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## Poverty to Percentiles: Significant Changes Coming to Overtime Exemptions

By **Matthew J. Feery**

Forty years ago, in 1975, the Department of Labor updated the salary level used to determine whether employees could, assuming they passed the corresponding duties test, be classified as exempt under the Fair Labor Standards Act. It was the seventh such update to the salary test since the DOL devised a test in 1938 to determine which employees would be exempt from the FLSA's overtime requirements. Those updates had been somewhat regular - every five to nine years. But after that 1975 raise, it would be 29 years before the salary level was updated. By the time the DOL issued major updates to the FLSA regulations in 2004, the salary levels in place from 1975 were so outdated that an employee earning the then-federal minimum wage of \$5.15 per hour earned more in a week than the DOL required for some exempt employees.

Then in 2004 the DOL issued major revisions to the FLSA, creating, with some updates along the way, the tests for exempt workers we have currently. Among the DOL's 2004 revisions was a raise of the salary level to what it is today: a salary of at least \$455 per week, or \$23,660 per year. That number may even come as a surprise to some employers. After all, most audits and litigation over employee misclassification comes from the "duties test" part of the exempt classification, not the salary test part. It also may even come as a surprise that the current annual threshold salary an employee must earn to be exempt (\$23,660) is below the federal government's

[current poverty line](#) for a family of four (\$24,008). All this, however, is about to change.

This past Monday, while many people were still recovering from their Fourth of July holiday or were perhaps still on vacation, [the DOL issued](#) a Notice of Proposed Rulemaking ("Notice") that announces proposed, significant changes to the salary level used to determine exempt employees. As with all such Notices, the DOL is inviting comment from the public on the proposed changes. But the Notice also may herald larger changes soon to come: the DOL is also inviting comment on proposed changes to the duties test used to determine whether employees meet the so-called "white collar" exemptions to the FLSA.

The Notice proposes two significant changes to the salary level. First, the DOL is proposing to more than double the current required salary. Under the proposed changes, the standard salary level an employee would need to earn to be considered exempt would jump from \$455 per week to \$921 per week. The proposed weekly salary equates to an annual salary of \$47,892. The DOL chose that level because it corresponds to the 40th percentile of earnings for full-time salary workers in 2013 under data collected and published by the Bureau of Labor Statistics ("BLS"). This increase alone will, according to the DOL's estimates, immediately make 4.6 million workers eligible for overtime under the FLSA. The DOL has not forgotten the highly compensated employee (HCE) exemption in the FLSA either; the salary level for employees to be considered an HCE will increase from \$100,000 per year to \$122,148 per year under the new regulations. The HCE figure corresponds to the 90th percentile of earnings for full-time salary workers in 2013.

To avoid a repeat of the long stretch of time between salary level updates, the DOL is also proposing another major change: to annually update the salary level using one of two methods. The first method is to tie the salary level to the percentile of earnings for full-time salaried workers under the data collected by BLS. This data is published quarterly, which would allow employers to track and plan throughout the year. The second method would tie the levels to changes in the BLS's Consumer Price Index for All Urban Consumers (called the "CPI-U"), which, generally speaking, measures inflation by tracking the prices paid by urban consumers for a set basket of goods. Under either method, employers would need to keep abreast of changes to the salary level and continually monitor their employees' classifications accordingly.

But as mentioned earlier, the Notice heralds larger changes ahead. The DOL makes clear in the Notice that it feels the current duties tests for professional, executive, and administrative workers may not be accurate enough and may allow, in its opinion, too many workers to be classified as exempt. Therefore, the DOL is now

considering what changes, if any, should be made to the "white collar" exemption tests. One option expressly mentioned by the DOL is to possibly adopt California's requirement that 50% of an employee's time be spent exclusively on work that is the employee's primary duty. In particular, the DOL is asking for comment on the following five issues:

- What, if any, changes should be made to the duties tests?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, how much time?
- Should the DOL adopt California's 50% rule?
- Does the duties test for each exemption appropriately distinguish between exempt and non-exempt employees, and should the DOL return to the long and short duties tests eliminated in the 2004 regulations update?
- Is the concurrent duties regulation for executive employees working or should it be changed?

These questions are likely not just academic: Change is coming. The DOL is taking comments until September 4, 2015. Looking just at the salary level, these proposed changes would mean more employees qualify for overtime. But for employers, it may result in some benefits as well. A clearer and more current salary level may help avoid some litigation over misclassification of lower level employees and help focus the exempt classification on those employees for whom it is truly meant. Employers should monitor these developments carefully, preparing now for the changes that are on the way.

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