



## United States Department of Labor to Expand Overtime Protections for “White Collar” Employees

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On June 30, 2015 the U.S. Department of Labor (DOL) announced its proposal to revise its Fair Labor and Standards Act (“FLSA”) regulations to narrow the exemptions from overtime pay for most so-called “white collar” employees. The proposed revisions result from an Executive Order signed by President Obama directing the Secretary of Labor to update the salary threshold for the “white collar” exemption which has been eroded over the years by inflation.

### Background

The FLSA requires that most employees in the United States be paid at least the federal minimum wage and overtime pay at time and one-half their regular rate of pay after 40 hours in a workweek. Among others, the FLSA provides exemptions from overtime pay for executive, administrative, professional and some computer employees who meet both a job duties test and a salary basis test. The existing exemption applies to those persons with qualifying exempt duties who are paid on a salary basis of at least \$455 per week (\$23,660 annualized).

### The DOL’s Proposed Revisions and the Potential Effect on Employers

The DOL’s proposed revisions more than double this salary threshold requirement. Specifically, the revisions set a new salary threshold at the 40th percentile of full-time salaried workers, which is projected for 2016 to be about \$970 per week (or \$50,440 annualized). The proposed revisions additionally establish a mechanism for automatically updating the salary threshold requirement to keep pace with inflation. These changes will primarily effect lower-wage industries, such as restaurants and retail stores, by broadening the number and type of employees eligible for overtime pay. For example, an exempt department store manager or fast food manager currently earning a salary of \$42,000 per year would become entitled to overtime pay.

The DOL is currently seeking comments on its proposed regulations.

### The Application of State and Local Overtime Rules

While the FLSA sets a floor with respect to wage and hour compliance, states may impose additional, more stringent requirements. Therefore, employees who meet the requirements of one of the FLSA “white collar” exemptions may not meet the requirements imposed by California law. For example, California law has long imposed a minimum level of remuneration for “white collar” employees that is higher than the \$455 per week federal threshold. Currently, executive, administrative and professional employees in California must receive a monthly salary equivalent to at least two times the applicable state minimum wage (\$9 per hour) in order to meet the exemptions. This equates to a weekly salary of \$720 and an annualized salary of \$37,440. Accordingly, if the proposed federal regulations are adopted, the federal salary basis minimum will exceed the California level. However, as California’s minimum wage increases,





the state minimum salary requirement could well exceed the proposed federal standard at some point in the future.

Similarly, with respect to the “duties” test, under both federal and California law, an employee’s “primary” duties must be executive, administrative or professional. Under the current FLSA regulations, “primary” is determined using a “qualitative” standard, focusing on the principal or most important duties that are performed. California, however, also imposes a “quantitative” test, pursuant to which the exempt duties must take up at least 51% of the employee’s work time in order to be deemed to be “primary.” Thus, under federal law, a manager who also performs some of the same work as her subordinates may be exempt because the most important aspect of her job is management. However, under California law, the exemption would not be met unless the manager spends at least 51% of her time engaged in managerial tasks. Significantly, in its commentary to the proposed federal regulations, the DOL specifically notes that it is seeking comments from the public on whether to adopt California’s “quantitative” approach under the federal regulations.

### **ASK MSK**

#### **Q: Are the proposed rules currently enforceable?**

A: No. At this stage, the proposed rules are just proposals. Nonetheless, the proposed rules, or a modified version of them, are expected to be enacted and will likely become effective sometime in 2016.

#### **Q: How do the proposed rules impact the exemption applicable to certain computer employees?**

A: Under the FLSA, certain computer systems analysts, computer programmers, software engineers and similar highly skilled employees may meet the exempt duties test. In addition, they also must be paid on either a salary basis, or they may be paid on an hourly basis, if the hourly wage exceeds 6 and 1/2 times federal minimum wage. Under the proposed regulations, computer employees who meet the duties test and are paid on a salary basis would need to meet the new, higher salary threshold. The proposed regulations do not contemplate any changes to the minimum hourly rate for computer employees. Of note, California law sets substantially higher minimum compensation requirements for exempt computer employees -- \$41.27 per hour or payment at an annualized salary of no less than \$85,841.60.

