

CAPLAW *e-news brief*

Proposed FLSA Regs Expand Eligibility for Overtime Pay

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On July 6, 2015, the U.S. Department of Labor (DOL) issued a proposed rule that more than doubles the minimum salary threshold for certain employees to be considered exempt from the minimum wage and overtime pay protections under the federal Fair Labor Standards Act (FLSA). While the FLSA guarantees minimum wage and overtime pay (i.e., 1½ times an employee's regular rate of pay for all work hours exceeding 40 in a workweek), employees who meet certain requirements may be exempt from the FLSA's minimum wage and overtime pay protections.

Under the current DOL regulations, an employer can generally classify an employee as exempt if the employee is: (i) paid a predetermined and fixed salary that does not vary based on the quality or quantity of work performed (the "salary basis" test); (ii) earns a minimum specified salary (the "salary level" test); and (iii) primarily performs duties involving executive, administrative or professional activities as defined by DOL regulations (the "duties" test). The proposed rule focuses primarily on updating the compensation figures for the salary level test, which were last revised in 2004. Currently, most executive, administrative, and professional employees ("exempt" employees) must earn at least \$455 per week, or \$23,660 per year, to be treated as exempt. Employees who earn at least \$100,000 in total annual compensation may fall within another, separate exemption for highly compensated employees.

The proposed rule would sharply reduce the number of exempt employees by setting the salary level of exempt employees at the 40th percentile of weekly earnings for full-time salaried workers (\$921 per week, or \$47,892 annually, in 2013) and the salary level of highly compensated employees at the 90th percentile of weekly earnings for full-time salaried workers (\$122,148 annually in 2013). Though the DOL used 2013 salary data to develop the proposed rule, the final rule will contain updated salary figures, which the DOL expects

to derive from data from the first quarter of 2016.

In issuing the proposed rule, the DOL noted that the failure to update the salary level test over time has resulted in certain employees who earn less than the poverty level for a family of four being classified as exempt employees and thus not eligible for overtime pay, even though they may work far in excess of 40 hours per week. To ensure that salary levels keep pace with inflation and wage growth, the proposed rule also includes a mechanism to automatically update the compensation thresholds of the salary level test on an annual basis, using either a fixed percentile of wages or the Consumer Price Index for all urban consumers (CPI-U). The DOL specifically seeks comments on whether the fixed percentile or the CPI-U methodology would be the more appropriate mechanism.

Recognizing that incentive compensation is increasingly common and currently not included in determining salary levels for exemption purposes, the proposed rule also invites comments on whether to count nondiscretionary bonuses and incentive payments towards the salary levels required for exemption. Furthermore, the DOL is considering revisions to the existing duties test due to a concern that certain exempt employees perform such a disproportionate amount of nonexempt work that they are not exempt employees in any meaningful sense. The DOL has not proposed any specific modifications to the duties tests at this time, but seeks comments on whether there should be any such changes in the final rule.

The new rule could affect 4.5 million workers who are currently exempt from overtime under the existing salary level test. Community Action Agencies should consider the effect that the proposed rule may have on their current employee classifications. Employees now exempt may become non-exempt when the new rule goes into effect.

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The [proposed rule](#) was published in the Federal Register on July 6, 2015 pursuant to a Notice of Proposed Rulemaking. All comments on the proposed rule are due by 11:59 p.m., Eastern Daylight Time, on Friday, September 4, 2015 and may be submitted electronically [here](#). The current rule will remain in effect until the DOL reviews these comments and issues a final rule, which will likely not take effect until 2016. For further information about how these proposed rules may impact your organization, see this [legal alert](#) from the law firm Fisher & Phillips LLP and this [one](#) from Kilpatrick Townsend & Stockton LLP.

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