
Who Burned Our 'Regs? - Overtime Proposal Turns Up Heat On Employers Again, More Than Doubling Salary Test

By Paul A. Wilhelm / Jun 30, 2015

The Department of Labor has unveiled the long-promised proposed changes to the regulations covering white collar exemptions from overtime under the Fair Labor Standards Act ("FLSA"). It is an ambitious plan that would impose a sea change among many sectors of the American workforce. The proposed regulations are *not* in effect, and are subject to a comment period before the final regulations issue.

The five major proposals are to:

1. On the effective date of the regulation, raise the minimum annual salary level required for "white collar" exemptions to approximately **\$50,440** (or about \$970 per week), up from the current \$23,660 (\$455 per week) - an increase of **113%**.
2. Raise the minimum salary for those covered under the "highly compensated employee" exemption, from \$100,000 in total compensation annually, to \$122,148 - an increase of **22%**.
3. Impose an escalator provision into the FLSA, automatically "updating" the above salary levels by tying them annually and *ad infinitum* to the newly-proposed fortieth percentile national measure (as defined) of earnings for full-time salaried employees, or based on changes in inflation, as measured by the CPI for all Urban Consumers.
4. Seek comment on the inclusion of nondiscretionary (*e.g.*, some performance or production) bonuses to satisfy a portion of the new salary level test.
5. Seek comment on possible changes to the standard duties tests for "white collar" exempt employees, which may include limits, or new sorts of limits, upon the amount of "nonexempt work" that can be performed by an exempt employee.

The proposed regulations appear more heavily weighted in favor of employers' operations in urban and more populous areas, and appear less in line with wage rates in more rural areas. For example, a review of two states, Michigan and Pennsylvania, shows this reality. The latest Bureau of Labor Statistics data shows employers in a mere six of Michigan's 83 counties (7.2%), and a mere eleven of Pennsylvania's 67 counties (16.4%) (in each case, usually the most populous counties), pay, on average, weekly wages of over \$970. See Fourth Quarter, 2014 BLS data, all industries (June 2015).

The proposed regulations are set to go into effect late this year or early next year after a notice and comment period. These proposed regulations stand to affect nearly all employers, especially those in retail, hospitality, education, social services, and sectors within healthcare and manufacturing. The FLSA does *not* contain an exemption for most small businesses, most non-profits, states or local governments.

If you would like to submit comments regarding the proposed regulations, feel free to contact us for assistance, and we will connect you with a member of our **DOL Comment Team**. Comments are due 60 days after the date of publication in the *Federal Register* (the proposed regulation is not yet published as of the preparation of this Alert).

Also, now is the right time to study your workforce structures and hiring and staffing models, including auditing your teams and individuals for compliance with the existing and proposed DOL mandates. We can provide you with a specially-tailored **DOL Audit Team**, which includes Lean Six Sigma expertise in time studies, and help you assess and maintain exempt status based on actual duties (beyond mere job titles).

To connect with our DOL Comment Team or our DOL Audit Team, contact Paul Wilhelm at (313)309-4269, PWilhelm@ClarkHill.com, or another member of Clark Hill's Labor And Employment Practice Group.