



**hro partners**  
powerful. simple. hr solutions

## Creating people strategies for companies that want to thrive.

From communicating employee benefits and improving retention rates to executive coaching and team building, HRO Partners will provide your organization with more horsepower to reach its full potential. We offer strong solutions to complex problems, bring value to every engagement and handle your needs with passion and sensitivity along the way.

Visit [hro-partners.com](http://hro-partners.com) or call 866-822-0123 to schedule a no-cost consultation.

# **SWEEPING OVERTIME RULE CHANGES:**

**Proposed Changes to  
the FLSA: How to  
Plan, Budget, &  
Prepare**



# STARTING AT THE BEGINNING . . .

## WAGE & HOUR LAW

---

The Fair Labor Standards Act (FLSA) is the federal law that governs wage and hour. The FLSA has three basic requirements:

- Employees must be paid at least federal **minimum wage** (\$7.25) for all hours worked;
- Employees must be paid an **overtime premium** (at time and one-half the regular rate of pay) for all hours worked over 40 hours in a workweek; and,
- Record keeping.

# STARTING AT THE BEGINNING . . .

## WAGE & HOUR LAW

---

**Non-exempt employees** = eligible for overtime

**Exempt employees** = ineligible for overtime

### SO WHICH EMPLOYEES ARE “EXEMPT”?

- For most employees, whether they are exempt or non-exempt depends on:
  - how they are paid
  - how much they are paid
  - what kind of work do they do

# STARTING AT THE BEGINNING . . .

## WAGE & HOUR LAW

---

### SO WHICH EMPLOYEES ARE “EXEMPT”?



- Executive
- Administrative
- Professional
- Outside Salespersons
- Highly Skilled Computer Employees
- Highly Compensated Employees (HCE)

# HOW DID WE GET HERE??

---

## March 13, 2014 Presidential Memorandum to the Secretary of Labor

- The “white collar” exemption regulations are outdated.
- Millions of Americans should be paid overtime and are not because the regulations are outdated.

*“Therefore, I hereby direct you to propose revisions to **modernize and streamline** the existing overtime regulations... and **simplify** the regulations to make them easier for both workers and businesses to understand and apply.”*

# HOW DID WE GET HERE??



DOL went to work  
and 15 months later (on June 30, 2015) . . .




The ***proposed*** changes to the FLSA regulations on the “white collar exemptions” were published.

295-page Notice of Proposed Rulemaking (NPRM)  
Find on DOL’s webpage or [www.regulations.gov](http://www.regulations.gov) RIN  
1225-AA11

# WHAT CHANGES DID THE DOL PROPOSE?

---

Remember, exemption depends on three things:

1. How employees are paid  **SALARY BASIS**
  - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
  - no partial day deductions
2. How much they are paid  **SALARY LEVEL**
  - currently this is \$455/week or \$23,660 per year
3. What *kind of work* do they do  **JOB DUTIES TEST**
  - each category of exemption – Executive, Administrative and Professional - has different required job duties as set forth in the regulations (ex. - regularly supervises two or more employees)



# WHAT CHANGES DID THE DOL PROPOSE?

---

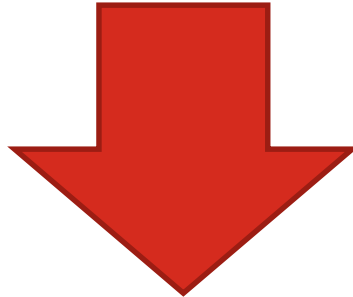
Remember, exemption depends on three things:

1. How employees are paid ➡ **SALARY BASIS**
  - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
  - no partial day deductions
2. **How much** they are paid ➡ **SALARY LEVEL**
  - currently this is \$455/week or \$23,660 per year
3. What kind of work do they do ➡ **JOB DUTIES TEST**
  - each category of exemption – Executive, Administrative & Professional have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more employees)

# WHAT CHANGES DID THE DOL PROPOSE?

---

To currently qualify for exemption, employees must be paid on a **salary basis** at not less than **\$455 per week** (**\$23,660.00 annually**).



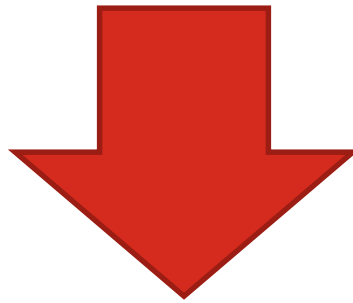
**The new proposed salary threshold for exemption is \$50,440 (\$970 per week)!**

- More than **two times** the current salary basis.

# WHAT CHANGES DID THE DOL PROPOSE?

---

To currently qualify for exemption as a highly compensated employee (HCE), the salary level is \$100,000 annually.



**The new proposed salary threshold for exemption for HCE is \$122,148.**

- 90<sup>th</sup> percentile of earning for full-time salaried workers.

# WHAT IS INCLUDED IN THE \$50,440?

---

- **Bonuses or Incentive Pay??** probably . . . but
  - no “catch up” payments
  - non-discretionary
  - “strictly limit[ed]” – 10%?
  - tied to productivity, profitability and/or specified performance metrics
  - paid frequently “employees would need to receive the bonus payments monthly or more frequently”
- **Commissions?** doubtful but seeking comments
- **Other paid benefits?** no

## AND THERE'S MORE . . .

---

DOL is also proposing to include a mechanism to **automatically update** the salary and compensation thresholds annually using a fixed percentile of wages or the Consumer Price Index.

# SUMMARY OF PROPOSED CHANGES

---

1. Increase of salary level test.
  - to 40<sup>th</sup> percentile of weekly earnings for full-time salaried worker (\$50,440/year for 2016)
2. Increase total compensation requirement for highly exempt employees (HCE).
  - to 90<sup>th</sup> percentile of weekly earnings for full-time salaried worker (\$122,148/year for 2016)
3. Establish a mechanism for automatically updating the salary and compensation levels annually.
  - percentage or tied to CPI

# WHAT DOES THIS MEAN?

---

Any of your salaried "exempt" employees (i.e. currently ineligible for overtime pay) that make less than \$970 per week or \$50,440 annually **will be re-classified as non-exempt and entitled to overtime** when the final rule goes into effect.

- Also required to comply with the DOL's **record keeping** requirements for non-exempt employees:
  - hours worked each day
  - total hours worked each week
  - daily/weekly straight time earnings for the workweek
  - overtime earnings for the workweek

# DO AFFECTED EMPLOYEES NEED TO BECOME HOURLY EMPLOYEES?

---

- NO. Hourly is not the same as “non-exempt.”
  - when properly done, non-exempt employees can be paid a salary
- Employers can pay a non-exempt employee any way they want (e.g. hourly, piece rate, salary, commission) **as long as:**
  - the employee receives at least the equivalent of minimum wage for every hour worked in the workweek; *and*,
  - the employee receives overtime pay for any hour worked in excess of 40 in the workweek.



# WHAT IS THE PROCESS NOW?

---

DOL will either:

- proceed with the proposed changes (issue a Final Rule);
- issue a new or modified proposal (this will include a new comment period); or,
- take no action on the proposed rule.

# WHAT IS THE PROCESS NOW?

---

After comment period ends, DOL will either:

- proceed with the proposed changes (issue a Final Rule);
- issues a new or modified proposal (this will include a new comment period); or,
- take no action on the proposed rule.



**MOST LIKELY**

expect Final Rule will be published and go into effect in  
early 2016

# PRACTICAL IMPACT

---

- More employees entitled to overtime
  - DOL estimates almost 5 million employees will become non-exempt under the new regulations
- More overtime claims and lawsuits
  - From 2004 (date of last revision) to 2007 the number of new FLSA suits rose 40% and there was a 98% increase in collective actions
- Expect increase in number of DOL audits



# IMPORTANT CONSIDERATIONS

---

- Issues with morale and perception:
  - Employees will often see reclassification as a “demotion.”
    - Many employees prefer being overtime-exempt. It means they don’t have to track their hours—and have more flexibility over when and where they work.
    - May resist keeping time records or accumulate “hidden” overtime.
  - Plan for how this re-classification will be communicated to affected employees.

# WHAT DO WE DO NOW???

---

## AUDIT!

- **Self Audit** – identifying affected employees and possible impact issues
  - gathering data for compensation analysis
  - reviewing policies on pay practices, leave, etc. and impact on newly classified non-exempt employees
- **Outside Audit**
  - ***privileged***
  - assist in compiling data and providing legal alternatives on re-classification
  - golden opportunity to analyze and correct *any* misclassification . . . “The law made us do it”

# ALL IS NOT LOST

---

- No employer is required to guarantee overtime work.
- No employer is required to pay an employee more compensation as a non-exempt employee than what the employee was earning as an exempt employee.
- The changes to the exemptions do not have to affect your labor costs. Can “back into” an hourly rate . . . must take into account overtime and “hidden” overtime.
  - As a legal matter, employers can configure the hourly wage and the anticipated overtime pay such that the employee’s total compensation is approximately the same as when the employee was paid on a salary basis.
  - Options such as fluctuating workweek/day rates.

# STAY TUNED

---

