

CUT AND PASTE POST
JULY 2015 SPECIAL EDITION:
PROPOSED UPDATE TO FEDERAL OVERTIME REGULATIONS

As you know, in order to be Exempt from overtime rules, Executive, Administrative, and Professional employees must generally meet 3 criteria. These include:

- Salary Level Test – The employee must receive at least \$455 per week;
- Salary Basis Test – The employee must receive the salary regardless of the number of hours worked in the week; and
- Duties Test – The employee must qualify as an Executive, Professional or Administrative employee, as described in the current regulations.

On July 6, the U. S. Department of Labor published the much-anticipated proposed update to the overtime Regulations found at 29 CFR Part 541. See <http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>. Here is a 'Cliff's Notes' version of the proposed update.

The only substantive change proposed in this 98(!) page document is an increase in the Salary Level to at least \$920.00 per week (\$47,840 annually)¹. It is projected that, by the rules change, the Salary Level would actually be \$970.00 per week (\$50,440 annually).

<i>MT Dept. of Labor: Montana 2014 Mean Non-farm Annual Wage: \$39,880.</i>

The proposed Salary Level reflects the 40th percentile of earnings for full-time salaried workers in the U.S. The new Salary Level Test would be subject to annual updates, linked to the 40th percentile figure or, alternatively, based on changes in the CPI-U. Needless to say, an annual update would require employers to annually review their Exempt positions to ensure compliance with the new Salary Level.

The DOL is also considering whether to permit nondiscretionary bonuses to count toward 10% of new Salary Level threshold, as long as the bonuses are paid monthly or more frequently.

Again, the only changes proposed affect the salaries paid to Exempt positions: The DOL has not proposed changes to the Salary Basis or Duties Tests, and it did not propose allowing private employers to provide compensatory time in lieu of overtime pay, which would have increased workplace flexibility for employees and employers.

However, the DOL did leave the door open to additional changes. In the proposed rule, the DOL asks for public comment on a number of questions about the Executive, Administrative and Professional Duties Tests. Specifically, the DOL wants to know:

- What, if any, changes should be made to the Duties tests?
- Should Exempt 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, what should that minimum amount be?

¹ The Salary Level Test for Highly Compensated Employees (HCE) would increase from \$100,000 to \$122,148 per year, which equates to the 90th percentile of salaried workers. The HCE Salary Level would be updated annually.

- Should the DOL look to California law, requiring that more than 50 percent of an employee’s time be spent exclusively on work that is the employee’s primary duty (Exempt level work), as a model? Is some other threshold that is less than 50 percent of an employee’s time worked a better indicator of the realities of the workplace today?
- Does the current Duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the department reconsider its 2004 decision to eliminate the long- and short-duties test structure?
- Is the concurrent duties regulation for Executive employees—allowing the performance of exempt and nonexempt duties concurrently—working well or does it need to be modified? Alternatively, should there be a limitation on the amount of nonexempt work that an Exempt Executive can perform? To what extent are Exempt lower-level Executive employees performing nonexempt work?
- Exempt Administrative positions are the most complicated to administer. The current Regulations, at 29 CFR 541 Subpart C, provides several examples of non-exempt and exempt duties performed by employees in Administrative positions. Do you want more examples? Do you have a specific situation you would like addressed?

The DOL also wants to know if employers should be able to apply up to 10% of nondiscretionary bonuses to satisfy a portion of the Salary Level Test. If so, what is the maximum percent that should be allowed to be included?

Comments are due by 5:00 p.m. on September 4, 2015.

Once the comment period is over, it is unclear whether the DOL will provide the public with the opportunity to comment on any changes made to the Duties test. Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington, D.C., and a former acting administrator of the Wage and Hour Division has said that employers should prepare for the possibility of a double whammy—an increase in the salary level and more stringent duties tests that limit the amount of nonexempt work that an exempt employee may perform. Others believe the DOL will tackle the salary adjustment first, and modify the Duties Tests at a later date.

“Employers should still steel themselves for the possibility of a double whammy—an increase in the salary level and more stringent duties tests that limit the amount of nonexempt work that an exempt employee may perform”
Alfred Robinson, Jr.

It’s important to remember that Montana has adopted, by administrative rule, most of the provisions of the Fair Labor Standards Act. See <http://www.mtrules.org/gateway/Subchapterhome.asp?scn=24%2E16%2E2>

Steps to Take:

- **First, don’t panic!** It is anticipated that it the final new rules won’t be published until the Late Winter/Early Spring, 2016, with an effective date no earlier than 60 days later;
- **Watch the SHRM webinar, *Changes to the Department of Labor's Overtime Rules*.** Learn how you can help influence the final overtime regulation and how the proposed changes could impact both your workplace and your employees. (The webinar qualifies for 1 General Recertification credit.) You can find this webinar at <http://www.shrm.org/multimedia/webcasts/pages/default.aspx>;
- **Comment before 9/4/15.** If you think the Salary Basis Test should be regionally adjusted, let your voice be heard. Tell the DOL what you think should happen with the current Duties tests, how nondiscretionary bonuses should be treated, and how long employers should have to comply with the new Salary rules. Submit your comments at www.regulations.gov;
- **Communicate with your Representatives in DC** about the impact of the proposed update to your business. Links are on the State’s home page: <http://mt.gov/>;
- **Visit advocacy.shrm.org/overtime** to send your comments to SHRM, and follow [@SHRMATeam](https://twitter.com/SHRMATeam) and [#overtime](https://twitter.com/SHRMATeam) on Twitter; and
- **Stay tuned for more information from GVHRA!** Even though it’s summer, we’re hot on the trail!