

DOL SEEKS PUBLIC INPUT ON RULES GOVERNING FLSA EXEMPTIONS

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The Fair Labor Standards Act (“FLSA”) generally requires covered employers to pay their employees at least the federal minimum wage for all hours worked, and overtime pay for all hours worked over 40 hours in a workweek. Employees who work in an executive, administrative, professional, outside sales, or computer position are exempt from these protections if they satisfy the Department of Labor’s (“DOL”) tests for exemption.

The tests include a duties test and a minimum salary test. In 2016, the DOL issued an updated salary test which increased the minimum salary from \$455 per week to \$913 per week (\$47,476 per year). The increase was scheduled to take effect on December 1, 2016, but a Texas federal court suspended enforcement of the new rule on November 22. The DOL appealed the ruling. It recently announced that it plans to

review the 2016 rule. Toward that end, on July 25, 2017, the DOL published a Request for Information (“RFI”) seeking public input on all aspects of the existing tests for exemption to assist it in formulating a proposal to revise the tests for exemption.

Specifically, the DOL is soliciting feedback on the following issues:

- Would updating the salary level of \$455 per week be appropriate, and what measure of inflation should be used;
- Should the regulations contain multiple salary levels;
- Should there be different salary levels for executive, administrative, and professional exemptions;
- What methodology should be used to determine the standard salary level;
- At what salary level does the duties test no longer fulfill its historical role in determining

exempt status;

- To what extent did employers increase salaries of exempt status or make other changes in anticipation of the 2016 Final Rule;
- Would a test that relies solely on the duties performed by an employee without regard to salary be preferable to the current test;
- Does the 2016 Final Rule exclude particular occupations that have traditionally been covered by the exemption;
- Is 10% an appropriate amount for permitting non-discretionary bonuses and incentives to satisfy the salary level test;
- Should there be multiple total annual

compensation levels for the highly compensated employee exemption; and

- Should the standard salary level and highly compensated employee total annual compensation level be automatically updated periodically.

The public may submit comments until September 26, 2017 according to the instructions listed in the RFI as published in the Federal Register and found on the DOL website. Once the DOL reviews this input, it will issue a proposed rule followed by a comment period before it issues a new final rule. The RFI is available at <https://federalregister.gov/d/2017-15666>.



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