



# Listen Up – USDOL Reveals Little In Public Listening Sessions

Insights

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Last month, the United States Department of Labor (USDOL) Wage and Hour Division announced that it would hold public listening sessions, inviting members of the public to comment on the FLSA's white-collar exemptions.

## Limited Topics

### 1. Salary Level Amount

- What is the appropriate salary level (or range of salary levels) above which the overtime exemptions for bona fide executive, administrative, or professional employees may apply?
- Why?

### 2. Effect Of Increase

- What benefits and costs to employees and employers might accompany an increased salary level?
- How would an increased salary level affect real wages (e.g., increasing overtime pay for employees whose current salaries are below a new level but above the current threshold)?
- Could an increased salary level reduce litigation costs by reducing the number of employees whose exemption status is unclear?
- Could this additional certainty produce other benefits for employees and employers?

### 3. Methodology

- What is the best methodology to determine an updated salary level?
- Should the update derive from wage growth, cost-of-living increases, actual wages paid to employees, or some other measure?

### 4. Updating Levels, Including Highly-Compensated

- Should the Department more regularly update the standard salary level and the total-annual-compensation level for highly compensated employees?
- If so, how should these updates be made?

- How frequently should updates occur?
- What benefits, if any, could result from more frequent updates?

### **Limited Information Shared**

Despite the optimism that the listening sessions might give us some insight into what the new regulations regarding the white-collar exemptions (commonly referred to as the "Overtime Rule") might look like, the reality fell well short of that. USDOL remains tight lipped about when exactly the regulations will be released, and what they may look like. At most, one might infer from the pre-determined list of topics that it does not plan to make changes to the duties-test.

Further, one thing was confirmed – USDOL will issue a notice of proposed rulemaking and proposed regulations, followed by a comment period, before finalizing a new rule. Although this is the typical process, given USDOL's currently enjoined final rule, and the fact that USDOL requested public comment already on how it should change the currently enjoined final rule, it was speculated that USDOL may simply implement a final rule, either on an emergency basis, or based upon the assumption that comments already have been provided.

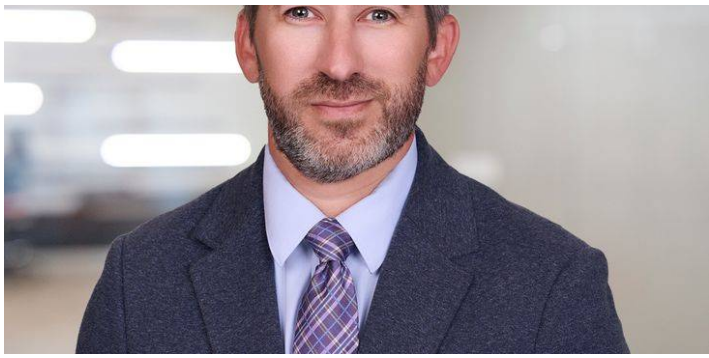
As for the listening session itself, the majority of individuals in attendance at the first session, in Atlanta, were Human Resource Professionals and business owners / executives. A number of lawyers also attended, and a small number of public interest employee advocates. Most of the comments centered around the fact that (1) the minimum salary level for the white collar exemptions should be increased; but (2) the increase should be lower than the prior final rule, with most recommendations falling somewhere between \$30,000 to \$35,000 per year (\$575 to \$675 dollars per week, on a salary basis).

### **The Bottom Line**

While we are hopeful that there might be an end in sight with respect to the 2016 debacle, there was a *deja-vu-esque* quality to the event. Even many of Fisher Phillips' own comments at the event were reiterations of what it previously submitted to the agency in 2015 and 2017. Nonetheless, there is something to be said for having the opportunity to highlight legal issues, as well as the practical ones, that were largely ignored before. One would hope that the agency's efforts to engage with the stakeholders again means that it is "listening" and will propose new regulations that are based on accurately described data sets, consistent with the historically stated purpose behind the salary-basis requirement, authorized by statute, and, in the end, known by employers well in advance of the effective date.

### ***Related People***





**Marty Heller**

Partner

404.231.1400

Email