



U.S. Department of Labor – Wage & Hour Compliance*

Shelley M. Jackson
Plews Shadley Racher & Braun LLP
sjackson@psrb.com
(317)637-0700

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Sources of Federal Authority for Wage/Hour Matters

1. **Fair Labor Standards Act** – Comprehensive federal statute covering most full and part time employees of private businesses and governmental entities (with certain exceptions)
2. **U.S. Department of Labor** – Administers and enforces FLSA, including through DOL regulations implementing FLSA
3. **Courts** interpreting FLSA *or* DOL regulations

U.S. Department of Labor – Administers and enforces FLSA, including through DOL regulations implementing FLSA



Rulemaking Timeline: What has happened?

- **March 13, 2014** President Obama issues a presidential memorandum instructing DOL to update its regulations regarding which white collar workers are protected by FLSA's minimum wage and overtime requirements.
- **2014-2015** DOL conducts listening tour and drafts proposed rule.
- **July 6, 2015** Proposed rule is published in the Federal Register with 60-day comment period.
- **September 4, 2015** Comment period ends.



Rulemaking Timeline: What's next?



1. USDOL is currently reviewing hundreds of thousands of comments received prior to drafting final rule.
2. Issuance of final rule will be published in Federal Register; timeline is not definite, although sometime in mid-2016 is prevailing thought.
3. Post-implementation challenges (legislative or judicial) may impact final effect of rule.



Current Rule: Executive Exemption

1. The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
2. The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent;
and
4. The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

USDOL Fact Sheet #17(b):

http://www.dol.gov/whd/overtime/fs17b_executive.pdf



Current Rule: Administrative Exemption

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;
and
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

USDOL Fact Sheet #17(c):

http://www.dol.gov/whd/overtime/fs17c_administrative.pdf



Current Rule: Learned Professional Exemption

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
3. The advanced knowledge must be in a field of science or learning;
and
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

USDOL Fact Sheet #17(d):

http://www.dol.gov/whd/overtime/fs17d_professional.pdf

Current Rule: Creative Professional Exemption

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
and
2. The employee's primary duty must be performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

USDOL Fact Sheet #17(d):

http://www.dol.gov/whd/overtime/fs17d_professional.pdf



Current Rule: Computer Employee Exemption

1. The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; **and**
3. The employee's primary duty must consist of:
 - (a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - (b) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - (c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - (d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

USDOL Fact Sheet #17(e):

http://www.dol.gov/whd/overtime/fs17e_computer.pdf

Current Rule: Highly Compensated Employee Exemption

1. The employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
2. The employee's primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

USDOL Fact Sheet #17(h):

http://www.dol.gov/whd/overtime/fs17h_highly_comp.pdf

Current Rule: Salary Basis

§ 541.602: Salary Basis

[T]he employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.



Current Rule: Salary Basis

§ 541.602: Salary Basis – Exceptions

1. Full sick days (if company policy);
2. Full personal days;
3. *Offset* for jury duty, military service, attendance as witness;
4. Imposition of penalties in good faith for infractions of safety rules of major significance;
5. Unpaid disciplinary suspensions;
6. First and last weeks of employment – proportional to work;
7. FMLA leave – proportional amount of time actually worked.

Current Rule: Fee Basis

§ 541.602: Fee Basis (Note: Does not apply to Executive or Highly Compensated Employee)

a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a “fee basis” within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecemeal payments with the important distinction that generally a “fee” is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.



Current Rule: Fee Basis (continued)

§ 541.602: Fee Basis (Note: Does not apply to Executive or Highly Compensated Employee)

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours. Thus, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist \$500 if 40 hours were worked.

Current Rule: General Provisions

1. Job title does *not* determine FLSA exemption status.
2. Some salaried “white-collar” workers are *not* subject to the EAP salary level test: teachers, academic administrative personnel, physicians, lawyers, judges, and outside sales workers.
3. EAP exemptions do not apply to “manual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy.”
4. Also does not apply to police firefighters, paramedics, and other first responders.

USDOL Fact Sheet #17:

http://www.dol.gov/whd/overtime/fs17a_overview.htm



The Proposed Rule

- *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*
- Available on USDOL website at:
<https://www.dol.gov/whd/overtime/NPRM2015/OT-NPRM.pdf>
- 295 pages





The Proposed Rule: What will change?

- The salary level element of EAP tests will be adjusted upward to the 40th percentile of weekly earnings for full-time, salaried workers. Current projections estimate that the new salary level (based on anticipated first quarter 2016 data) will be \$970, or \$50,440.
- Highly-compensated employee salary level will increase to an amount equal to 90th percentile of earnings for full-time, salaried workers (currently \$122,148).
- In order to prevent levels from becoming outdated, will implement annual adjustments.

The Proposed Rule: Who will be impacted?

- **Which employees?** Employees meeting all other applicable elements for an EAP exemption who earn *at least* \$455/week (\$23,360/year) but *less than* the projected \$970/week (\$50,440/year). USDOL estimates up to 21.4 million workers could be impacted.
- **Which employers?** Any employer otherwise subject to FLSA who employs at least one employee described above.
 - USDOL estimated annualized direct costs to employers in connection with new rule: \$239.6 and \$255.3 million
 - USDOL estimated income resulting from new rule: \$1.18 and \$1.27 billion

USDOL FAQ:

<http://www.dol.gov/whd/overtime/NPRM2015/faq.htm>

Special Note: Other Issues

- USDOL solicited comments from public on “whether the standard duties tests are working as intended to screen out employees who are not bona fide white collar exempt employees.” Could signal a potential change to duties test.
- USDOL received significant feedback during its listening tour regarding use of electronic devices after work hours by employees who may be newly entitled to overtime due to this rule. Expect guidance on this issue.



Big Question: Why does this all matter?

Short Answer: Improper classification of exempt and non-exempt employees can lead to significant liability under FLSA and companion state law claims. Anticipated increase in regulatory oversight in wake of new rule.

Liquidated
Damages

Attorney Fee
Awards



Legal Fees

Prejudgment
Interest

What to do next?



Be proactive –
Examine the potential
impact on your
organization *before* the
Final Rule is issued.

What to do next?

Be practical – Assess infrastructure (payroll, time entry, etc.) to ensure ability to accurately track time of affected workers and achieve compliance.





What to do next?

Be practical (continued) – Look at both hard and “soft” costs of new rule:

Hard = Additional income to employees;

Soft = Administrative costs of implementation (*e.g.* tracking time, calculating overtime, employee time spent in analyzing and shifting workloads)

What to do next?

Be holistic – This is a good time to generally review payroll and worker classification practices. Misclassification can come in many forms, not just in relation to the new overtime rule. Some estimates claim that up to 70% of employers are noncompliant in some way with wage/hour laws.



What to do next?

Be resourceful –

- Consult reputable, reliable sources regarding new developments in rulemaking and any challenges to the rule once implemented.
- Evaluate current HR/payroll service provider to determine ability to assist in compliance activities.
- When in doubt regarding compliance-related issues, seek guidance from counsel.

RESOURCES:

- USDOL Notice of Proposed Overtime Rulemaking Website:
<http://www.dol.gov/whd/overtime/NPRM2015/>
- USDOL Wage and Hour Division Compliance Assistance for Employers:
<http://www.dol.gov/WHD/foremployers.htm#ca>
- USDOL's *Handy Reference Guide to the Fair Labor Standards Act*
<http://www.dol.gov/whd/regs/compliance/hrg.htm>

Questions?

