

## Labor Department Reopens White-Collar Salary Exemption for Comments

The U.S. Department of Labor (DOL) has published a [Request for Information](#) (RFI) in the Federal Register seeking comments from the public about how the white-collar salary regulations under the Fair Labor Standards Act should be updated. The Obama Administration [had sought to revise the same regulations](#), but that effort was blocked by a federal court in late 2016. Under current law, employees working in a “bona fide executive, administrative, or professional capacity” are not eligible for overtime pay. Federal regulations determine which employees fall within those categories. In most cases, employees will be considered exempt from overtime pay if (1) the employee is paid on a salary basis (“salary basis test”); (2) the employee’s job primarily involves executive, administrative, or professional duties as defined by the regulations (“duties test”); and (3) the employee receives at least a minimum specified salary amount (“salary level test”), which is currently set at \$455/week. The questions posed by the Labor Department in the new Request for Information give the public the opportunity to weigh in on whether and how those tests should be changed in future DOL rulemaking. The deadline for [submitting comments to Department of Labor](#) is **September 25, 2017**.

### Procedural History

In late June 2017, the Labor Department [opted not to defend the overtime rule](#) that had been scheduled to go into effect on December 1, 2016, but that was [enjoined by a federal district court](#) in Texas. The [2016 Overtime Final Rule](#) promulgated by the Obama Administration would have raised the threshold for the “white collar” salary level test to \$913/week (\$47,476 yearly) from the current \$455/week (\$23,660 yearly) under which employees must receive overtime pay. The Labor Department did not defend the higher threshold in a recent court filing, but it did ask the appellate court to “not address the validity of the specific salary level set by the 2016 final rule,” because it “intends to undertake further rulemaking to determine what the salary level should be.” The new Request for Information is in furtherance of that statement to the court.

### Background on the Fair Labor Standards Act

Under the Fair Labor Standards Act (FLSA), employees are entitled to wages at or above the federal minimum wage and must be paid time and a half (“overtime”) for work after 40 hours in any work week.<sup>1</sup> In enacting the federal wage and hour law, Congress exempted executive, administrative, and professional employees from these labor standards and left it up to the Secretary of Labor to define the terms of the exemption.

Persons who are properly classified as executive, administrative, or professional employees are considered “exempt employees.” All others are “non-exempt” and must be paid at least the minimum wage and overtime after 40 hours worked in a week.

Generally, employers have the burden of demonstrating that a worker is exempt from the overtime provisions by satisfying three tests. The **salary basis test** requires that the employee be paid a predetermined salary, rather than on an hourly basis, and that the amount paid is not adjusted based on whether the person worked a certain number of hours. The **duties test** requires that the individual’s job duties must primarily involve executive, administrative, and professional duties as defined by the Labor Department regulations. The **salary level test** – which is the primary focus of

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<sup>1</sup> See “[Overtime Regulations and the Impact on Nonprofits](#),” National Council of Nonprofits website, for more information about whether individual nonprofits and their white-collar employees are covered by the Fair Labor Standards Act or state law.

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the pending Request for Information – requires that an employee be paid at or above a minimum specified amount. That amount is currently set in regulations at \$455 per week, or \$23,660 per year, and requires regulatory action by the Department of Labor to change it.<sup>2</sup>

There is a special category in the regulations that exempts “highly compensated employees” if their total annual compensation exceeds \$100,000 and they customarily and regularly perform at least one of the exempt duties or responsibilities (duties test) of an executive, administrative, or professional employee.

States have the power to set higher standards for non-exempt and exempt employees. Currently, 31 states have set minimum wage levels [higher than the federal minimum wage](#) of \$7.25 per hour. Likewise, some states, such as California and New York, have set the salary level test at a higher amount than is set in current U.S. Department of Labor regulations.

### Nonprofits Need to Share Their Perspectives through Comments

The answers to the many questions posed by the Labor Department in its Request for Information may vary widely among nonprofit organizations. During the rulemaking that led to the 2016 Final Rule, many nonprofits expressed moral support for raising the salary threshold because of the potential positive effect on the people they serve and their own employees, but operational anxiety as they worried about how to cover any increased costs. In responding to the current set of questions, larger organizations that regularly compete with for-profit and governmental organizations (e.g., hospitals) would likely experience different challenges than smaller nonprofits and those that provide services on behalf of governments pursuant to grants and contracts. Additionally, there likely could be wide variations in the impact of potential changes depending on whether a nonprofit operates in a rural versus urban area.

The only assured point here is that unless a significant number of individual nonprofits submit comments to the Department of Labor by September 25, 2017, the impact of future regulations on the nonprofits sector will be defined by academics, [for-profit management groups](#), [worker rights organizations](#), bureaucrats, and others based on assumptions and data from other sectors.

In considering responses to the questions in the Request for Information, the National Council of Nonprofits encourages all nonprofits to conduct a **mission-based analysis**. That means answering questions about how an increase in the minimum salary levels would affect operations, resources, and staffing, *as well as* what impact changed regulations would have on persons relying on the services and the mission of the nonprofit. Below are some questions that can help shape an organization’s analysis and responses to the Request for Information.

1. What effect – positive or negative – would potential changes to the white-collar exemption have on your organization’s ability to advance its mission? Variables could include the need to raise more money, serve fewer people, or not being able to perform under government grants or contracts that fail to cover full costs, among many others.
2. What effect – positive or negative – could potential changes have on the individuals and communities your organization serves? For example, would higher compensation, if realized, reduce the number of individuals seeking services from the organization, and thus cut the workload of the organization or enable you to pursue other mission objectives?
3. Assuming changes may be made, what transition rules do you think would be appropriate for your nonprofit and similarly situated organizations? Should implementation of final regulations

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<sup>2</sup> See generally, **Classifying Employees Correctly**, National Council of Nonprofits website; <https://www.councilofnonprofits.org/tools-resources/classifying-employees-correctly>.

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be delayed until a certain date, until the beginning of an organization's fiscal year, or phased in over a period of time?

### Special Note for Nonprofits with Government Grants and Contracts

Once the Labor Department issues new regulations, nonprofits with government grants and contracts at any level of government (local, state, tribal, or federal) will likely be put in the position of having to comply with new federal requirements that impose new costs not known when those grants and contracts were signed. Unlike businesses that can raise prices, or governments that can raise taxes or curtail public services, nonprofits with government grants and contracts may find themselves contractually bound to maintain services at increased costs that may not be expressly covered by existing written agreements. Federal for-profit contractors are entitled to seek "labor standards adjustments" or "equitable adjustments" to protect them from government-mandated labor cost increases, but that right is not currently available to nonprofits performing work under government grants.<sup>3</sup> We encourage nonprofits with government grants and contracts to respond to the Labor Department's Request for Information and clearly articulate both the impact that cost changes in the middle of grant/contract performance would have on the organization and the need for treatment equal to for-profit government contractors whenever new regulations are implemented.<sup>4</sup>

### Brief Summary of the Questions

In its [Request for Information](#), the Labor Department asks the public to respond to 11 enumerated questions. Most employees and employers will focus on the first question (**#1**), whether to update the current salary level test (\$455/week), either by adjusting that dollar figure for inflation, by raising the weekly salary minimum using the same rationale as was used in 2004 (setting the test at the 20<sup>th</sup> percentile of salaries in the South and retail trades), or by using some other method. The RFI expresses openness to setting different salary level tests for regular (**#2**) and highly compensated employees (**#10**) on the basis of employer size, region of the country, as well as considering whether separate salary minimums (**#3**) should be set for the separate categories of white collar workers – executive, administrative, professional.

One question (**#5**) related to the pending litigation asks at what level does the salary level test eclipse the duties test, while another (**#11**) seeks input on whether and how the DOL should implement an automatic adjustment in the salary level test in the future. Four questions relate directly to the 2016 Final Rule: should the Department return to the pre-2004 long test and short test (**#4**); what is the extent and impact of efforts to implement the stalled regulations prior to their intended effective date of December 1 (**#6**); how did the 2016 Final Rule affect various occupations (**#8**); and seeking opinions on whether the recognition of non-discretionary bonuses, and the 10 percent cap on them, were appropriate (**#9**). One additional question (**#7**) asks commenters to envision a white-collar rule that had no salary level test at all – would that be preferred and, if so, what elements would be necessary in a duties-only test?

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Nonprofits should share their answers to any or all of these questions with the Department of Labor in the form of [responses to the Request for Information](#). Comments are due by **September 25, 2017**.

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<sup>3</sup> See Federal Acquisitions Regulations ([FAR 52.222-44](#)) and [Executive Order 13658](#) (implemented through [FAR 52.222-55](#)).

<sup>4</sup> See [The Nonprofit Overtime Implementation Conundrum](#), National Council of Nonprofits (May 23, 2016), reporting on results of a national survey on the likely effects of the 2016 Final Rule on nonprofits with government grants and contracts.

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“[Taking the Mystery Out of Filing Comments on Proposed Rules](#)” is a helpful guide that shows that submitting public comments can be easy and effective.

Comments are to be submitted electronically via the Federal eRulemaking portal <http://www.regulations.gov>. Comments should be identified by Regulatory Information Number (RIN) 1235-AA20. In the alternative to electronic submission, commenters may mail their responses to Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

## Additional Resources

For more information about the impact of Federal Wage and Hour Laws on nonprofits and their employees, review the following resources:

- [Request for Information](#), U.S. Department of Labor, July 26, 2017, 82 FR 34616, RIN 1235-AA20
- [Overtime Final Rule and the Non-Profit Sector](#), U.S. Department of Labor, May 2016 (explaining the blocked 2016 Final Rule)
- [Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act](#), U.S. Department of Labor, May 2016 (explaining the blocked 2016 Final Rule)
- [Classifying Employees Correctly](#), National Council of Nonprofits
- [Is our nonprofit covered by the FLSA?](#) (WorkSmart Partners)
- [The Nonprofit Overtime Implementation Conundrum: Results of the National Survey of Nonprofits with Government Grants and Contracts](#), National Council of Nonprofits, May 23, 2016
- [DOL Proposed Overtime Reforms and the Impact on Nonprofits](#), National Council of Nonprofits, July 13, 2015 (initial analysis of proposed regulations and considerations that charitable nonprofits need to take into account)

August 8, 2017

## Questions Presented in the Request for Information

[Request for Information](#); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 FR 34616, July 26, 2017, RIN 1235-AA20

Below are the verbatim questions posed by the Labor Department in the Request for Information. We have reformatted them because the 11 enumerated questions include multiple sub-questions that would otherwise be difficult to follow. We have also added headings and annotations [in brackets to show our words] to try to identify and clarify the category of issues that the questions are getting at.

### 1. [Adjusting the Standard Salary Level Test]

*[Annotation: No one can assert that the current salary level test amount of \$455 per week (\$23,660 per year) is a meaningful measure of “white collar” status. By comparison, the federal poverty level in 2017 for a family of four is \$24,600 per year.<sup>5</sup> The poverty level in 2004, when the overtime salary level was last reset, was \$18,850 per year.<sup>6</sup> It is therefore understandable that the past and present leadership of the Department of Labor have sought to update the standard based on changing costs of living. The debate is over the details: What are the appropriate salary levels for exemptions and what other changes to the regulations are needed to more accurately reflect how work is performed and managed across the country?]*

In 2004 the Department set the standard salary level at \$455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry.

- 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. [Questions Regarding Possible Creation of Multiple Standard Salary Levels]

- 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?

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<sup>5</sup> Federal Poverty Level, Department of Health and Human Services; <https://aspe.hhs.gov/poverty-guidelines>. For Alaska and Hawai`i, the equivalent poverty levels are \$30,750 and \$28,290, respectively.

<sup>6</sup> The 2004 HHS Poverty Guidelines; <http://www.aspe.hhs.gov/poverty/04poverty.shtml>.

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### 3. [Salary Level Tests Based on White Collar Classification]

- 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. [Setting the Standard Salary Level in Relation to Pre-2004 Short and Long Tests]

*[Annotation: This question requires an understanding of the history and rationale for the short test and the long test for exempt status, which can be found at [82 F.R. 34616-17.](#)]*

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. [Evaluating the Duties Tests]

*[Annotation: The following questions arise because of the primary reason that the federal judge blocked the 2016 Final Rule. The judge held that the white-collar exemption under the Fair Labor Standards Act is clearly based on the duties that individual employees perform, and that the Labor Department did not have the authority to create a different or higher standard based on salary levels. Specifically, he ruled: "Congress gave the Department the authority to define what type of duties qualify [for the overtime exemption] — it did not give the Department the authority to supplant the duties test and establish a salary test that causes bona fide EAP's [Executive, Administrative, Professional] to suddenly lose their exemption 'irrespective of their job duties and responsibilities.'" ]*

- 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 salary level does the duties test no longer fulfill its historical role in determining exempt status?

### 6. [Impact of the 2016 Final Rule in Practice]

- 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?

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### 7. [If There Were No Salary Level Test]

- 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. [Impact of the 2016 Final Rule on Particular Occupations]

- 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. [Treatment of Non-Discretionary Bonuses and Incentive Payments]

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. [Questions Regarding Highly Compensated Employees]

- 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. [Automatic Adjustment Questions]

- 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?