

EMPLOYERS LEFT WAITING FOR NEW EXEMPTION REGS: EXPLAINING THE WHAT, WHY AND WHEN

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In July 2015, the U.S. Department of Labor (USDOL) published proposed regulations that could alter whether you may or should treat employees as being exempt from the minimum-wage and overtime requirements of the federal Fair Labor Standards Act (FLSA). Employers continue to sit on pins-and-needles awaiting the final versions of these new rules. Here is the what, why, and when of the anticipated regulations.

What Are The Proposed Regulations?

The proposed regulations will define how you determine who may be deemed exempt under the federal FLSA's Section 13(a)(1) provision for executive, administrative, professional, outside-sales, and derivative exemption categories.

In order to be exempt, an employee's work must meet specific duties tests, and in most cases, that employee must also be paid in certain ways at not less than a particular compensation level. The proposed regulations do not prescribe specific changes in the duties tests, but USDOL's accompanying commentary leaves some room to wonder whether the final rules will revise them. So while it is not yet essential to review the duties of employees currently treated as exempt, it would be wise to do so.

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One thing is certain, however: there are likely to be significant increases in the minimum compensation levels when the regulations are finalized. USDOL intends to double the minimum salary threshold, raising it from \$455 a week to at least \$921 a week (and possibly even more). This figure annualizes to \$47,892.

And even worse, for the first time in the seven-decade history of these rules, USDOL is proposing to release an annual "updated" salary. The agency's accompanying remarks suggest that this might result in a \$970 threshold (annualizing to \$50,440) as early as 2016.

Therefore, if you are viewing this proposal from the standpoint of longer-range planning and budgeting, you should project for now that the minimum salary will move up steadily. We predict that it will head toward an annualized level in the mid-\$50,000s in the not-too-distant future.

Why Are There New Regulations At All?

Statements made by proponents of the changes and by administration officials themselves suggest that USDOL seeks to increase the compensation of employees treated as exempt in one of two ways: by sharply reducing the number of exempt workers so as to cause them to become eligible for FLSA overtime compensation, or by giving a big raise to employees who will continue to be treated as exempt under the revised regulations. Whether employee compensation as a whole will actually increase in response to these regulations is a different matter; employers may choose among a number of alternative responses.

When Will The New Regulations Go Into Effect?

That is the million-dollar question (perhaps literally). The comment period closed in early September 2015, despite numerous requests for an extension. This led many to believe that the implementation of the new rules would be fast-tracked, but how fast that will be has become increasingly unclear.

USDOL's most recent semi-annual regulatory agenda released in November 2015 shows a July 2016 "Final Rule" timeframe for the revised regulations. If that's the case, and if the lead-in period before they become final is 60 days (as some are surmising), this would lead to an effective date sometime in August or September 2016. A high-ranking USDOL official made waves just before that agenda was released when she suggested that the revisions would not be forthcoming until "late 2016." However, in mid-December, U.S. Labor Secretary Perez muddied the waters further by predicting that the rules will be finalized by the spring of 2016.

Meanwhile, a coalition of employer associations and advocacy groups is pushing for a substantially delayed implementation or even a complete revision of the proposed regulations. Neither seems likely at the moment, but it's also true that USDOL is not always able to meet these kinds of target dates. The bottom line is that no exact release date exists or can be reliably predicted.

What Should You Do?

While you wait for the other shoe to drop, we recommend that you prepare immediately, including by taking at least the following steps:

- evaluate immediately what the proposed changes would mean for your organization and employees;
- determine whether and how to bolster the FLSA exemption status of those you treat as exempt today and anticipate continuing to treat as exempt in the future;
- decide what other FLSA exemptions might apply to one or more of your employees;
- design alternative FLSA-compliant pay plans that would serve your needs if you decide to convert one or more employees to non-exempt status; and

- consider what other cost-saving measures might be available to offset salary increases and wage hikes prompted by the eventual changes.

For a much more detailed discussion and analysis of these matters, read our Wage and Hour Laws Blog by clicking [here](#) or by visiting www.wage-hour.net.

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