

White Collars Turning Blue? The Possible Impact on Employers of the Department of Labor's Proposed Revisions to the Regulations Governing Overtime Pay for 'White Collar' Workers

Written By **Grant B. Osborne** (gbo@wardandsmith.com)

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The Department of Labor has proposed rules to dramatically limit the ability of employers to classify "white collar" employees as exempt from overtime pay requirements.

Background

The federal Fair Labor Standards Act ("FLSA") generally requires employers to pay each employee at least the federal minimum wage and premium overtime pay at the rate of one and one-half times the employee's "regular hourly rate" for all hours worked over 40 in a work week.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay requirements for employees in certain "white collar" positions. To be properly classified as "exempt," an employee generally must meet all of the following criteria:

- Paid on a salary basis, or in some cases a fee basis; and,
- Paid a minimum of \$455 per week; and,
- Fit the requirements of the "duty test" for the applicable exemption.

Proposed Changes to Salary Threshold

The United States Department of Labor ("DOL") enforces the FLSA's wage and overtime requirements. In 2014, President Obama directed the Secretary of Labor to update FLSA's overtime regulations. On June 30, 2015, the DOL announced the long-awaited proposed regulations ("Proposed Rules") that, if adopted, would change the rules to make more executive, administrative, and professional employees, so-called "white-collar" employees, entitled to the FLSA's minimum wage and overtime pay.

The Proposed Rules dramatically increase the weekly salary threshold for exempt employees. Currently, the "white collar" exemptions from the FLSA's minimum wage and overtime pay mandate generally apply only when the employee meets the applicable duty test and is paid a defined "salary" of no less than \$455 per week. The Proposed Rules include a steep increase to the weekly salary threshold to a rate in the 40th percentile of weekly earnings for full-time salaried workers in the United States. This means that the projected minimum weekly salary may well be \$970 per week in early 2016, with annual increases.

Current Duty Tests

Job titles do not determine whether an employee's job qualifies for "exempt" status. For an employee to be exempt, the employee's specific job duties and salary must meet all of the requirements of the classification,

as set out in the DOL regulations.

The most commonly used "white collar" exemptions are the administrative, executive, and learned professional exemptions.

To qualify for **the Administrative Employee Exemption**, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate currently of not less than \$455 per week; and,
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and,
- The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

To qualify for **the Executive Employee Exemption**, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate currently of not less than \$455 per week; and,
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; and,
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and,
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

To qualify for **the Learned Professional Employee** exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate currently of not less than \$455 per week; and,
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; and,
- The advanced knowledge must be in a field of science or learning; and,
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Proposed Changes to Duty Tests

The duty tests prescribe the duties that an employee must perform to qualify for exemption. The Proposed Rules do not include changes to the current duty tests for any of the current exemptions, but the DOL has requested comments on whether the duty tests adequately determine whether an employee qualifies as exempt or non-exempt and whether the current tests permit exempt employees to perform a disproportionate amount of non-exempt work. Therefore, the DOL may well be contemplating revisions to the duty tests. This will not be known until the final regulations are published, but any such changes could negatively impact employers because if the applicable duty test changes, an exempt employee may no longer qualify for exemption even though the employee's job duties have not changed.

When Will The Regulations Be Final?

The Proposed Rules were published in the Federal Register in early July, 2015, and a 60day public comment

period follows (which will end on September 4, 2015). The DOL is required to review and consider all submitted comments before issuing the final regulations. There is no set deadline for the DOL to release the final regulations, but many predict that changes will not be effective before January, 2016.

What Should Your Company Do?

No adjustments to employee compensation are currently needed, but, during the comment period and before the final regulations become effective, employers should prepare by reviewing the salary of each employee who is currently classified as exempt in order to determine whether the employee will meet the salary threshold if the Proposed Rules become effective. Employers may wish to consider raising salaries to preserve exemptions in cases in which it makes economic and practical sense to do so. In cases where salaries will not be increased, employers should be prepared for the possibility that previously "exempt" employees may become "non-exempt" and thus entitled to the minimum wages and premium overtime pay required by law.

Employers should also be prepared to implement policies and procedures that will enable them to record and document all hours worked by all newly "non-exempt" employees (because you can be sure that many such employees will create such records for their own purposes). Employers who anticipate that a large number of their employees will lose exempt status should also consider, where appropriate, policies requiring management pre-approval of overtime in order to limit potential liability for overtime pay.

Employers, and those who control them, must take these probable new requirements seriously. There are many cases in which executives with responsibility for payroll practices can be held personally responsible for violations of the FLSA, resulting in personal liability for substantial unpaid wages, additional equal amounts as "liquidated damages," and the claimant's attorneys' fees, all of which can total a considerable sum.

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