

## ALERTS

### Labor And Employment Law Alert - Employers Beware: The Department Of Labor Wants To Dramatically Increase Labor Costs

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On June 30, the U.S. Department of Labor's (DOL) Wage and Hour Division revealed a long-awaited proposal to amend 29 CFR Part 541 (the "white collar" exemption for executives, administrators and professional employees) which is designed make millions of additional workers eligible for overtime pay under the federal Fair Labor Standards Act (FLSA).

Under the FLSA, employees are currently "exempt" if (1) their job duties meet the statutory requirements for executive, administrative, professional or other categories and (2) they are paid at least \$455 weekly. The proposed rule more than doubles the current minimum weekly salary, threatening to make the job duties test irrelevant and knocking millions of people out of those exemption categories and into eligibility for overtime pay.

#### Key Points

- If enacted, countless employees currently considered "exempt" from FLSA requirements will be nonexempt and must be paid overtime if they work more than 40 hours in a week.
- The proposed new "white collar" exemption affects employees who earn a projected \$50,440 per year (or a projected \$970 per week) — a huge increase over the current threshold of \$23,660 annually (or \$455 per week) that was set in 2004.
- The salary threshold for the "highly compensated" employee exemption would increase from \$100,000 to a projected \$122,148.
- The DOL proposes automatic updates to the salary thresholds. The proposed threshold for white collar exemptions would be indexed to the 40th percentile of weekly earnings for full-time salaried workers; the highly compensated employee exemption would be indexed to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers.
- There is no proposal regarding the duties test for these exemptions, though the DOL asks for comments on the issue. The duties test does not mean much, however, if so many employees are knocked out of consideration at the outset. However, employers should be on alert as a change in the duties test may appear in the final rule to be issued by DOL.
- Proposed salary levels do not apply to outside sales employees, lawyers, doctors or teachers.

## RELATED PEOPLE



**Kenneth J. Yerkes**

Partner  
Indianapolis

P 317-231-7513  
F 317-231-7433  
[ken.yerkes@btlaw.com](mailto:ken.yerkes@btlaw.com)



**John T.L. Koenig**

Partner  
Atlanta

P 404-264-4018  
F 404-264-4033  
[john.koenig@btlaw.com](mailto:john.koenig@btlaw.com)



**David B. Ritter**

Partner  
Chicago

P 312-214-4862  
F 312-759-5646  
[david.ritter@btlaw.com](mailto:david.ritter@btlaw.com)



**William A. Nolan**

Partner  
Columbus

P 614-628-1401  
F 614-628-1433  
[bill.nolan@btlaw.com](mailto:bill.nolan@btlaw.com)

The proposed amendments will appear in the Federal Register, with a 60-day deadline for written comments, which can be submitted at [www.regulations.gov](http://www.regulations.gov). There will be a “wait and see” period after the expiration of the 60-day comment period. The final regulations may be different than the agency’s proposal.

#### *Possible Employer Response*

According to DOL Secretary Thomas Perez, “employers have a range of options in terms of how to comply. That’s why it’s difficult to predict with precision what the economic effects will be.” However, the DOL makes a staggering prediction: “We believe, given our study of the literature that, on an annual basis, workers will get roughly \$1.2 to \$1.3 billion in additional wages as a result of this rule.”

However, the DOL may not be accounting for the fact that many employers in our competitive global market will be effectively forced to take aggressive action to control costs, including eliminating positions; reducing hours of newly classified nonexempt workers; and adjusting base hourly rates downward.

#### *Critical Preparation*

We do not expect to see a final ruling from the DOL until this time next year or later. However, employers cannot be complacent, because they may have a short window in which to comply with the final regulations that emerge. In 2004, for instance, employers only had 120 days to comply and some commentators suggest that the lead time may be shorter for employers this time around.

Employers should consider addressing the potential impact of 2016 changes on their budgets for salaries and overtime. Are they willing to increase certain salaries to be in line with new thresholds? And, even if they are willing to increase salaries, will potential changes in duties rules (suggested as a possibility by the request for comments) still block position from exempt status? Further, will employers need to change their operations so that overtime will not be necessary?

For more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm’s Labor and Employment Department in the following offices:

Kenneth J. Yerkes  
Department Chair  
(317) 231-7513

John T.L. Koenig  
Atlanta  
(404) 264-4018

David B. Ritter  
Chicago  
(312) 214-4862

William A. Nolan  
Columbus  
(614) 628-1401

Mark S. Kittaka



**Mark S. Kittaka**

Partner

Fort Wayne, Columbus

P 260-425-4616

F 260-424-8316

[mark.kittaka@btlaw.com](mailto:mark.kittaka@btlaw.com)



**Robert W. Sikkel**

Of Counsel (Retired)

P 616-742-3978

[robert.sikkel@btlaw.com](mailto:robert.sikkel@btlaw.com)



**Peter A. Morse, Jr.**

Partner

Indianapolis, Washington, D.C.

P 317-231-7794

F 317-231-7433

[pete.morse@btlaw.com](mailto:pete.morse@btlaw.com)



**Scott J. Witlin**

Partner

Los Angeles

P 310-284-3777

F 310-284-3894

[scott.witlin@btlaw.com](mailto:scott.witlin@btlaw.com)

Fort Wayne  
(260) 425-4616

Robert W. Sikkell  
Grand Rapids  
616-742-3978

Peter A. Morse  
Indianapolis  
(317) 231-7794

Scott J. Witlin  
Los Angeles  
(310) 284-3777

Teresa L. Jakubowski  
Washington, D.C.  
(202) 371-6366

Janilyn Brouwer Daub  
South Bend/Elkhart  
(574) 237-1130

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**Teresa L. Jakubowski**

Partner  
Washington, D.C.

P 202-371-6366  
F 202-289-1330  
[teresa.jakubowski@btlaw.com](mailto:teresa.jakubowski@btlaw.com)



**Janilyn Brouwer Daub**

Partner  
South Bend, Elkhart

P 574-237-1139  
F 574-237-1125  
[janilyn.daub@btlaw.com](mailto:janilyn.daub@btlaw.com)

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