# U.S. Department Of Labor Seeks To Increase Salary Level For Federal Overtime Exemptions

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**Announcement of Proposed Changes**
On June 30, 2015, the United States Department of Labor ("Department") released on its website information about proposed rulemaking changes to federal overtime exemptions.

The Notice of Proposed Rulemaking explains that the Department intends to update the executive, administrative, professional, outside sales and computer employee exemptions—referred to as the FLSA's "EAP" or "white collar" exemptions—to implement intended overtime protections and simplify the identification of nonexempt employees.

**Proposed Changes to Federal Overtime Exemptions**

The Department proposed to increase the salary level for federal overtime exemptions. Currently an employer must pay employees falling within "white collar" exemptions on a "salary basis" of not less than $455 per week, or $23,660 per year. DOL Fact Sheet #17G. The proposed new salary level would be set at the 40th percentile of weekly earnings for full-time salaried employees, which the Department estimates for 2016 will be about $970.00 per week, or $50,400.00 per year. The Economic Policy Institute had previously reported in March 2014 that adjusting the 1975 salary level of $250.00 per week for inflation would raise the amount to $970.00 per week, or $50,440 per year. The Department also proposed automatic increases to the salary level.

The Department announced it was also considering other aspects of the exemptions and requested comments. The Department announced it was considering whether there needs to be revisions to the exemptions' duties tests. The Department explains that possible revisions to the duties test include limiting or specifying a specific amount of time an overtime exempt employee can perform non-exempt work and adding to the regulations additional examples of how the exemptions may apply in particular occupations.

The Department also discussed the possibility of including non-discretionary pay in calculating total annual compensation under the highly compensated exemption.

The requests for discussion on revisions to the duties and inclusion of non-discretionary pay did not propose any specific regulatory changes. The Department's proposed rulemaking also noted that while it is beyond the scope of this rulemaking, it intends to address in the near future the use of electronic devices by overtime-protected employees outside of scheduled work hours.

**Reasons for the Proposed Rule Changes**

On June 29, 2015, President Barack Obama in an opinion article for the Huffington Post criticized the nation's overtime regulations as "outdated" and stated that "too many Americans are working long days for less pay than they deserve." The present salary level is below the poverty level for a family of four and would qualify a family of three to four to receive federal Supplement Nutrition Assistance Program ("SNAP") benefits. The Notice of Proposed Rulemaking explains that "a convenience store manager, fast food assistant manager, or some office workers may be expected to work 50 or 60 hours a week or more, making less than the poverty level for a family of four, and not receive a dime of overtime pay." The Department believed that the salary level set in 2004 was "too low to efficiently screen out from the exemption overtime-protected white collar employees when paired with the standard duties test." After a review regulatory history and other considerations, the Department stated in the Proposed Notice of Rulemaking that it believed that setting the proposed salary level at the 40th percentile of all salaried workers establishes "an appropriate dividing line helping differentiate between white collar workers who are overtime-eligible and those who are not."

The Department is considering including nondiscretionary bonuses and incentive as part of the total compensation within the highly compensated exemption because several employers encouraged the Department to consider this change, "noting that such bonuses are a key part of exempt employees' compensation in their industries and contribute to an 'ownership mindset.'"

The Department is considering revisions to the duties test in response to feedback during listening sessions. It explained in the Proposed Notice of Rulemaking that business interests, while not advocating for any changes to the tests, had concerns about the difficulty of imposing any limit on the amount of nonexempt work that exempt employees may perform and suggested adding additional examples would increase clarity of the tests. Employee interests, on the other hand, advocated for stricter requirements to limit nonexempt work which they believed would clarify the exemption.

**Effects of Proposed Changes**

The Department explained that its "outreach has made clear that there are also some widespread misconceptions about overtime eligibility under the FLSA." The proposed rulemaking and discussions are geared toward "making the exemptions easier for employers and workers to understand."

The proposed increase in the salary level for overtime exemptions is more likely to have an effect on entry-level workers and workers in small businesses. According to the Bureau of Labor Statistics, executives who are exempt as management in "restaurants and other eating places" may benefit the most since management occupations in that industry have a mean wage of $58,730 compared to other management occupations in other industries that have a mean wage of $80,000 or more. Workers in management occupations are also the most likely to work long hours as a result of the business. An increase in the minimum salary for entry level professionals may create pressure to increase mid- and senior-level professional pay.

Workers should not expect to see changes anytime soon since the Department will still have to review feedback to the proposed rulemaking and make any revisions after the 60-day comment period is over. The Department may revise the proposed rule and once it makes its final rulemaking decision, there must be a regulatory impact analysis followed by a 30-day waiting period after publishing the final rule

before it can be implemented. Changes resulting from discussions of the current Notice of Rulemaking will likely take longer to be implemented.

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