \$50,440 Per Year

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Practices: Employment, Labor & Benefits

## EXECUTIVE SUMMARY:

The U.S. Department of Labor ("DOL") issued a Proposed Rule that seeks to increase the salary level required for an employee to be considered exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA") and, therefore, not entitled to receive overtime pay. The DOL is also proposing that the salary level automatically increase each year. Currently, an exempt employee must be paid a minimum salary of \$455 per week (\$23,660 per year). The Proposed Rule would increase the minimum salary level to approximately \$970 per week (\$50,440 per year). As a result, many employees who are currently classified as exempt employees (not entitled to overtime) will automatically be considered non-exempt employees and eligible for overtime pay for all hours worked in excess of 40 hours in a given workweek. Because the Final Rule will likely be issued in early 2016, and because employers will only be given 30 to 120 days to comply, it is important to identify all employees who are currently classified as exempt employees and determine the impact of the rule on the company's budget and work procedures.

The FLSA guarantees a minimum wage and overtime at a rate of not less than one and one-half times an employee's regular rate of pay for all hours worked over 40 hours in a given workweek. Section 13(a)(1) of the FLSA provides several exemptions that exclude certain "white collar employees" from the minimum wage and overtime requirements. These "white collar exemptions" require exempt employees to meet three tests: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"), (2) the amount of salary paid must meet a minimum specified amount (the "salary level test") and (3) the employee's duties must primarily involve executive, administrative or professional duties (the "duties test"). Outside sales people and some computer professionals are also considered exempt employees.

The DOL believes that the salary level test is the "best single test" of exempt status. Under the current regulations, an exempt employee must be paid at least a minimum salary of \$455 per week (\$23,660 per year). The Proposed Rule would automatically raise the minimum salary level to approximately \$970 per week (\$50,440 per year) and provide a mechanism to automatically update the salary level on an annual basis using either a fixed percentile of wages or the Consumer Price Index.

By increasing the salary level, the DOL believes it is creating a "bright-line" test for employers. In short, unless an employee earns \$970 per week (\$50,440 per year), the employee must be considered a non-exempt employee and entitled to overtime pay. Additionally, because of the salary level increase, the DOL believes that FLSA litigation may be reduced because employers will not be required to apply the duties test to many positions.

**ACTION REQUIRED:**

In analyzing the impact of the Proposed Rule, employers will need to (1) identify all affected positions and be prepared to begin paying these employees overtime pay or adjust their salaries to meet the new level, (2) review all timekeeping procedures to ensure that formerly exempt employees now record their time on a daily basis, (3) consider the importance of paying for off-the-clock time and travel time to newly non-exempt employees, and (4) consider how to communicate these changes to employees who feel that they are "professionals" who have "earned" the designation "exempt employee" because of their education, experience or years with the company.