



## Proposed Regulations Published – Salary Floor Would Be Doubled (Updated 07 06 15)

Insights

6.30.15

**UPDATED 07 06 15:** The proposals were officially published this morning. Unless there is an extension of the deadline, comments are to be submitted by *Friday, September 4, 2015*.

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**UPDATED 07 02 15:** According to the Federal Register website, the proposals will be officially published this coming Monday, July 6. If they are, then comments will be due no later than Friday, September 4, 2015.

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At long last, the anxiously-awaited proposed changes in regulations defining the federal Fair Labor Standards Act's Section 13(a)(1) executive, administrative, professional, outside-sales, and derivative exemptions have been published by the U.S. Labor Department for public consideration and comment. Blaring headlines notwithstanding:

- *These provisions are not in effect,*
- *The exemption rules have not yet been changed, and*
- *Employers are not required to do anything differently for the moment.*

### The Compensation Tests

USDOL currently intends to increase the minimum salary threshold by approximately 100%, to \$921 per week, which annualizes to \$47,892. This is on the high side of what we had anticipated.

It appears that sharply reducing the proportion of exempt workers and "giving employees a raise" are the driving purposes behind this figure, rather than the proposal's being the result of the fundamentally distinction-drawing principles that are actually authorized and have historically been followed. We have previously written about these principles.

In addition, USDOL wants to raise the total-annual-compensation threshold for the "highly compensated employees" exemption by about 22%, from its present \$100,000 minimum to a new

level of \$122,148.

And for the first time in these exemptions' more-than-75-year history, an "updated salary rate" would be published annually. USDOL's accompanying remarks suggest that this might result in a \$970 threshold (annualizing to \$50,440) as early as next year.

The "highly compensated" threshold would also be "updated" annually.

### **The Duties-Related Tests**

The good news is that USDOL is not yet proposing to change any of the exemptions' requirements as they relate to the kinds or amounts of work performed. Readers will recall, for example, the widespread speculation that a strict more-than-50% requirement would be proposed in connection with the proportion of exempt work that would be necessary.

However, USDOL asks for comments directed to whether there *should* be such changes "for consideration in the Final Rule." We do not see how USDOL could legitimately make any such revisions in the duties tests without further putting *those* proposals out for public consideration and comment.

### **The Bottom Line**

Comments on and criticisms of these proposals must be submitted to USDOL within 60 days after their publication in the *Federal Register* (rather than 90 days, as in 2003). It is not yet clear when this publication will occur; as of the time of this posting, the *Federal Register* website does not reflect that the proposals have been filed there.

We urge employers to:

- Evaluate immediately what these changes would mean for their organizations and employees; and
- Consider preparing comments for submission to USDOL (copies of which might perhaps be sent to an employer's Senators and Representatives).

Furthermore, employers who have not already done so should start thinking *right now* about:

- Whether and how to bolster the FLSA exemption status of those whom management treats as exempt under Section 13(a)(1);
- What *other* FLSA exemptions might apply to one or more employees; and
- What alternative FLSA-compliant pay plans would serve management's needs if it decides to convert one or more employees to non-exempt status. As we have said, usually there are entirely lawful ways to establish new pay plans that, when properly administered, could result in little or no increase in the employees' pay.

USDOL also released extensive remarks explaining its rationales for what it seeks to do. We will be studying the proposals and commentary carefully and will offer further considered views on them in coming days.

It is difficult to predict when any final changes will actually be put into effect. Using history as a rough guide, we are inclined to think that this will not occur before late this year or early next year.