

# **DOL's Proposed Changes to the White Collar Regulations: What Should Employers Do Now?**

***Presented by:***



**Tammy McCutchen**

Principal

Littler | Washington DC

(202) 414-6857

[tmccutchen@littler.com](mailto:tmccutchen@littler.com)

# Agenda

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DOL Proposals

Employer Comments

Preparing for Change



# 29 C.F.R. Part 541

- DOL has defined the “white collar” (or “EAP”) exemptions in regulations at 29 C.F.R. Part 541
  - Executive
  - Administrative
  - Learned Professional
  - Creative Professional
  - Computer
  - Outside Sales



# Three Tests for Exemption

- Salary Level
- Salary Basis
  - Salary level and basis tests do not apply to lawyers, doctors, teachers or outside sales
  - Computer employees can be paid by the hour (\$27.63)
- Duties



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# PROPOSED CHANGES

# Minimum Salary Level

Set the minimum salary at the 40th percentile of weekly earnings for full-time “non-hourly paid” employees

- Currently, \$921/week or \$47,892/year
- Expected to increase to \$970/week or \$50,400/year by the time a Final Rule is issued in 2016



# Including Bonuses in Salary Level

DOL sought comments on the possibility of including nondiscretionary bonuses paid monthly or more frequently to satisfy up to 10% of the minimum salary level



# Automatic, Annual Increases



DOL proposed to establish a mechanism for automatically increasing the salary levels annually based either on the percentile (40%) or inflation (CPI-U)

# Will DOL Change the Duties Tests?



News, cases, companies, firms



## Final OT Rule May Go Beyond Salary Hike, Lawyers Say

By Ben James

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The DOL said in an email Tuesday that “while no specific changes are proposed for the duties tests, the NPRM contains a detailed discussion of concerns with the current duties tests and seeks comments on specific questions regarding possible changes. The Administrative Procedure Act does not require agencies to include proposed regulatory text and permits a discussion of issues instead.”

# Redefining “Primary Duty”

## Current definition:

- The “principal, main, major or most important duty that the employee performs.”

## Possible changes:

- Requiring employees to spend a minimum amount of time performing work that is their primary duty;
- Adopting the “California rule” requiring that 50% of an employee’s time be spent exclusively on work that is the employee’s primary duty.



# Elimination of “Concurrent Duties”

## Current definition:

- Nonexempt work “does not disqualify” an employee from the executive exemption when the employee decides when to perform such non-exempt work and remains responsible for success/failure of the business.

## Possible changes:

- Eliminated entirely
- Modifying the rule “to avoid sweeping nonexempt employees into the exemption”
- Limitation on the amount of nonexempt work that an exempt employee can perform



# Returning to the “Long” and “Short” Tests

## Current:

- In 2004, DOL eliminated the “long” and “short” duties test structure and adopted a single standard duties test for each exemption.

## Possible changes:

- Return to a two-tier structure with additional duties requirements for employees at a lower salary level;
- Pre-2004 “long” tests included a 20% restriction on non-exempt work (40% in retail).



Changes to the White Collar Regulations Expected in 2016:  
What Should Employers Do Now?

## **EMPLOYER COMMENTS**

# Public Comments

## Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Docket Folder Summary [View all documents and comments in this Docket](#)

**Docket ID:** WHD-2015-0001      **Agency:** Wage and Hour Division (WHD)

**Parent Agency:** Department of Labor (DOL)

### Summary:

The Department proposes to update the regulations governing which executive, administrative, and professional employees (white collar workers) are entitled to the Fair Labor Standards Act's minimum wage and overtime pay protections. Key provisions of the proposed rule include: (1) setting the standard salary level required for exemption at the 40<sup>th</sup> percentile of weekly earnings for full-time salaried workers (projected to be \$970 per week, or \$50,440 annually, in 2016); (2) increasing the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90<sup>th</sup> percentile of weekly earnings of full-time salaried workers (\$122,148 annually); and (3) establishing a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption. The Department last updated these regulations in 2004, which, among other items, set the standard salary level at not less than \$455 per week.

[less...](#)

**RIN:** 1235-AA11      **Impacts and Effects:** None      **CFR Citation:** 29 CFR 541

**Priority:** Economically Significant

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293,370

Comments Received\*

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Regulatory Timeline

 Pre Rule

 Proposed Rule

 Final Rule  
Current Stage

# Public Comments

- Some employers acknowledged that an increase in salary level is due, but most said \$50,000 is too high
  - Some employers suggested a 3 to 5 year phase-in period
- Employers supported counting bonuses towards salary level, but also stated:
  - Commissions should also count
  - Bonuses paid quarterly or annually should also count
  - Should not be limited to just 10%
- Near universal opposition to annual increases
  - Some commenters suggested an alternative of automatic increases every 5 years
- Employers objected to any changes in the duties tests because of DOL's failure to provide sufficient notice

# The Rulemaking Process Thus Far



- March 2014, Memorandum: President Obama directs Secretary of Labor Perez to revise the overtime regulations
- Summer 2014, Listening Sessions: Secretary Perez meets with stakeholders including (business associations, non-profit organizations, employee advocates, unions, state/local governments)
- July 2015, NPRM: Wage & Hour Administrator Weil issues proposed changes to the Part 541 regulations. The comment period closed September 4, 2015
- March 14, 2016, DOL sends Final Rule to White House Office of Management & Budget for review



# When Will the Final Rule Be Published?



- OMB review generally takes 30 to 90 days
- In this rulemaking, OMB's review of the proposed regulations took 60 days
  - NPRM sent to OMB: May 5, 2015
  - NPRM published: July 6, 2015
- Thus, most likely, the Final Rule will be published around May 16, 2016
- DOL must provide at least a 60-day effective date, but do not expect more – be prepared to comply with the new regulations by July 15, 2016

# Path to Stop or Modify the Rule?

## Legislative Options

- **Protecting Workplace Advancement and Opportunity Act**
  - Introduced March 17, 2016 by Senate and House Republicans; even if passed, unlikely to withstand President Obama's veto
  - Nullify proposed or final rule
  - Prohibit automatic salary increases
  - Prohibit changes to duties test without providing notice and comment period on specific changes
- **Congressional Review Act**
  - Requires joint resolution of Congress within 60 legislative days of publication of the Final Rule
  - President Obama would veto

# Path to Stop or Modify the Rule?

- Litigation Challenge
  - Possible challenge to automatic salary increases and any changes to the duties test, but any APA challenge is difficult
  - No viable challenge to the salary level, and unlikely to stay the salary level increase
- New Notice of Proposed Rule Making
  - An incoming Republican administration could restart the regulatory process
  - Most likely also would be limited to automatic salary increases and changes to the duties test
  - Difficult to walk back from the salary level increase
- Bottom Line: There is no path to stop or change DOL's Final Rule unless Republicans re-take the White House in 2016

# What is Likely to Change?

- Salary Level
  - Although DOL may moderate down a bit, also unlikely to increase salary level above \$50,440
  - Likely to implement automatic annual increases
  - Unlikely to allow bonuses to count towards the minimum salary level
- Duties Tests
  - Likely to move towards the California 50% primary duty rule, but not likely to bring back 80-20 rule under a long test
  - Likely to eliminate concurrent duties



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**PREPARING FOR CHANGE**

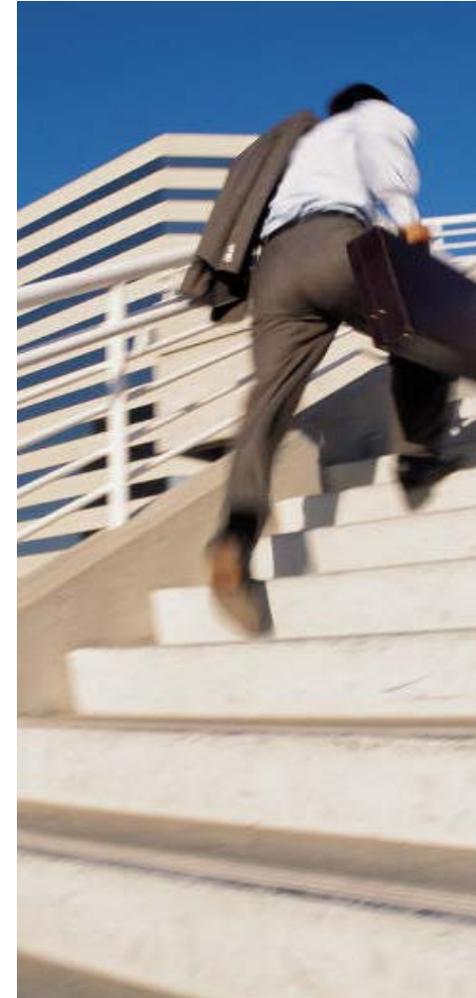
# Preparing for Change

- Do ***not*** wait until DOL publishes its final rule to begin preparing for change
- DOL likely will provide employers only ***two months*** to comply with the Final Rule
- Determining who to reclassify and implementing reclassification can take up to ***six months***
- Business partners need to understand the possible budgetary impact of the salary-level increase



# Compliance, Step-By-Step

1. Identify employees who need to be reclassified
2. Develop new compensation plan for the reclassified employees
3. Review wage-hour policies and processes
4. Communicate the changes
5. Train the reclassified employees and their managers



# Identify Jobs for Review

- Jobs paid below \$55,000 annual salary
  - DOL's proposal for automatic annual increases to the salary level will soon push the level over \$50,440
- Jobs with large numbers of incumbent employees
- Class action favorites
  - Accounting
  - Assistant managers
  - Sales and sales support
  - Help desk functions and other computer employees without programming duties
  - Customer service
  - Technicians



# Salary Increase or Overtime?

- Pull salary and incentive pay data
- Calculate the cost of increasing salary to \$50,440
  - Consider lowering incentive pay to offset salary increase
- Calculate the cost of overtime
  - How many hours are exempt employees are working?
  - $(\text{Weekly salary} / 40) * 1.5 * \text{expected overtime hours}$



# Cost-Neutral Solution

## **Weekly Salary / (40 + (OT Hours x 1.5))**

- With a good estimate of expected weekly work hours, applying this formula will provide an hourly rate which will result in the same weekly and annual compensation
- Yes, its legal – DOL gave us this formula in the preamble to the 2003 Notice of Proposed Rulemaking (68 F.R. 15576)

# Compliance HR



## OT COST ESTIMATOR

In fall 2016, the U.S. Department of Labor (DOL) issued new rules from the Fair Labor Standards Act (FLSA) overtime pay requirements (\$50,440 annually). If these proposed changes take effect, overtime pay.

To comply with the new rules, employers with exempt employees must:

- 1) Maintain the exemption by providing employees with an opportunity to work overtime.
- 2) Reclassify the employees to non-exempt and pay overtime.

This OT Cost Estimator assists you to make this decision based on the number of hours worked each week, and with one click, the tool will calculate the overtime pay (using an hourly rate of current salary divided by 40 hours).

The Estimator also will calculate a "cost neutral" option based on an hourly rate or lower salary level that, with the exemption, employees thus minimizing additional labor costs to the employer.

Annual Salary	\$	<input type="text" value="35000"/>
Annual Bonus/Incentive	\$	<input type="text" value="1750"/>
Annual Commissions	\$	<input type="text" value="0.00"/>
Other Compensation	\$	<input type="text" value="0.00"/>
Estimated Weekly Work Hours		<input type="text" value="50"/>

Calculate

➔ **Estimated Cost of Compliance** [Calculation Details](#)

- |                                      |  |
|--------------------------------------|--|
| <b>Increase salary</b>               | Increase annual salary by <b>\$13,690.00</b> . This would cause the employee's salary to meet the minimum required to avoid paying overtime. |
| or                                   |  |
| <b>Reclassify &amp; Pay Overtime</b> | Pay an additional <b>\$13,251.20</b> in overtime.  |
| or                                   |  |
| <b>Reclassify Cost Neutral</b>       | Maintain your labor costs of \$36,750.00 by paying an hourly rate of <b>\$12.99</b> .  |

Click here to see the OT Cost Estimator in ACTION!

<http://compliancehr.com/our-solution/>

# Job Duty Review

- Even if salary level is not an issue, you may have employees who do not meet the duties requirements for exemption – under the current or new regulations
- Rare opportunity to correct classification issues with reduced risk of triggering litigation



# Job Review Process

- Fact-Finding
  - HRIS Data – salaries, bonuses, direct reports, educational degrees
  - Documents – job descriptions, training materials, performance expectations
  - Interview SME managers (usually, direct supervisors)
- Analysis
  - Apply a 50% standard for primary duty
  - Assume concurrent duties test will be eliminated

# ComplianceHR has an App for that

- A first-of-its-kind online and intelligent solution delivering expert level risk assessments on overtime exemptions at internet scale and speed
- Results after spending 10 to 15 minutes completing an on-line questionnaire about job duties
- Visit [compliancehr.com](http://compliancehr.com) for more information

Compliance **HR** Navigator OT

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## Overtime Exempt Risk Report for Jane Doe



### EMPLOYEE

Jane Doe  
Engineering



### MANAGER

John Smith  
Accounting



### LOCATION

Illinois

What is the risk of classifying Jane Doe as an exempt employee?



Very Low

Jane Doe is very likely to meet the requirements for the following exemption: Administrative.

Jane Doe is likely to meet the requirements for the following exemption: Learned Professional.

Jane Doe is very unlikely to meet the requirements for the following exemption: Executive.

Jane Doe does not qualify for the following exemptions: Computer, Creative Professional and Outside Sales.

▶ [View All Individual Exemption Risks](#)

**FOR MORE INFORMATION ABOUT YOUR RESULTS PLEASE SEE THE RESOURCES BELOW:**

- ▶ [Understanding Your Risk](#)
- ▶ [Summary of Law](#)
- ▶ [Transcript of Your Questions and Answers](#)
- ▶ [Disclaimer](#)

# After the Reclassification Decision



**So many choices  
So little time!**

# Compensation Plan Redesign

- Should we continue to pay reclassified employees on a salary or convert them to a hourly rate?
- Should we adjust the salary level downward or adopt an hourly rate that will minimize additional costs?
- How will we calculate overtime for salaried non-exempt employees?
  - Divide salary by 40
  - Divide salary by actual hours worked
  - Fluctuating workweek
- Will we continue to provide incentive compensation?
- Do we need to make changes to any benefits?

# Review Policies and Processes

- Policies
  - Off-the-clock work
  - Meal and rest break
  - Travel time
  - Mobile device
- Processes
  - Timekeeping
  - Payroll changes
  - Controlling overtime hours



# Communicate the Changes

- Need to communicate with senior management, managers of reclassified employees and the employees themselves
- Key decisions
  - Who will communicate the changes?
  - What will be communicated?
  - How will changes be communicated?
  - When will the changes be communicated
- Prepare talking points and FAQs

# Training

- Train the reclassified employees and their managers
  - Wage & hour policies
  - Timekeeping procedures
  - Activities that are compensable work

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The Ethics and Compliance Experts



# Littler Can Help!

- Compliance Audit Services
  - Littler attorneys focused on reviewing exempt jobs
- Reclassification Toolkit
  - All the tools you need to reclassify employees
- ComplianceHR



## Navigator OT

Exempt or Non-Exempt?

Navigator OT is the first of its kind, delivering expert level guidance at internet scale and speed

Reviews | Evaluations

# Questions?



Thank  
You!



Ready or Not ...  
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**Tammy McCutchen**

Principal

Littler | Washington

(202) 414-6857

[tmccutchen@littler.com](mailto:tmccutchen@littler.com)

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