

Labor Department Asks for Public Input on FLSA White Collar Exemptions

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As a preliminary step to replacing the December 1, 2016, Fair Labor Standards Act “white collar” exemptions Final Rule, the Department of Labor has issued a [Request for Information](#) (RFI) seeking public comment on a wide variety of issues related to potential revisions of the Rule. Comments on the RFI, published in the Federal Register on July 26, 2017, are by September 25, 2017.

The Final Rule would have more than doubled the minimum salary required to qualify under the FLSA’s white collar exemptions. The Rule is currently subject to a nationwide injunction imposed by a Texas District Court Judge and is on appeal at the Fifth Circuit Court of Appeals. (For more on the case, see our article, [DOL Will Issue New Rule to Set Salary for White Collar Exemptions, But Asks Fifth Circuit to Reverse District Court Order Granting Nationwide Preliminary Injunction.](#))

President Donald Trump’s Executive Order 13777, “[Enforcing the Regulatory Reform Agenda](#),” directs all federal agencies to repeal, replace, or modify regulations that “are outdated, unnecessary, or ineffective,” and “impose costs that exceed benefits.” Referring to Executive Order, the RFI outlines many of the issues DOL will be considering before issuing a new proposed rule.

Beyond merely seeking comments on what, if any, increase should be made to the minimum salary requirement of the white collar exemptions, the DOL is seeking input on what methods should be used to set those levels, whether the new rule should include provisions for automatic increases as set forth in the Final Rule, and whether different salary levels should be set for different geographic regions. It also asks for employer feedback on the burdens and costs they faced in complying with the Final Rule and the impact the Rule has had on employees (for those employers who modified pay practices prior to the issuance of the Texas court injunction).

RFI

The Department has asked for comments on the following:

1. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?
2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage-based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?
3. Should the Department set different standard salary levels for the executive, administrative, and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?
4. In the 2016 Final Rule, the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?
5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what

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Insurance

- salary level does the duties test no longer fulfill its historical role in determining exempt status?
6. To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?
 7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?
 8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?
 9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?
 10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage-based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?
 11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long-term economic conditions?

Next Steps

The RFI offers an excellent opportunity for employers to express their opinions on the appropriate salary level and the impact of the Final Rule.

Please contact the Jackson Lewis attorney with whom you work regarding any questions about the DOL's Request for Information, the related lawsuit, or the 2016 Final Rule.

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