



**FREEMAN FREEMAN &  
SMILEY, LLP**

**EMPLOYMENT LAW  
BULLETIN**

**July 7, 2015**

*Specializing in  
Employment Law and  
Business Litigation*

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## **The DOL Proposed Changes to Exempt Status: Tip of The Iceberg For California Employers**

There has been a flurry of articles analyzing the recently-proposed Department of Labor (DOL) regulations regarding white collar exemptions.

Employers, particularly those with employees in California, need to be aware that (1) these are proposed changes, and that the final regulations will almost certainly be different, and (2) California employers still need to comply with the most employee-friendly provision of any applicable law. This means that California employers will have to examine not only the final DOL regulations when they are issued, but comply with the most generous provisions of federal, state, and local requirements.

### ***The Currently-Proposed DOL Changes To The Salary Requirements***

The currently-proposed DOL changes make significant changes to the salary requirements for minimum wage and overtime exempt status under federal law.

Federal regulations currently require white collar-exempt employees to be paid a salary of at least \$455 per week (\$23,660 annually), with the “highly-compensated” exemption requiring a salary of over \$100,000 annually.

The currently-proposed regulations increase the minimum salary amount by pegging it to the 40<sup>th</sup> percentile of all full-time salaried employees. Had this been in effect in 2013, it would have meant that the minimum salary for exempt status would have been \$921 per week, or \$47,892 for a full-year worker. The DOL projects that the minimum salary will likely be \$970 per week, or \$50,440 for a full-year employee in 2016. They also increase the “highly-compensated” exemption salary to \$122,148 annually.<sup>1</sup>

Unlike past minimum salary requirements that remained constant for many years at a time, the proposed regulations require the minimum salary level to be automatically updated each year, meaning that employers will have to closely track the annual changes to ensure that exempt employees remain paid at a level that will continue exempt status.

### ***The DOL Has Signaled That It Will Probably Change The Duties Test For Exempt Status***

To be exempt under federal law, an employee must not only meet the salary requirements, but also a duties test. The DOL has not yet issued proposed changes to the duties tests for the white collar exemptions, but has solicited comment on several specific questions, clearly signaling the likelihood that these requirements will also change.

<sup>1</sup> The proposed regulations also include a special salary level test of \$774 for America Samoa, and \$1,404 per week for employees in the motion picture industry.



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The nature and scope of the changes it is thinking about can be gleaned from the five specific questions that it posed, i.e.,

- a) What, if any, changes should be made to the duties tests?
- b) Should employees be required to spend a minimum amount of time performing exempt work and if so, what should that minimum be?
- c) Should the DOL look to California's law (which requires an exempt employee to spend more than 50% of working hours in a workweek performing exempt duties) as a model or is there a different model that should be adopted?
- d) Does the single, standard duties test for each exemption appropriately distinguish between exempt and nonexempt employees? Should it reconsider its earlier decision to eliminate the long/short duties tests structure?
- e) For the executive exemption, is allowing the performance of both exempt and nonexempt work concurrently appropriate or should it be changed? Should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?

The DOL has also signaled that it may include a two-tiered system under which employers can choose between an increased salary requirement or a lower salary threshold that has more stringent duties requirements. It may also allow nondiscretionary bonuses, incentive payments, and commissions to count toward a portion of the standard salary level test and, if so, it is considering how to include these additional payments as part of the salary level test.

#### ***Implications For California Employers***

It is clear that the final regulations will complicate decisions for employers who have California employees, and will likely trigger a massive number of class actions against employers who fail to comply with the most employee-friendly provisions of each applicable law and regulation. The DOL anticipates that the largest impact of changed regulations of the sort it is currently proposing will be felt by employers in the educational and health services, wholesale/retail, professional and business services, and the leisure and hospitality industries.

It is not yet clear whether or how the California legislature will change state laws on exempt status, but the signaled federal changes and the local trend toward enacting higher minimum wage requirements will probably spur it to do so.

If past history is any indication, employers will have a relatively short period of time once the DOL issues its final regulations to come into compliance. Here is a tentative roadmap for compliance:

1. There will probably not be any change to the basic requirement that an exempt employee be paid on a salary basis. This means that there are very few permissible deductions that can be made from the salary for absences or disciplinary reasons.



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2. It is likely that the duties test will be more stringent, resulting in employees who meet the new salary requirements still falling into nonexempt status due to the failure to meet the duties requirements.
3. The minimum salary will clearly increase.
4. Employers have to carefully comply with the more stringent requirement under applicable laws on any given issue. For example, California's minimum salary for exempt status is currently \$37,440 annually. Since state salary is pegged to the state's minimum wage, the minimum annual salary for exempt status will increase to \$41,600 when the state minimum wage increases to \$10 per hour effective January 1, 2016. If the federal minimum salary increases to \$50,440 annually as currently proposed, California employers will have to increase exempt salaries to that level in order to remain compliant with both laws for their exempt employees; otherwise, they will be subject to class actions under federal law for the failure to pay federal overtime. In other words, those making less than \$50,440 would be nonexempt under both federal and state laws, those making over \$54,080 could be exempt under both laws (if they meet the duties requirements). Those whose salary falls between these two salary levels would be exempt under state law but not federal law and would presumably be entitled to weekly (but not daily) overtime and would not be entitled to meal and rest periods.
5. The local laws currently being adopted address minimum wage rates for affected employees, but do not affect the salary requirements for exempt status under state, or federal laws. This may change as local legislative bodies re-examine their local requirements.

Written by [Teresa R. Tracy](#)

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