



# Employment Update

Keeping You Informed About Employment Matters

June 30, 2015

## DOL Releases Proposed Changes to Overtime Rules

By Christopher B. Lunny



On June 30, 2015, the United States Department of Labor (DOL) released its sweeping [295 page Notice of Proposed Rulemaking \(NPRM\)](#) which addresses the DOL's proposal to significantly increase the minimum salary levels needed for employees to maintain their executive, administrative or professional exemption (EAP) under the Fair Labor Standards Act. Observers may recall that, in March of 2014, [President Obama called upon the DOL](#) to revise the overtime regulations and noted that the exemptions "have not kept up with our modern economy."

More than a year later, the DOL has now published its NPRM which heavily focuses on the minimum salary level needed to maintain EAP exemptions. In sum, the NPRM proposes to:

- Increase the minimum salary requirement for EAP exemptions from \$455 per week to approximately \$921 per week (\$47,892) or more. The NPRM explains that the DOL arrived at the \$921 figure because it represents the 40th percentile of [2013](#) weekly earnings for full-time salaried workers. At present, the increase would be \$466 a week or 102.4%, though the DOL expects that the 40% level could be as high as \$970 a week (\$50,440) when the NPRM is adopted as a final rule;
- Increase the total annual compensation needed to exempt highly compensated employees to the 90th percentile of weekly salaried earnings which is \$122,148 based upon 2013 wage data; and
- Annually update these minimum salary levels through either a percentile of wage earnings or an inflationary measurement.

The NPRM expressly requests comments from stakeholders, including whether employers should be able to meet the proposed salary levels by including nondiscretionary bonuses. The NPRM signals the DOL's reluctance on this issue, however, by noting that "it is important to strictly limit the

amount of the salary requirement that could be satisfied through payment of nondiscretionary bonuses and incentive pay." According to the NPRM, the DOL "is considering whether to permit such payments to satisfy 10 percent of the standard weekly salary level."

In addition, the NPRM solicits input on whether the DOL should revise the "primary duties" test that must also be satisfied for any EAP exemption to apply. The NPRM informs employers that the DOL is considering revisions to the duties test, including a requirement (borrowed from California state law) that exempt EAP employees spend "at least 50 percent of their time performing their primary duty, not counting time during which nonexempt work is performed concurrently." Although the NPRM does not propose a formal change to the duties test, employers can reasonably expect more changes to come.

**"The NPRM proposes to: increase the minimum salary requirement for EAP exemptions from \$455 per week to approximately \$921 per week or more."**

Since the EAP regulations were first issued in 1938, the DOL has increased salary basis levels seven (7) times. As a result, most commentators expected DOL to propose an increase. The NPRM's proposed increases and annual adjustments, however, are irrefutably significant. The DOL estimates that "the direct employer costs of this proposal will total \$592.7 million in the first year" and that the salary level increase to the 40th earnings percentile "would directly affect 4.6 million workers" and potentially affect as many as 21.4 million EAP workers.

As soon as the NPRM is published in the Federal Register, employers can offer the requested feedback and submit comments [here](#). Once the comment period ends, DOL will review the comments and begin the process of formal rulemaking. The NPRM, however, provides more than enough insight for employers to start planning now on how the expected changes will impact payroll expenses and staffing levels. Employers can now carefully examine EAP exempt employees in the salary range of \$25,000-\$50,000 annually and begin to plan for change.

*This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.*