
Coates' Canons Blog: They're Finally Here: The U.S. Department of Labor's Proposed New FLSA Regulations

By Diane Juffras

Article: <http://canons.sog.unc.edu/?p=8162>

This entry was posted on July 20, 2015 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act

Here's something to shake you out of a nice summer nap: it is virtually certain that beginning in 2016, local governments will have to pay time-and-one-half overtime premium pay to some employees who now earn a straight salary regardless of how many extra hours they work. If a proposed new federal rule goes into effect – as it likely will – nobody paid less than \$50,440 will be exempt from the overtime requirement of the federal Fair Labor Standards Act (FLSA). The city manager, the human resources director, the solid waste director and the chief sheriff's deputy are all now exempt because of the nature of their duties. You pay them a salary and you don't owe them overtime pay when they work more than 40 hours. But if any of those positions make less than \$50,440 per year, that is about to change.

The United States Department of Labor (DOL) published the proposed new overtime rule on July 6, 2015. The primary change is to raise the minimum weekly salary that a person must be paid before qualifying for exemption from overtime premium pay. Under the current rules, the minimum salary requirement is \$455 per week or \$23,660 on an annualized basis. Under the proposed new rule, the minimum salary requirement will increase to the 40th percentile of full-time salaried workers – currently \$921 per week or \$47,892 per year. That figure is projected to be \$970 per week or \$50,440 per year when the final rule is issued in 2016. DOL also proposes that the minimum salary be automatically increased on an annual basis. In a related change, DOL may revise the exempt duties tests in the final rule. It may be hard to qualify employees as exempt from overtime even when their salaries are above the new minimum.

Background

Since 1938, the FLSA has required employers to pay employees at a premium rate of one-and-one-half times their regular rate of pay for every hour over 40 that they work in a workweek. Certain employees are exempt from the overtime requirement. Since 2004 – the last time DOL revised the overtime regulations – the exemption requirements have been set out this way:

1. the position must be paid on a salary basis;
2. the position must be paid a minimum of \$466 per week (\$23,660 annually); and
3. the position's duties must satisfy either the executive, administrative or professional duties test.

I have discussed these requirements in previous blog posts. Read about the salary basis test [here](#), the executive duties test [here](#), the administrative duties test [here](#) and [here](#), and the professional duties test [here](#) and [here](#).

Last March, when President Obama directed the U.S. Secretary of Labor to modernize the FLSA regulations, he took note of the inadequacy of the minimum salary threshold of \$455 per week. The threshold was designed to provide a clear, bright-line test for determining the exempt status of most positions. In other words, if an employee made above a certain amount, he or she was probably doing work that should be exempt. In 1975, 65 percent of the nation's workers fell below the then-threshold of \$250 per week and were eligible for overtime. Today's salary threshold of \$455 per week is below the poverty line for a family of four. Only 12 percent of salaried workers nationwide fall below it, which means that the salary threshold no provides a bright-line test. For 88 percent of the country's workforce, a duties test analysis must be undertaken to determine exempt status. In the introductory comments to the proposed new rule, DOL says that it made a mistake in setting the salary threshold at \$455 per week in 2004. So it comes as no surprise that the proposed new rules raise the salary threshold – the only question for employment lawyers and human resources professionals has been “by how much?”

The Proposed New Salary Threshold

Why did DOL settle on a salary of at least \$921 per week in the proposed rule — most likely \$970 per week in the final rule? Why not \$850 or \$1,000 per week? Because \$921 per week, or \$47,982 annually, was the 40th percentile of earnings for a full-time (35 hours per week), full-year, salaried worker in 2013. DOL believes that a standard salary level at the 40th percentile of all full-time salaried employees will adequately distinguish between employees whose positions may meet the duties test requirements and those whose positions are likely not to do so. Reducing the number of employees for whom employers must perform a duties test analysis simplifies the exemption, as the President directed DOL to do.

By the time the final rule becomes effective, new data will allow DOL to update the minimum salary threshold to reflect the new 40th percentile of earnings for a full-time, salaried employees. DOL's stated intention is to rely on data from the first quarter of 2016 (which means that the final rule will not be issued until sometime after March 2016). The latest data available is for the first quarter of 2015: there the 40th percentile of the salaries earned by full-time employees is \$951 per week or \$49,452 per year. DOL assumes that there will be two percent growth between the first quarter of 2015 and first quarter of 2016 and therefore projects that the 40th percentile weekly salary figure that it will use in the final rule will be \$970 per week or \$50,440 per year. The actual numbers may turn out to be a bit different.

Automatically Updating the Minimum Salary Threshold

In the past, the minimum salary threshold has not been updated in a timely way. It was most recently increased in 2004, but the increase before that was in 1975. DOL has therefore proposed a regular, automatic update to the minimum salary threshold to 1) ensure the salary threshold maintains its effectiveness as a bright line rule to distinguish between exempt and nonexempt positions and 2) make changes to the threshold more predictable for employers. DOL proposes to update the threshold amount one of two ways: maintaining the level at a fixed 40th percentile of earnings or increasing the amount based on changes to the Consumer Price Index-Urban (CPI-U). The CPI-U is used by other federal agencies to update figures as varied as the IRS' personal income tax brackets and baseline eligibility for government assistance. Regardless of which method DOL chooses, it is clear that the threshold will be updated annually. DOL is interested in receiving comments about which method to use and about whether the threshold should be updated more frequently than annually. The changes are written into the draft rules as alternatives, so there will be no additional notice and comment period once DOL decides which method to use.

The Highly Compensated Employee Salary Threshold

DOL has also proposed an increase in the minimum salary necessary for a position to qualify as exempt under the special highly-compensated employee exemption, from \$100,000 to \$122,148 annually. This exemption was created in 2004. Currently, to qualify, an employee must be paid \$100,000 annually and must customarily and regularly perform just one of the exempt duties identified in either the executive, administrative or professional duties tests. Unlike the executive, administrative or professional exemptions, the highly-compensated exemption allows for compensation in excess of \$455 per week to be in the form of nondiscretionary bonuses or commissions and allows employers to make a final "catch-up" payment to bring the employee's salary up to \$100,000 per year within one month after the end of the year. [See 29 CFR 541.601\(b\)](#). The idea behind the highly-compensated individual exemption is that the very high salary threshold offsets this exemption's minimal duties test. The highly-compensated individual salary threshold will also be updated annually using the same methodology as the executive, administrative and professional exemption salary threshold.

The Computer Professional Exemption

Although this exemption is a subcategory of the professional exemption, it really stands on its own. Under the computer professional exemption (which I discuss in detail [here](#)), an employee who is paid at a minimum rate of \$27.63 per hour — either on a salary basis or on an hourly basis — and who satisfies the computer professional duties test (see [here](#)) may be considered exempt from overtime. DOL will not revise the minimum hourly rate of this exemption or its duties test because Congress has set the requirements with great specificity in the text of the FLSA itself.

The Exemption for Teachers

Under the [current FLSA regulations](#), any employee with "a primary duty of teaching, tutoring, instructing or lecturing in the

activity of imparting knowledge” who is employed as a teacher in a public school, college or university will qualify for the teachers’ professional exemption. Neither the salary basis and salary threshold tests, nor the general requirements for the professional exemption currently apply to the exemption for teachers. DOL has not proposed or suggested any change to the professional exemption for teachers and it is likely that teachers exemption will continue to be not subject to the salary basis and salary threshold tests when the final rule is issued next year.

Positions Likely to Be Affected by the New Salary Threshold

We can get some idea of how a change in the minimum salary required for exempt status will play out in North Carolina local government by taking a look at the School of Government’s [County Salaries in North Carolina 2015](#). In 11 out of 69 counties reporting salaries for the human resources director position, for example, the actual annual salary paid in 2015 was less than the likely new threshold of \$50,440. For the position of county solid waste director, 17 of 55 reporting counties pay salaries below the proposed new threshold. And 35 counties pay their chief deputy sheriff – a job that seems likely to satisfy either the executive or the administrative duties test – less than \$50,440 per year.

On the municipal side, a recently advertised position for town manager in a North Carolina municipality with a population of just under 1,500 people specified a pay range of between \$40,000 and \$50,000. In that jurisdiction, the position of town manager would not qualify as exempt under the proposed new rule even though the job duties of the town manager position satisfy the executive exemption. Very small municipalities may find it very hard to classify any of its employees as exempt.

Revising the Duties Tests

In addition to the question of the minimum salary threshold for overtime exemption, DOL has raised a second big issue. It has asked for public comment on the need to revise the executive, administrative and professional duties tests. DOL is particularly concerned that the current tests may allow employees performing a disproportionate amount of nonexempt work along with exempt work to be classified as exempt. Before the 2004 revisions to the FLSA regulations, each of the duties tests had both a long and a short form, with the long form being coupled with a lower salary threshold and the short form with a higher salary threshold. The long duties tests had a 20 percent limit on the amount of time that an exempt employee could spend on nonexempt tasks. The 2004 revisions did away with the long and short duties tests in favor of a single standard test for each of the exemptions. DOL now fears that under the single tests, employees who would not have “passed” the long duties tests are being classified as exempt inappropriately.

DOL has identified as an area of concern instances where a management employee performs nonexempt duties more than half of the time, but is nevertheless classified as exempt based on the notion that the exempt duties are so important that they should be considered the employee’s primary duties. It is similarly concerned with the classification of a management employee as exempt when the employee performs exempt and nonexempt duties at the same time – when, for example, an executive employee thinks about management while performing nonexempt duties.

DOL is considering a number of options. It could require that exempt employees spend a minimum amount of time performing their primary duty – DOL cites the 50% minimum primary duty time required by California law as one possibility – or it could limit the amount of nonexempt work an exempt employee may perform, or it could add additional examples of how the duties tests apply to particular occupations – or all of these.

Although DOL has not proposed any changes to the duties tests in the proposed rule, it has left open the possibility that it may nonetheless incorporate revisions to the tests in the final rule. To satisfy the notice and comment requirement of federal agency rulemaking, DOL has invited comment on the specific types of changes it is considering, namely:

1. Whether changes should be made to the duties tests at all?
2. If so, what changes should be made?
3. Whether employees should be required to spend a minimum amount of time performing the exempt work that is their primary duty in order to qualify for an exemption? If so, what should that amount be?
4. Whether DOL should look to California’s law requiring that 50 percent of an employee’s time be spent exclusively on work that is the employee’s primary duty as a model? Or should some other threshold that is less than 50 percent of an employee’s time worked a better indicator of the realities of the workplace today?
5. Whether the single standard duties test for each of the executive, administrative and professional exemptions

- appropriately distinguishes between exempt and on exempt employees?
6. Whether DOL should consider reinstating the long and short duties tests?
 7. Whether allowing executive employees to perform both exempt and nonexempt duties concurrently works as intended or whether it needs to be modified to avoid sweeping nonexempt employees into the exemption?
 8. What specific additional examples of nonexempt and exempt occupations would be most helpful to include in the regulations?

How to Comment on the Proposed Rule

The public comment period on the proposed rule runs until September 4, 2015. You may submit comments electronically at <http://www.regulations.gov/#!docketDetail;D=WHD-2015-0001> by clicking on the button that says "Comment Now!" You can also read the comments of others on the proposed rule there. Comments are public record.

Conclusion

The commentary accompanying the proposed rule indicates that DOL expects to issue a final rule that will be effective sometime in 2016. Given its reasons for setting the new salary threshold at the 40th percentile of weekly earnings of full-time employees (projected to be \$970 per week), and the number of comments about the appropriate minimum salary that DOL received from stakeholders before it concluded its work on the proposed rule, it seems likely that whatever the actual number turns out to be, the final rule will set the threshold at the 40th percentile.

North Carolina local government employers should therefore immediately begin analyzing the salaries they pay exempt employees. How many currently exempt positions actually fall below the likely minimum salary of \$970 per week (\$50,440 a year). For those positions that fall below the proposed new salary threshold, local governments will have to decide what to do. Will it be financially feasible to raise those salaries to the new threshold and maintain the position's exempt status? Making that determination may require analyzing the number of hours per week that persons in that position worked last year (if, that is, the jurisdiction requires exempt employees to keep track of their time) and then, after converting the exempt salary to an hourly rate, calculating what the overtime cost would be if the employee continued to work a similar number of hours. Employers may also decrease the converted hourly rate so that once overtime is taken into account, an employee's total compensation for the year approximates the salary earned when the employees was classified as exempt. Another alternative may be to hire part-time employees to do the work that would otherwise be done by formerly exempt employees who would have to be paid overtime under the new threshold.

DOL is clearly concerned about the number of employees who are classified as exempt while performing some level of nonexempt duties. Employers should therefore not be surprised if the final rule contains some limitation on the amount of time that an exempt employee may spend on nonexempt duties. Identifying those exempt positions whose duties include some nonexempt work would be a good way to prepare for possible regulation in this area.

The proposed rule may be found [here](#) or [here](#).

Links

- www.law.cornell.edu/cfr/text/29/541.601
- www.law.cornell.edu/cfr/text/29/541.303
- www.sog.unc.edu/node/518
- www.regulations.gov/#!docketDetail;D=WHD-2015-0001
- www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf
- www.federalregister.gov/articles/2015/07/06/2015-15464/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and