

DOL's New Salary Level Requirements

I. Current Regulations

With limited exceptions, the executive, administrative, professional, and highly compensated exemptions (so called "white collar" exemptions) to the FLSA require that the employer prove that the employee:

1. Is paid a salary (salary basis test)
2. Has the salary equal \$455 per week (\$23,660 per year) (salary level test).
3. Meets the duties of an exempt executive, administrative, professional, or highly compensated employee (duties test).

"Highly compensated" employees must earn at least \$100,000 (but can be paid \$23,660 of that on a salary basis). In return for such a high wage, the law lessens the duties test for employers for these employees.

The regulations were last updated in 2004.

II. Exceptions To Salary Basis Test

The salary basis test does not apply to:

- outside sales employees.
- lawyers
- doctors
- computer professional employees who earn \$27.63 per/hour.
- a few other employees (mostly academic in nature).

III. Proposed Changes

A. Procedure

Earlier this summer, the DOL proposed changes to some of the regulations governing the exemptions of white-collar employees.

This is just a proposal. A serious one, no doubt, but the proposal has not become law.

- The proposal was made July 6, 2015.
- There was a 60-day comment period, which expired September 4, 2015.
- DOL refused to extend comment period, despite pleas from business groups and the Small Business Administration's Office of Advocacy
- The DOL is technically supposed to consider comments before issuing a "final rule"

- Sometimes that process takes years. In 2003, it took 13 months.
- Right now, most observers expect this to be fast tracked and something finalized in early to mid-2016.

B. Substance Of Changes

The new rules propose the following:

1. Increasing the salary level for executive, administrative, and professional employees from \$23,660 (\$455 per week) to \$50,440 (\$970 per week).

-Employees who earn more than this amount are in the top 40% of workers.

2. Increasing the salary level for highly compensated employees from \$100,000 per year to \$122,148 per year.

-Employees who earn more than this amount are in the top 10% of workers.

C. The Department Of Labor Also Asked For Comments

In addition, the DOL asked the public to comment on the following issues:

1. Should the Consumer Price Index (CPI) be applied to the salary level tests each year or should the salary level be fixed to the top 40% of workers (top 10% for highly compensated employees)?

2. Should non-discretionary compensation be considered as partial satisfaction of the salary level requirements?

-The DOL has asked for information on the types of employees who typically earn non-discretionary bonuses and incentive payments.

3. Should the Duties test for Highly Compensated Employees Be Changed?

-Specifically, the DOL seeks comments about whether “highly compensated” employees should spend a minimum amount of time performing work that is their primary duty; and

-The DOL specifically seeks comments on whether it should apply California state law requiring that 50% of an employee’s time be spent exclusively on work that is the employee’s primary duty.

4. These questions should scare employers. It is possible that there are more rule changes to come, without any comment period given to employers.

IV. Effect Of Proposal

There is no doubt that, if enacted, these rules would represent a tectonic shift for some industries (particularly retail, restaurants, and hospitality; as well as Southern and rural employers of all types).

Oxford Economics conducted a study for the National Retail Foundation estimating that restaurant and retail employers will pay more than \$9.5 billion per year in extra labor costs.

The positions most effected are:

- First Line Supervisors
- Fast Food and Department Store Supervisors
- Office Clerks
- flexible working arrangements, such as part-time exempt employees

Moreover, companies will have to:

- update their payroll systems
- conduct annual audits of salaried employees
- spend hours converting employees
- expanded use of staffing companies

It is unlikely that many employees will actually see more pay. Instead, we can expect employers to take a variety of counter measures:

- Cutting bonuses and benefits to account for the increase of base salaries
- Changing employees from salary to a lower hourly rate to account for overtime

It is far more likely that workplaces will simply “hollow” out low-level supervisors, thus increasing hierarchy and inequality. Talent acquisition will be a problem.

V. Practical Notes On Salary Basis

Many employers do not realize their current vulnerability on salary basis issues.

A salary is a “predetermined and fixed [payment] that is not subject to reductions because of the variations in the quality or quantity of work performed.”

-The main key here is not to take improper deductions from a salary. Deductions from an exempt employee’s salary of less than a week are generally prohibited.

-Deductions of partial-day absences almost always violate the law (the only ones allowed are for violating safety rules of major significance and intermittent FMLA).

-Deductions of full day absences are only allowed under certain circumstances, such as absence for personal reasons, certain disciplinary suspensions; or full day absences based on a bona fide sick leave policy; or to offset jury fees, witness fees, or military pay.