



## A Substantial Salary-Test Jump Is Likely

Insights

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On January 28, the Economic Policy Institute announced that "noted economists and a former Secretary of Labor" had written to U.S. Secretary of Labor Thomas Perez to propose an increased salary threshold of around \$960 a week (about \$50,000 a year) for the federal Fair Labor Standards Act's executive, administrative, professional, and derivative exemptions. EPI's website also provides what is essentially a way to sign a petition to this effect. (It is worth noting that Heidi Shierholz, who last September advocated raising the salary level to \$984 a week and who is still shown on EPI's website as a "Former EPI Economist", is currently Secretary Perez's Chief Economist.)

The next day, 26 Senators wrote to President Obama (link to copy below) to push for an increase to "at least" \$1,090 a week (which annualizes to \$56,680). These Senators also implied that a rate of \$1,327 (about \$69,000 annualized) would purportedly be justifiable, perhaps to make their recommendation appear reasonable by comparison. Their letter also advocates indexing the salary to inflation thereafter.

These letters follow closely on the heels of one sent to the President by 32 Representatives on January 19 proposing the \$69,000 level.

These groups rely principally upon (i) the impact of inflation since 1975 (as if the 2004 increase had never occurred); (ii) the higher proportion of "salaried workers" who will fall within the FLSA's "overtime protections" if the salary threshold is increased by over 200%; and (iii) how much such a move will supposedly "help" many employees.

### A Stew Of Inapt Considerations

We have earlier pointed out that "helping" employees by raising the salary threshold is a wholly-illegitimate motivation. USDOL has also historically rejected rote reliance upon inflation measures where setting the salary test is concerned, including that it has declined to embrace "indexing" the figure. Neither has it ever established the salary level in the interests of increasing the proportion of salaried employees who would thereby automatically be excluded from these exemptions. These are fundamentally policymaking matters to be addressed, if at all, through the lawmaking process, rather than through administrative rulemaking. (And the Senators and Representatives are of course particularly well-placed to propose legislation along these lines, as was done in 2012, if they believe that such measures are desirable.)

Instead, USDOL has in the past selected the threshold based upon actual wages earned by real employees based upon the most-current data, taking into account an increase's inflationary impact and the effects upon lower-wage industries and small businesses, as well as wage variations among regions and rural and urban communities. Moreover, in consideration of the complexities presented by the U.S. economy as a whole and by significant geographical differences, USDOL has deliberately set the threshold near the *lower* end of prevailing salaries. And, contrary to what the above letters urge, it has expressly done so in part to *avoid* excluding substantial numbers of employees from exempt status by definition.

### **The Bottom Line**

Nonetheless, it is likely that the convergence of these letters and the related publicity is not simply coincidence, and that they are intended to facilitate what the signatories know is a coming USDOL proposal for a substantial salary-test increase based (whether explicitly or not) upon the reasoning they espouse. Although what this level will be remains somewhat speculative, a composite analysis of most reports points in the direction of a threshold falling somewhere between \$800 a week and the Senators' \$1,090 figure.

Employers should be prepared to make their views known promptly once the Notice of Proposed Rulemaking is published.

[26 Senators' Overtime Letter 01 29 15.pdf \(184.94 kb\)](#)