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# MEMORANDUM

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Date: July 21, 2015

To: The Honorable Chair and Members  
Pima County Board of Supervisors

From: C.H. Huckelberry  
County Administrator 

Re: **Possible Change to Fair Labor Standards Act Related to Salary Levels for Exempt Classifications from Overtime**

Attached is a July 15, 2015 memorandum from the Human Resources Director regarding a proposed change in the Fair Labor Standards Act (FLSA). Such a change would significantly increase the number of employees that would now be eligible for overtime.

If the final rule is approved, it is likely another 700 or more employees would be eligible for overtime, and their FLSA status would change from exempt to non-exempt.

Such a proposed change would require all of the effected employees to begin tracking their hours worked and use the time and accounting methods currently used for employees who are non-exempt.

It is expected the final rule could go into effect as early as January 1, 2016.

CHH/anc

Attachment

c: John Bernal, Deputy County Administrator for Public Works  
Tom Burke, Deputy County Administrator for Administration  
Jan Leshar, Deputy County Administrator for Medical and Health Services  
Allyn Bulzomi, Director, Human Resources

To: C.H. Huckelberry  
County Administrator

Date: July 15, 2015

From: M. Allyn Buizman, Director  
Human Resources

Via: Tom Burke  
Deputy County Administrator

Re: Possible Change to Fair Labor Standards Act (FLSA for Exempt Classifications)

As previously reported in my May 20, 2015 memorandum (attached), the United States Department of Labor (DOL) is pursuing changes to the Fair Labor Standards Act (FLSA) that may have a significant impact to the white-collar exemption from the payment of overtime under the FLSA. Last week, our Classification/Compensation Team participated in a Society for Human Resource Managers (SHRM) webcast that discussed the proposed changes. The following is information that they were able to glean from the webcast:

**Salary Level Test Will Increase**

Currently to be exempt, most salaried workers must make more than \$455 per week (\$23,660 annually). The proposed rule sets the standard salary level at the 40<sup>th</sup> percentile of weekly earnings for full-time salaried workers which for 2013 were \$921 per week, or \$47,892 annually. If the 40<sup>th</sup> percentile approach is adopted, the 2016 level is projected to be \$970 a week, or \$50,440 annually. (Note – certain IT related professionals as well as lawyers and doctors do not fall under this salary level test.)

**Effects of Increased Salary Level Test on Pima County**

If the salary test is set to \$970 per week (\$50,400 annually) as anticipated, this would affect current exempt classifications in numbered grades 53 and below and current exempt classification with letter grades (i.e. M1, L3, P1, etc.) where the minimum starting salary of the grade, authorized salary matrix or established hiring minimum is less than \$50,440 annually.

- Currently we have 118 classifications in numbered grades 53 or below (not including the Courts classifications) with starting salaries below the proposed salary level test with approximately 413 employees.
- We have another 32 classifications in letter grades (i.e. M1, L3, P1, U1, U2 etc.) which have salary matrices or minimum starting salaries below the proposed salary level test with approximately 269 employees.
- We would be required to change the FLSA exemption status of these classifications from exempt to non-exempt status, which will require all employees within the affected classifications to start tracking their hours worked. Nationwide, DOL is anticipating this

C.H. Huckelberry, County Administrator  
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change will affect over 5 million currently exempt workers who will become eligible for overtime.

#### **Changes to Highly Compensated Employees (HCE)**

The DOL is proposing to set the HCE annual compensation level equal to the 90<sup>th</sup> percentile of earnings for full-time salaried workers (\$122,148 annually), or based on changes in inflation. Currently, in order to come within this exemption an employee must earn at least \$100,000. Pima County has no current classifications where the FLSA exemption is based solely on the employee(s) in the classification being highly compensated.

#### **Automatic Annual Raise to the Salary Level Test(s)**

For the first time ever, the DOL is proposing to automatically update the salary level test (including for highly compensated employees) on an annual basis, either based on percentiles of earnings for full-time salaried workers or based on changes in inflation. If this proposal makes it to the final rule, we will have to review annually our exempt classifications to ensure they continue to meet the salary level test.

#### **Duties Test**

There currently are no proposed changes to the duties test for the white-collar exemption; however, DOL is seeking comments on whether the duties test should be revised.

The DOL issued the required Notice of Proposed Rulemaking (NPRM) on July 6, 2015. The comment period extends until September 4, 2015 after which time the DOL will determine exactly how/what the final rule will include. It is expected that the final rule will not go in to effect until sometime in 2016, possibly as early as early as January 1, 2016. We won't know the exact date until DOL publishes it in the Federal Register.

As we do not yet know exactly what the final rule will look like with regards to the salary level test, nor when the changes will take effect, it would be premature to make any large-scale adjustments to our classifications at this time. I will however draft a preliminary notice to all Appointing Authorities notifying them of the pending changes so they can begin to prepare within their own departments.

Please advise if you would like us to take any other actions at this time.

AB/cs

Attachment

Date: May 20, 2015

To: C. H. Huckelberry  
County Administrator

From: M. Allyn Bulzoni  
Human Resources Director

Re: **Possible Change to Fair Labor Standards Act (FLSA) for Exempt Classifications**

Recent proposed changes by the Department of Labor (DOL) may have significant impact on the method in which we identify white-collar exemptions from the payment of overtime under the FLSA. These changes will also significantly impact the County's position classification system by requiring us to change the FLSA exemption status on a large number of County classifications.

Currently, the general salary test requires most exempt positions (classifications) to be paid a weekly salary of at least \$455. Based on a presidential directive in March 2014, the Department of Labor (DOL) has sent a proposed rule to the Office of Management and Budget (OMB) that may raise the salary threshold test from \$455 per week to somewhere between \$42,000 - \$61,000. We won't know the actual change/increase until OMB publishes the rule in the *Federal Register*. When this happens, we will be required to change the FLSA exemption status for a significant number of classifications, making employees in those classifications eligible to receive overtime payments for hours worked in excess of 40 hours per work week. A preliminary review of our classification structure based on various possible change scenarios is provided:

Salary Test: (per annum basis)	No. of Exempt Classifications Potentially Affected	Approx. No. of Employees in Potentially Affected Classifications:
\$40,000	35 (Grade 48 and below)	138 employees
\$45,000	78 (Grade 48 and below)	317 employees
\$50,000	119 (Grade 53 and below)	396 employees
\$55,000	155 (Grade 57 and below)	556 employees

In addition to the proposed change in the general salary test, the rule change may also include changes to the primary duty test. We believe changes to the primary duties test may not have the same major impact that changes to the general salary test will have.

As we will not know the results of the proposed rule change until OMB actually publishes the rule (Typically OMB takes 4-8 weeks for review), we are continuing to prepare by developing proposed/draft communications to all departments and employees that we can modify as necessary once the final rule changes are released.

Please let me know if you have any questions or require additional information.

C: Tom Burke, Deputy County Administrator

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## Proposed Overtime Rule Advances to OMB Review

By Allen Smith 5/6/2015

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After talking for more than a year about issuing a proposed rule to overhaul white-collar exemptions so that more people are eligible for overtime, Secretary of Labor Thomas Perez announced on May 5, 2015, that the U.S. Department of Labor (DOL) has sent its proposed rule to the Office of Management and Budget (OMB).

"In the near future, the public will have an opportunity to weigh in and help us craft a final rule," Perez said on the DOL blog.

"It's about time," said Alexander Passantino, an attorney with Seyfarth Shaw in Washington, D.C., who is a former acting administrator for the DOL's Wage and Hour Division.

First there was [the president's directive \(/legalissues/federalresources/pages/white-collar-exemption.aspx\)](#) to expand the availability of overtime pay in March 2014. The initial target date for the proposed rule was November 2014, Passantino said. "Then we heard the beginning of the year," he added. Perez next said in the spring. A lot has happened behind the scenes in the meantime, Passantino said, noting that the fact the proposed rule has gone to the OMB means, "OK, this is really happening."

The proposed rule's provisions will be revealed only when the OMB reviews the regulations and approves them for publication in the *Federal Register*.

### Main Issues

In listening sessions with stakeholders, the department has focused on the requisite salary level to be exempt and changes to the primary duty test, Passantino noted. Recommendations on salary level increases have ranged from \$42,000 to \$61,000, he said. "I bet it will come in under \$1,000 a week," he predicted.

Passantino thought the proposed rule may switch out the primary duty test with something more dispositive, such as nonexempt duties having to be less than 40 or 50 percent for a worker to still be classified as exempt.

Perez is "aware that the California greater-than-50-percent quantitative standard is one alternative," said Paul DeCamp, an attorney with Jackson Lewis in Reston, Va., and former administrator of the Wage and Hour Division, referring to exempt duties having to be more than half a worker's responsibilities there for the employee to be exempt.

Passantino added that if the white-collar exemptions go to a quantitative test, employers will have to consider whether they need to switch some exempt positions to nonexempt--positions they never would have expected to change--simply because it's too difficult to track what percentage of time workers spend on exempt versus nonexempt functions.

Employers should be ready to share such practical unintended consequences of the proposed rule once it has been reviewed by OMB and published.

OMB review "typically takes four to eight weeks," DeCamp noted. "The actual review time can be shorter or longer for a variety of reasons, including if OMB has already seen and informally cleared an earlier version of the NPRM [notice of proposed rulemaking] or if OMB considers portions of the NPRM to be exceptionally controversial."

#### **Other Issues**

Other possible changes that the Wage and Hour Division may make in the proposed rule may include eliminating the ability of employees under the executive exemption to perform exempt and nonexempt duties concurrently, said Lee Schreter, an attorney with Littler in Atlanta and chairman of the board for the firm.

Another thing to watch is whether the 20 percent test for the outside sales exemption, which was removed in the 2004 regulations, will be put back in, she noted. Under the test, nonexempt work was limited to 20 percent.

There is discussion too, she noted, about indexing the minimum salary to the consumer price index, a change Schreter said could put the white-collar exemptions largely out of reach in rural areas.

Employers are trying to get the department to expand its examples of the computer employee exemption created under the regulations, as there are new, highly paid occupations in information technology. "From employers' perspective, we need further clarification, but I don't expect good news in these regulations for employers," she remarked.

#### **Action Items**

At this point, "HR should be doing several things," DeCamp said. "First, make sure you have current, accurate job descriptions, at least for positions currently classified as exempt. This will facilitate the analysis that companies will have to undertake to assess compliance under the new regulations.

"Second, take a look at your current exempt workforce and develop an understanding of which currently exempt positions might be in the zone for reclassification if the salary threshold increases to \$40,000, \$45,000, \$50,000 or \$55,000.

"Third, if it looks like an increase in the salary threshold for exempt status to these levels would have a significant impact on the business, HR should consider letting the business know sooner rather than later that this change may be in the works so that the business can begin to plan for how to respond," he added.

"Fourth, anticipate the employee relations aspects of the NPRM. There is a good chance that employees will be talking about the proposed rule once it comes out. It may be important, depending on the workplace, to have messaging ready to go on short notice letting the employees know that the NPRM is a proposal and not a final rule, that the company is reviewing the proposal, and that the company is looking into what changes, if any, may be necessary to comply with whatever final rule the Department of Labor issues," DeCamp remarked.

*Ailen Smith, J.D., is the manager of workplace law content for SHRM. Follow him @SHRMlegaleditor (<https://twitter.com/SHRMlegaleditor>).*

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