
US Department of Labor Proposes Changes to Overtime Pay Regulations under the Fair Labor Standards Act

2003-05-13

The Current Requirements and Proposed Changes to These Requirements

On March 31, 2003, the United States Department of Labor (DOL) proposed changes to regulations issued under the Fair Labor Standards Act (FLSA) governing federal minimum wage and overtime pay requirements. These FLSA regulations generally require covered employers to pay their employees at least the federal minimum wage (currently \$5.15 an hour) and overtime pay of time and one-half their regular rate of pay for all hours worked in excess of forty (40) per week. However, the FLSA regulations have designated certain categories of "white collar" employees, including executives, administrators, learned and creative professionals, outside salespeople, and computer employees (e.g., systems analysts, programmers and software engineers) as exempt from minimum wage and overtime requirements, provided they meet the requirements established under certain tests.

Under the current regulations, exempt status has been reserved for those employees who: (1) receive fixed weekly salaries of prescribed amounts that are not subject to reduction based on quality or quantity of work performed (including deductions for full-day absences resulting from disciplinary infractions); and (2) perform certain job duties enumerated in "long tests" or less strict "short tests." To qualify as exempt under the "long test," an employee's weekly salary must be at least \$155 or \$170 (depending upon the category of employee). To qualify as exempt under the "short test," an employee's weekly salary must be at least \$250. There are exceptions for computer employees, who may still qualify as exempt if they are paid an hourly wage of at least \$27.63, and for outside salespeople, who need not be paid any salary at all.

The DOL is proposing its changes in order to reduce the confusion caused by the current tests, make the regulations "easier to decipher" when applied to specific factual scenarios, and increase the number of low-wage-earning employees entitled to receive overtime compensation. The proposed regulations, for the first time since 1975, raise the minimum weekly salary required for an exemption to \$425 (except for outside salespeople, for whom there continues to be no minimum salary requirement, and computer employees, for whom the hourly wage of \$27.63 will continue to be an acceptable alternative), and eliminate the "long" and "short" tests in favor of a single test

focusing on an employee's "primary duty." (For more specific information on how the proposed single-standard tests differ from the current tests, please visit the DOL's website for a side-by-side comparison table.) The proposed regulations also create a new category of "highly compensated employees," who will qualify as exempt if they are guaranteed total annual compensation of at least \$65,000, perform office or non-manual work, and perform at least one of the exempt duties of an executive, administrative or professional employee.

Other substantial changes depart from the current prohibition on deductions from pay for full-day absences taken for disciplinary reasons. The proposed regulations would permit deductions for full-day absences occasioned by infractions of workplace conduct rules, such as sexual harassment or workplace violence, and would also create a "safe harbor" provision in the event of improper pay deductions. Under the proposed rule, an employer that has a written policy prohibiting improper pay deductions, and that notifies employees of the policy and reimburses them for any improper deductions, will not lose the exemption for any employees unless it "repeatedly and willfully" violates the policy.

The Impact on Employers of the Proposed Changes

It is likely that the proposed regulations, if implemented as written, will increase the number of employees entitled to receive overtime pay for hours worked in excess of forty (40) per week, as formerly exempt employees earning less than \$425 per week will no longer qualify for the exemption. The DOL estimates that the proposed regulations will provide overtime protection to an additional 1.3 million "low-wage workers" and will strengthen overtime protections for an additional 10.7 million employees. On the other hand, certain types of highly compensated employees who may not be properly classified as exempt under the current regulations may become exempt if the proposed regulations become effective.

If the proposed changes become effective, employers should be prepared to re-evaluate the exempt or non-exempt status of their workforce to determine which employees are entitled to overtime compensation for hours worked in excess of forty (40) per week. Employers may wish to enforce a policy preventing employees from working more than forty (40) hours per week to avoid having to pay overtime to a significantly larger population of newly non-exempt employees. Similarly, employers may choose to alter job duties or raise salaries of employees to secure exempt status for these employees as another means of avoiding liability for overtime payment. Employers may also decide to convert salaried employees to an hourly rate (cannot be less than minimum wage) that would result in the employees' compensation remaining the same.

In any event, however, all employers should understand that the FLSA does not preempt stricter state or local laws concerning minimum wage and overtime requirements. Many states set a higher bar for both minimum wage and overtime exemptions, and these laws will remain unaffected by changes to the FLSA regulations.

Public Comment on the Proposed Changes

The DOL has invited public comment on any aspect of the proposed changes to the FLSA regulations. (The DOL is particularly interested in comments on so called "borderline" occupations-

those where the determination of exempt status has caused much "confusion and litigation"- including insurance salespersons, loan officers, stock brokers, and hotel sales and catering managers.) All comments must be submitted in writing on or before June 30, 2003, to:

Tammy D. McCutchen
Administrator, Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, D.C. 20210

Commenters who would like to receive notification that their comments were received should include with their comments a self-addressed stamped postcard or submit them by registered mail, return receipt requested. Comments of 20 pages or less may be faxed to (202) 693-1432 or e-mailed to whd-reg@fenix2.dol-esa.gov.

Following the comment period, there may be additional changes to the proposed regulations as the DOL evaluates the comments it receives. We will issue another bulletin when the proposed regulations become effective. In the meantime, employers with questions or concerns about the current or proposed regulations should consult with a member of Hale and Dorr's Labor and Employment Department.

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