

The Impact of the DOL's Proposed Changes to Overtime Pay

By Kristy A. Saum and Justin N. Brunner

The human resources departments of banks and other employers are buzzing over proposed changes to federal overtime rules. Employers have historically been able to avoid paying overtime to “white collar” employees who meet certain criteria. But the criteria are changing, and the U.S. Department of Labor (DOL) expects the changes to convert 5 million exempt white collar employees into overtime eligible workers. The DOL expects these changes to cost employers increased wages of \$1.18 to \$1.27 billion per year plus \$239.6 to \$255.3 million per year to become familiar with and adjust to the new rules. Although the scale of the changes seems drastic, banks and other employers can take steps now to prepare.

Many banks and other employers are already familiar with the overtime exemptions for white collar and highly compensated employees. The Fair Labor Standards Act requires overtime pay for covered employees at a rate of not less than 1.5 times the regular rate of pay after 40 hours of work in a workweek. Since 1940, the DOL's regulations have addressed the exemptions for certain white collar workers. To qualify, an employee's job duties must primarily involve executive, administrative, or professional duties. The employee must receive a fixed, predetermined salary, and the salary must meet a

minimum threshold. If these tests are met, the executive, administrative, or professional employee is exempt from the Fair Labor Standards Act's overtime provisions. Other employees are exempt if they are sufficiently highly compensated even if they do not fit as neatly into the categories of executive, administrative, or professional employees.

The familiar rules are being changed by DOL to remedy perceived problems with the exemptions. The DOL claims that the exemption was originally designed so that employers could avoid paying overtime to workers who earned higher salaries and presumably enjoyed better benefits, job security, and advancement opportunities. But the regulations have not been updated for over 10 years, and employers may now avoid paying overtime to employees whose salary is as little as \$23,660 a year. In the words of the DOL, this salary level affects “a convenience store manager, fast food assistant manager, or some office workers” who are “expected to work 50 or 60 hours a week or more, making less than the poverty level for a family of four, and not receiv[ing] a dime of overtime pay.”² In essence, the \$23,660 salary that currently qualifies a worker for the white collar exemptions does not reflect current economic conditions.



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To remedy the perceived problems with the white collar exemptions, the DOL has proposed regulations that make at least two significant changes.³ First, the DOL proposes that the white collar exemption will apply to only those workers earning at or above the 40th percentile of salaries – meaning at least \$50,440.00 in 2016 by DOL's estimate. This more than doubles the previous salary threshold of \$23,600. Second, the DOL proposes that the highly compensated exemption will apply to only those employees earning at or above the 90th percentile of salaries – meaning at least \$122,148.00. In other words, employers must be paying their employees a significantly higher salary before the employees will be ineligible for overtime.

The DOL is accepting comments to the proposed changes through September 4, 2015, unless an extension to this deadline is granted. The DOL has specifically requested comments on a methodology for annually updating the minimum salary requirements as well as whether or not a nondiscretionary bonus or other incentive compensation should be factored into an employee's salary for meeting the threshold. Additionally, while the proposed rule does not currently make any changes to the duties test used to determine a workers' classification, the DOL has requested comment on whether changes should be made. Changes to the duties test could include new rules on whether employees must spend a specified minimum amount of time performing their primary executive, administrative, or professional duty in order to be ineligible for overtime.

The impact of the new rules, if passed, remains to be seen and will likely vary as employers try various avenues to adjust to the new regulations. If employers do nothing, they will likely face increasing personnel costs as certain employees would become eligible for overtime pay at the rate of 1.5 times their standard hourly rate, for any hours in a workweek over forty. This could result in employers reducing staff in other areas or limiting certain services provided by the employer in order to maintain a similar profit ratio. Employers may also react to the increased personnel cost by decreasing or eliminating training opportunities provided by the employer. Alternatively, employers may elect to avoid paying overtime by raising the pay of affected employees so that their salary meets the new minimum threshold. In this instance, employers would retain the employees but may also add increased duties and responsibilities, putting more work on existing employees.

While the proposed rules are not yet finalized, there are a number of steps that banks and other employers can take now to assess the potential impact of the new rules and prepare their organization. Employers should review their written job descriptions and make sure that the descriptions are accurate and up to date. Since job titles alone do not determine whether an employee is exempt, it is important to have detailed job descriptions indicating the duties of each position in order to evaluate whether the exemption is being properly applied. Employers can also look at their current workforce and estimate how many of their current employees will no longer meet the exemption requirements due to the increased salary threshold. In some instances, employers may elect to provide employees a raise in order to maintain the exemption. In situations where the exemption cannot be maintained, employers will need to prepare to train a pool of workers that have historically not been accustomed to using timeclocks or timecards. Employee handbooks or other similar policies outlining the requirements for accurate timekeeping as well as guidelines concerning the use of overtime can be essential tools for an employer. Finally, employers may consider increasing the size of their work force in order to avoid working existing employees for longer hours and to minimize overtime pay.

The proposed overtime rules come during a year when the DOL has also issued guidance on other labor concerns, including the distinction between independent contractors and employees. Banks and other employers should be aware of these various issues and consult with legal counsel as to the effect on their particular organization. Employers should

also be aware that certain states can impose stricter standards than the DOL entitling their citizens to broader overtime protection, further underscoring the need for competent counsel. ■

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¹ Generally a business is covered if it has an annual gross volume of sales made or business done of \$500,000.00 or more.

² See U.S. Dept. of Labor, Wage and Hour Division, Notice of Proposed Rulemaking: Overtime, available at <http://www.dol.gov/whd/overtime/NPRM2015/>, last visited Aug. 17, 2015.

³ See U.S. Dept. of Labor, Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 128, 38516 – 38612 (July 6, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>, last visited Aug. 17, 2015.



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