



## FREQUENTLY ASKED QUESTIONS: Overtime NPRM

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### GENERAL

#### 1. Q. Who is entitled to overtime pay under federal law?

A. Most employees [covered](#) by the Fair Labor Standards Act ("FLSA") must be paid at least one and one-half times their regular rate of pay for any hours they work beyond 40 in a workweek. An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.

## 2. Q. Who is covered by the Fair Labor Standards Act (FLSA)?

A. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than \$7.25 per hour. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

Generally, employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more are covered by the FLSA. In addition, employees of certain businesses are covered by the FLSA regardless of the amount of gross volume of sales or business done. These businesses include: hospitals, businesses providing medical or nursing care for residents; schools (whether operated for profit or not for profit); and public agencies.

## 3. Q. Does the FLSA and the Department's proposed overtime rule for white collar workers apply to state or local government workers?

A. Yes, state and local government employers are subject to the FLSA and the Department's proposed regulations concerning white collar employees.

## 4. Q. Is there a small business exemption from the FLSA or the Department's proposed overtime rule for white collar workers?

A. The FLSA does not provide an exemption for small businesses. Generally, the FLSA and the proposed rule apply to employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more, and certain other businesses. The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees.

## 5. Q. Is there an exemption for non-profit organizations from the FLSA or the Department's proposed overtime rule for white collar workers?

A. There is no exemption for non-profit organizations under the FLSA or in the proposed rule. Thus, the proposed rule may impact non-profit organizations having an annual dollar volume of sales or business done of at least \$500,000. In determining coverage, only activities performed for a business purpose are considered and not charitable, religious, educational, or similar activities of organizations operated on a non-profit basis where such activities are not in substantial competition with other businesses.

## 6. Q. How is overtime pay determined?

A. Unless exempt, employees covered by the FLSA must receive overtime pay for all hours worked over 40 in a workweek at a rate not less than one and one-half times their regular rates of pay.

## 7. Q. What are the white collar exemptions to the FLSA?

A. The FLSA's white collar exemptions exclude certain [executive, administrative, and professional](#) employees from federal minimum wage and overtime requirements. Certain computer professionals and outside sales employees are also excluded from these requirements.

## 8. Q. What determines if an employee falls within one of the white collar exemptions?

A. Currently, to qualify for exemption, a white collar employee [generally](#) must:

1. be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
2. be paid more than a specified salary threshold, which is \$455 per week (the equivalent of \$23,660 annually for a full-year employee) in existing regulations (the "salary level test"); and
3. primarily perform executive, administrative, or professional duties, as provided in the Department's regulations (the "duties test").

Certain employees are not subject to either the salary basis or salary level tests (for example, doctors, teachers, and lawyers).

## 9. Q. I'm paid a salary and my job title is manager. Am I exempt from overtime pay?

A. Job titles do **not** determine exempt status, and the fact that a white collar employee is paid on a salary basis does not alone provide sufficient ground to exempt that employee from the FLSA's minimum wage and overtime requirements. For an exemption to apply, an employee's specific job duties **and** salary must meet all of the applicable requirements provided in the Department's regulations.

## 10. Q. What if a state has its own overtime laws?

A. The FLSA provides minimum standards, and does not preempt a state from establishing more protective standards. If a State establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that State.

**11. Q. What is the current salary level required to qualify for a white collar exemption?**

A. Under the current regulations, a white collar employee must be paid at least \$455 per week (equivalent to \$23,660 annually for a full-year employee) to qualify as an exempt executive, administrative, or professional employee. An employee may qualify as an exempt [computer professional](#) if he or she is paid at least \$455 per week or at least \$27.63 an hour, if paid on an hourly basis. There is no salary level test required to qualify as an exempt [outside sales employee](#). Certain professionals including doctors, lawyers, and teachers are also not subject to the salary level test. Finally, the current regulations also contain a relaxed duties test for certain [employees](#) who receive total annual compensation of \$100,000 or more and are paid at least \$455 per week.

**12. Q. When did the Department last revise its overtime regulations for white collar workers?**

A. The Department last updated the white collar overtime regulations in 2004. That update, which included setting the standard salary level test amount of \$455 per week, has been in effect since August 23, 2004.

**13. Q. Why is the Department revising its overtime regulations for white collar workers?**

A. To help build real, lasting economic security for more hardworking Americans, President Obama directed the Secretary of Labor to update the FLSA's overtime pay protections and to simplify the overtime rules for employers and workers alike. By way of this rulemaking, the Department seeks to update the salary level test to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of overtime-eligible employees, thus making the white collar exemptions easier for employers and workers to understand.

**14. Q. What are the significant proposed changes to the overtime regulations for white collar workers?**

A. To restore the effectiveness of the salary level test, the Department proposes to set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers. Using 2013 data, the proposed salary amount would equal \$921 per week (which is \$47,892 annually for a full-year worker). Should the Department decide after consideration of comments received on the NPRM to set the standard salary level in the final rule at the 40th percentile of weekly earnings of full-time salaried workers, the Department estimates that a 2016 level may be about \$970 a week, or \$50,440 a year.

The Department is also proposing to set the highly compensated employee ("HCE") annual compensation level equal to the 90th percentile of earnings for full-time salaried workers (\$122,148 annually). Further, in order to prevent the salary level requirements from again becoming outdated and ineffective between rulemakings, the Department is proposing to automatically update the salary and compensation levels on an annual basis.

**15. Q. Is the Department proposing adjustments to the standard duties tests?**

A. While the Department is not proposing any specific changes to the standard duties tests, the Department is seeking comments on whether the current duties tests are working as intended to screen out employees who are not bona fide "white collar" exempt employees.

**16. Q. How does the proposed rule provide greater clarity for millions more workers so they - and their employers - know more clearly if they should be covered by overtime protection?**

A. The proposed rule will clarify the overtime requirements for approximately 11 million workers who earn below the proposed salary threshold and their employers because their entitlement to overtime pay can be determined solely on the basis of the bright line salary threshold. This group includes almost 5 million white collar workers who will become newly entitled to overtime protection because of the increase in the salary threshold, and approximately 6 million white collar employees who are currently entitled to overtime who will have their eligibility clarified because it will be determined solely by application of the salary threshold.

**17. Q. Where can I review, and how can I comment on, the Department's proposed changes to the overtime regulations for white collar workers?**

A. The Department's Notice for Proposed Rulemaking ("NPRM") is available at [www.regulations.gov](http://www.regulations.gov) under Rule Identification Number (RIN) 1235-AA11. The Department encourages all interested parties to participate in the rulemaking process by submitting written comments regarding the NPRM through the online portal provided at [www.regulations.gov](http://www.regulations.gov).

**18. Q. Will the proposed rule impact employees who use electronic devices, such as smartphones or laptops, for work-related purposes outside of regular work hours?**

A. During its outreach to stakeholders, the Department heard questions and concerns related to the use of electronic devices by white collar workers who may be newly entitled to overtime pay as a result of this rulemaking. Because this concern involves compensation for hours worked by overtime-protected employees, it is beyond the scope of this rulemaking. The Department, however, understands the importance of this concern and will publish a Request for Information (RFI) in the near future seeking information from stakeholders on the use of electronic devices by overtime-protected employees outside of scheduled work hours. The Department anticipates issuing the RFI in August 2015.

**SALARY LEVEL**

### **1. Q. What is the proposed standard salary level?**

A. In order to re-establish the effectiveness of the salary level test as a ready method of drawing a line separating exempt from nonexempt employees, the Department proposes to set the standard salary level at the 40th percentile of [weekly earnings for full-time salaried workers](#). Using 2013 data, the proposed salary amount would equal \$921 per week (which is \$47,892 annually for a full-year worker). Should the Department decide after consideration of comments received on the NPRM to set the standard salary level in the final rule at the 40th percentile of weekly earnings of full-time salaried workers, the Department estimates that a 2016 level may be about \$970 a week, or \$50,440 a year.

### **2. Q. Why is the Department proposing to set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers?**

A. The Department believes that the 40th percentile of weekly earnings for full-time salaried workers represents the most appropriate line of demarcation between exempt and nonexempt employees. This amount effectively distinguishes between employees who may meet the duties requirements of the white collar exemptions and those who likely do not, without necessitating a return to the more detailed "long" duties test that existed before 2004. This salary level minimizes the risk that employees legally entitled to overtime will be subject to misclassification based solely on the salaries they receive, without excluding from exemption an unacceptably high number of employees who meet the duties test.

Currently, approximately 85 percent of white collar salaried workers who fail the duties test and therefore are entitled to overtime protection earn at least \$455 per week. Because the current salary level is only screening from exemption approximately 15 percent of overtime-eligible white collar salaried employees, it is not an effective test for exemption and does not serve the intended purpose of simplifying application of the exemption by reducing the number of employees for whom employers must perform a duties analysis. Increasing the standard salary level to the 40th percentile of weekly earnings for full-time salaried workers would reduce the number of white collar employees who do not meet the duties test but earn at least the proposed salary level to approximately 41 percent.

### **3. Q. Is the Department proposing to increase the salary level for highly compensated employees?**

A. The Department is proposing to set the HCE annual compensation level equal to the 90th percentile of earnings for full-time salaried workers (\$122,148 annually).

### **4. Q. Will the Department consider bonuses as part of the new salary level test?**

A. In a further effort to respond to changing conditions in the workplace, the Department is seeking comment on whether to allow nondiscretionary bonuses, such as certain production or performance bonuses, to satisfy a portion of the standard salary test requirement. Such bonuses include for example, nondiscretionary incentive bonuses tied to productivity and profitability.

### **5. Q. Why is the Department proposing to automatically update the salary level and HCE total annual compensation level?**

A. The Department is proposing to automatically update the standard salary and HCE total annual compensation requirements to ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers. Experience has shown that the salary level test is a strong measure of exempt status only if it is up to date. Left unchanged, the test erodes due to inflation, becoming substantially less effective as wages for overtime-protected workers increase over time. Automatically updating the salary level and HCE total annual compensation requirement using the most recent data will ensure that these tests continue to accurately reflect current economic conditions.

### **6. Q. How is the Department proposing to automatically update the salary level and HCE total compensation levels?**

A. The Department has proposed two different methodologies for updating the standard salary and HCE total annual compensation levels. One method would keep those levels pegged to the 40th and 90th percentiles of earnings for full-time salaried workers, respectively. The other method would adjust the standard salary and HCE compensation amounts based on changes in inflation, as measured by the Consumer Price Index for all Urban Consumers (CPI-U). The Department is seeking comment on both methods of updating.

## **DUTIES TEST**

### **1. Q. How will the Department update the "duties tests" in the proposal?**

A. The Department is not making specific proposals to modify the standard duties tests; however, the Department is seeking comment on whether the standard duties tests are working as intended to screen out employees who are not bona fide white collar exempt employees.

### **2. Q. What is the basis for the standard duties test?**

A. From 1949 until 2004 the regulations contained two different tests for exemption - a long test for employees paid a lower salary, and a short test for employees paid at a higher salary level. Under the old short test/long test structure, the long duties test included a limit on the amount of nonexempt work that could be performed (20 percent for most workers and 40 percent for retail and service workers) and thus provided an adequate safeguard against the exemption of white collar workers who should be overtime-protected but who were paid between the long test salary level and

the short test salary level. The short duties test did not include a cap on nonexempt work for employees paid at or above the higher short test salary level. The Department in the 2004 Final Rule replaced the short test/long test structure with a single "standard" test. The standard test based the new "standard" duties tests on the short duties tests (which did not strictly limit the amount of nonexempt work that could be performed), and tied them to a salary test level that was updated from the long test salary (which historically had been paired with a cap on nonexempt work).

## ECONOMICS

### 1. Q. What are the costs and benefits of the proposed rule?

A. The Department estimates that average annualized direct employer costs will total between \$239.6 and \$255.3 million per year, depending on the updating methodology. In addition to the direct costs, this proposed rulemaking will also transfer income from employers to employees in the form of higher earnings. Average annualized transfers are estimated to be between \$1.18 and \$1.27 billion, depending on which of the two updating methodologies is used.

### 2. Q. How many employees does the Department think will be impacted by the proposed salary level increase?

A. In the first year, the Department estimates that 4.6 million workers exempt under the current regulations who earn at least the current weekly salary level of \$455 but less than the proposed salary level of \$921 would, without some intervening action by their employers, become newly entitled to overtime protection under the FLSA. Similarly, an estimated 36,000 currently exempt workers who earn at least \$100,000 but less than \$122,148 and who meet the minimal HCE duties test but not the standard duties test may also become eligible for minimum wage and overtime. Additionally, the Department estimates that 6.0 million salaried white collar workers who are currently entitled to overtime due to their job duties, and who earn at least \$455 per week but less than the proposed salary level, would have their overtime protection strengthened because their exemption status would be clear based on the salary test alone without the need to examine their duties. This would reduce the number of overtime eligible workers potentially subject to misclassification as exempt by their employers.

### 3. Q. Where can I find the earnings information the Department used in setting the salary and total annual compensation levels?

A. The Department set these levels using Bureau of Labor Statistics (BLS) data available at [http://www.bls.gov/cps/research\\_nonhourly\\_earnings\\_2013.htm](http://www.bls.gov/cps/research_nonhourly_earnings_2013.htm). On a quarterly basis, BLS publishes a table of deciles of the weekly wages of full-time salaried workers, calculated using Current Population Survey data. See [http://www.bls.gov/cps/research\\_series\\_earnings\\_nonhourly\\_workers.htm](http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm)

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