U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(March 2019)

Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees

The Department of Labor (Department) is proposing to update and revise the regulations issued under the Fair Labor Standards Act (FLSA or Act) implementing the exemption from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales and computer employees.[1]

Since 1940, the Department's regulations have generally required each of three tests to be met for one of the FLSA's exemptions to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed ("salary basis test"); (2) the amount of salary paid must meet a minimum specified amount ("salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test").

The Department proposes to update both the minimum weekly standard salary level and the total annual compensation requirement for "highly compensated employees" to reflect growth in wages and salaries. The Department believes that the proposed update to the standard salary level will maintain the traditional purposes of the salary level test and will help employers more readily identify exempt employees. The Department also proposes to revise the special salary levels for employees in the motion picture industry and certain U.S. territories. The Department is not proposing any change to the duties test. If finalized as proposed, the Department estimates that 1.3 million currently exempt employees would, without some intervening action by their employers, become nonexempt.

* Key Provisions of the Proposed Rule *

The NPRM focuses primarily on updating the salary and compensation levels needed for these workers to be exempt. Specifically, the Department proposes to:

1. increase the standard salary level to $679 per week (the equivalent of $35,308 annually for a full-year worker), up from the currently enforced level of $455 per week;

2. increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to $147,414 annually, up from the currently enforced level of $100,000 annually; and

[1] On May 23, 2016, the Department issued a final rule increasing the standard salary level, among other changes. That rule was declared invalid by the United States District Court for the Eastern District of Texas, and an appeal of that decision to the United States Court of Appeals for the Fifth Circuit is being held in abeyance pending the completion of the Department's rulemaking. Currently, the Department is enforcing the regulations in effect on November 30, 2016, including the $455 per week salary level set in 2004.

3. allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, provided these payments are made on an annual or more frequent basis, while inviting comment on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

Additionally, the Department is asking for public comment on the NPRM's language for periodic review to update the salary threshold. An update would continue to require notice-and-comment rulemaking.

Standard Salary Level

The Department proposes to increase the standard salary level to $679 per week ($35,308 for a full-year worker). The proposed amount accounts for wage growth since the 2004 rulemaking, projected forward to January 1, 2020, the approximate date a final rule is anticipated to be effective. The Department proposes to update the standard salary level set in 2004 by applying the same method used to set that level in 2004 to current data—*i.e.*, by looking at the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South), and/or in the retail sector nationwide.

HCE Total Annual Compensation Requirement

The Department proposes to increase the total annual compensation requirement for highly compensated employees to $147,414 per year. This is an increase over the level of $100,000 set in 2004. To be exempt as an HCE, an employee must also receive at least the new standard salary amount of $679 per week on a salary or fee basis (without regard to the payment of nondiscretionary bonuses and incentive payments). The proposed HCE annual compensation level is set using the same method used in the 2016 final rule—*i.e.*, equivalent to the 90th percentile earnings of full-time salaried workers—projected forward to January 1, 2020.

Special Salary Levels for Employees in U.S. Territories and the Motion Picture Industry

The Department proposes to maintain a special salary level of $380 per week for American Samoa because minimum wage rates there have remained lower than the federal minimum wage. Additionally, the Department is proposing a special salary level of $455 per week for employees in Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

The Department also proposes to maintain a special "base rate" threshold for employees in the motion picture producing industry. Consistent with prior rulemakings, the Department proposes to increase the required base rate proportionally to the increase in the standard salary level test, resulting in a new base rate of $1,036 per week (or a proportionate amount based on the number of days worked).

Updating

Experience has shown that fixed earning thresholds can become substantially less effective over time. Accordingly, the Department is asking for public comment on the NPRM's language for periodic review to update the salary threshold. An update would continue to require notice-and-comment rulemaking.

Treatment of Nondiscretionary Bonuses and Incentive Payments

The Department also proposes to permit employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level. For employers to credit nondiscretionary bonuses and incentive payments toward a portion of the standard salary level test, they must make such payments on an annual or more frequent basis. Additionally, the Department has invited comment on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

If an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the Department permits the employer to make a “catch-up” payment within one pay period of the end of the 52-week period. This payment may be up to 10 percent of the total standard salary level for the preceding 52-week period. Any such catch-up payment will count only toward the prior year’s salary amount and not toward the salary amount in the year in which it is paid.

Disclaimer: This proposed regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the proposed regulation~~s~~ may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official proposed regulation. The public will have 60 days to comment on the proposed regulation; the comment period will begin on the date of publication in the Federal Register.

For additional routine information outside of the rulemaking, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone,
1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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