

Proposed Changes to Federal Overtime Rules Could Impact Employers

The Department of Labor (DOL) recently announced the highly anticipated proposed federal overtime rules under the Fair Labor Standard Act (FLSA), coming more than a year after President Obama directed the Secretary of Labor to begin creating new federal overtime rules.

Before the proposed changes were announced, many employers did not need to worry too much about the FLSA. Why? Because issues covered by the FLSA are also covered by their state laws, and in most cases, contain similar or more favorable conditions for employees. (Note: when both state and federal law govern the same issue, you follow the law more favorable to the employee). Thus, employees working in California are generally governed by California overtime laws, which are the most favorable to them. In Nevada, employment law relies heavily on the federal regulations. But all this may change for states who don't always follow federal regulations if the proposed federal overtime rules pass.

The rules are primarily aimed at changing the minimum salary requirements that must be met before an employee qualifies for the federal "white collar" overtime exemptions for executive, administrative and professional employees.

Salary Test

The DOL proposes to update the baseline salary level for overtime exemptions and seeks to automatically update the salary level to keep it from becoming outdated. In general, employees must meet a minimum salary requirement to be classified as exempt. The salary threshold to be exempt will be significantly higher under the proposed rule — higher than California's current minimum salary requirement, for example, — which means that California employers may be affected.

Currently, the minimum salary level under federal law is \$455 per week (\$23,660 annually for a full-time employee). This level was set in 2004.

Under the proposed rules, the minimum salary level is projected to increase to **\$970 per week (\$50,440 annually)** in 2016, when the rules would be expected to become effective. Those employees earning less than this amount would be nonexempt. This change would greatly increase the number of employees entitled to overtime. It would also decrease the ability to have part-time positions which are exempt.

How would this increase affect California employers?

The proposed federal salary threshold is higher than the current salary threshold in California. Under the proposed federal rules, more California employees would potentially be nonexempt under the FLSA and entitled to overtime because they don't meet the federal minimum salary threshold.

Currently, to be exempt in California, an employee must earn a minimum monthly salary of two times

the state minimum wage, which amounts to \$3,120 per month and \$37,440 a year. Beginning January 1, 2016, the minimum annual salary requirement in California will rise to \$41,600 when the state minimum wage increases to \$10 per hour (Note: Under California law, the minimum salary requirement for exempt employees is based on the state minimum wage, not the minimum wage rate that may be applied by any local ordinance).

As mentioned, employers must comply with the law that gives the most protection to the employee.

An example of what could happen in 2016:

- Employees making less than \$50,440 would be nonexempt under federal law and entitled to overtime under the FLSA rules;
- Employees making less than \$41,600 could also be nonexempt under California law; and
- Employees making more than \$41,600 but less than \$50,400 could be exempt under California law but nonexempt under federal law and entitled to weekly overtime under the FLSA.

The salary threshold, under the proposed rule, would be updated annually without further rulemaking. The DOL is considering two different methods for calculating annual updates to the rule and is seeking comment on which method is the most appropriate.

The DOL is also considering increasing the highly-compensated-employee salary test to \$122,148. Currently, under the FLSA certain “highly compensated” employees can be classified as exempt if they have a total annual compensation of at least \$100,00, are compensated on a salary basis and meet other tests.

The proposed minimum salary threshold may not end up as the final rule. Those with an interest should send in comments during the public comment period. For more information on submitting comments, see below.

Duties Test

Generally, to meet one of the white-collar exemptions, an employee must not only meet the salary threshold but must also meet the “duties” test. Although the DOL has not proposed any specific regulations relating to job duties, the DOL is seeking comments on whether adjustments are necessary. Specifically, ***the DOL is looking at whether to adopt California’s duties test*** — a test that, in part, requires an employee to spend more than half of his/her time engaged in exempt duties to qualify for the exemption.

The DOL is posing the following questions:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty to qualify for exemption? If so, what should that minimum amount be?
- Should the department 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? Is 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?

- Does the single standard-duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties tests structure?
- Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately? Or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt, lower-level executive employees performing nonexempt work?

We'll be watching the progress of proposed changes over the next 15 months, as any change is likely to take place before the present administration leaves office.

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