## DOL Overtime Proposed Regulations Memo

**DOL proposed regulations overtime review**: The major change in the proposed regulations impacts the salary level test. **DOL proposes to increase the standard salary level to qualify for exemption from the FLSA overtime requirements as an executive, administrative, or professional employee from $455 a week ($23,660 a year) to an anticipated $970 a week ($50,440 a year), based on proposed 2016 data. The regulations also proposed a mechanism for annually updating the minimum salary and the DOL is seeking comments on one of two proposed mechanisms.**

**The exemption amount for “highly compensated employees” would also be modified by the proposed regulations.** In 2004, the DOL issued final regulations that applied a minimal duties test for “highly compensated employees,” stating that those earning at least $100,000 in total annual compensation would be exempt from overtime if they customarily and regularly spent time on one or more exempt duties and did not engage in manual work. The DOL proposed regulations would increase the required salary for “highly compensated employees” to $122,148, indexed to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers.

Although the DOL proposed regulations did not include any modifications to the duties requirements of Administrative, Executive, Professional or Outside Salesman that must be met in order for these individuals to be exempt from the FLSA overtime pay requirements, it did state that it is seeking comments as to whether the duties tests should be updated. Currently, administrative employees are exempt if (1) a primary duty of the performance of office or non-manual work directly relates to the management or general business operations of the employer or the employer’s customers; and (2) a primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance. For executive employees, there must be: (1) a primary duty of management of the enterprise in which the employee is employed or manages a customarily recognized department or subdivision thereof; (2) customarily and regularly direct the work of two or more other employees; and (3) possess authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight. For professional employees, the duties test requires that either: (1) the employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character. Advanced knowledge must be in a field of science or learning, and such knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction; (2)work that is original and creative in a recognized field of artistic endeavor; (3)teaching in a school system or educational institution, or (4)work as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

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**Action anticipated soon:** Although DOL continues to be tight-lipped about the proposed regulations released last summer reports continue to indicate that it is diligently processing over 250,000 comments last fall and plans to release final regulations this summer with an effective date prior to the end of the calendar year. While the $50,440 figure represents the 40th percentile of the average salary earned by full-time employees throughout the US, there remains speculation that this figure could be subject to change. Of equal concern is the potential change that DOL could make to the standard “duties” test that currently permits many employers to exempt certain executive, professional and administrative employees from minimum wage and overtime rules.

The DOL proposal remains the object of intense lobbying and concern by employers, representative organizations, as well as among lawmakers on Capitol Hill. A broad coalition of associations and business groups (Business Roundtable, National Federation of Independent Business, US Chamber of Commerce) have formed the “Partnership to Protect Workplace Opportunity” ( see [www.protectingopportunity.org](http://www.protectingopportunity.org) for the current 57 members) According to their website, it is “dedicated to advocating the interests of its members in the expected regulatory debate on potential changes to the FLSA overtime regulations. The Partnership’s members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.” Most recently a group of public sector employees representing state and local governments, public schools, public institutions of higher education and other public sector entities sent a letter to Congress expressing serious concerns with the proposed overtime rule. It urges congressional leaders to contact DOL and the Administration and request they reconsider the rule as the proposal’s unintended consequences will adversely affect public sector employees and threaten public institutions’ abilities to fulfill the critical missions they perform on behalf of the American public.

**Congressional reaction:** Earlier this month a group of Democratic senators submitted a letter to Labor Secretary Perez urging the agency to move quickly to finalize the overtime rules noting that while the cost of education, childcare, and retirement have risen, wages have remained virtually unchanged. The letter notes that in 1975, overtime protections covered nearly 62 percent of full-time salaried workers—a stark contrast from just 8 percent of full-time salaried workers eligible today. They note that raising the overtime pay threshold to $50,440 could restore protections to more than five million full-time salaried workers, creating $1.4 billion in wages in the first year alone.

Republican members seem to be united in their opposition to the proposed changes. A hearing held last fall in the House Small Business Committee charged that DOL “vastly underestimated the small business compliance costs” and failed to consider numerous key small entities affected by the rule.

In late February the House Committee on Education and the Workforce held a hearing on the” Every Student Succeeds Act” where Acting Secretary of Education John B. King Jr was urged to speak with Secretary Perez about the unintended consequences the overtime proposal will have on colleges and school districts.

The Protecting Opportunity coalition members expect that there will be a push during the fiscal year 2017 DOL appropriations process to impose restrictions the ability of the agency to finalize or implement the overtime regulations. In addition, others have called on Congress to exercise its prerogative under the Congressional Review Act to overrule the regulations, when and if, the proposals are made final.