



Proposed Regulations Issued Concerning FLSA Exemptions From Overtime

On June 30, 2015, the Department of Labor (Department) issued proposed regulations which, if finalized, will have a significant impact on exemptions under the Fair Labor Standards Act (FLSA). These proposed regulations have been anticipated for some time, ever since March 2014, when President Obama issued a memorandum to the Secretary of Labor to “update and modernize” the overtime exemption rules under the FLSA. It is possible that the final regulations will be adopted and in effect by 2016. Past history shows that the Department will likely not provide a long grace period for compliance, with perhaps as little as 120 days to comply. This FYI will briefly summarize the proposed regulations and offer advice on next steps.

Background / Current Regulations

The FLSA is a federal law that sets minimum wage, overtime, equal pay, recordkeeping, and child labor standards for employees who are covered by the Act. State and local governments, including school districts, must comply fully with the FLSA. Employees who are covered by the Act fall into two categories: non-exempt and exempt. Non-exempt employees are subject to all of the FLSA requirements. Exempt employees are not subject to the minimum wage and overtime provisions, but are still subject to other FLSA requirements. It is the employer’s burden to prove that an employee is exempt.

Exemptions are identified by different categories, including bona fide executive, administrative, academic administrative, professional, and computer employees. The FLSA regulations define the requirements for each of these exemptions. Each exemption generally includes three basic requirements: (1) a salary basis requirement; (2) a salary level requirement; and (3) a primary duty requirement.

- *Salary Basis.* An employee must be paid on a salary, rather than an hourly, basis. In other words, each pay period, the employee must regularly receive a predetermined amount constituting all or part of his or her compensation, without regard to the quality or quantity of the work performed.
- *Salary Level.* An employee must earn a minimum weekly salary. Under the current rules, the minimum salary requirement is generally \$455 per week (equivalent to \$23,660 annually).
- *Primary Duty.* An employee’s primary duty must be the performance of exempt work. Although an exempt employee may perform some nonexempt duties, the primary duty of the employee must be exempt in nature. Employees who spend more than 50 percent of their work time on nonexempt duties may still have exempt work as their primary duty. Each exemption identifies the duties that an employee must perform to meet that exemption.

Below is a brief summary of each of the exemptions and the positions within a school district that generally fall within these exemptions.

- *Executive Employees.* These employees generally include those who engage in the management of the district or a department within the district, which generally involves oversight of employees and control over the work involved.

Employees who may qualify in a school district include the supervisor of buildings and grounds, transportation director, and food service program director.

- *Administrative Employees.* These employees are generally those who engage in running or servicing the district or a department within the district. Administrative duties include work in such areas as finance, accounting, budgeting, procurement, safety and health, personnel management, human resources, labor relations, computer network, and similar activities. Employees who may qualify in a school district setting include the human resource director or business director.
- *Academic Administrative Employees.* These employees are generally those who perform work related to the academic operations and functions in a school, rather than administration along the lines of general business operations. Such employees include the superintendent; any assistants, responsible for administration of such matters as curriculum and other aspects of the teaching program; the principal and any vice-principals; academic counselors; and other employees with similar responsibilities.
- *Professional Employees.* Professional employees are generally those who are engaged in work that requires knowledge of an advanced type in science or learning acquired by a prolonged course of specialized instruction. Employees who may qualify in a school district setting include a school nurse or physical therapist. Professional employees also include teachers, which are identified under a separate regulatory section. The salary level and salary basis requirements do not apply to teachers.
- *Computer Employees.* Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals. Computer employees may also be paid on an hourly basis of not less than \$27.63 per hour.

The current regulations also contain a relaxed duties test for certain “highly compensated” employees who receive total annual compensation of \$100,000 or more and are paid at least \$455 per week.

Proposed Regulations

Changes to Salary Amounts. Prior to the new proposed regulations being released, many observers believed that the proposed regulations would significantly increase the salary threshold. Some even believed that the Department would double this salary threshold to somewhere between \$42,000 and \$52,000 per year. These predictions held true.

However, the proposed regulations do not identify a specific amount that would remain stable over time. Instead, the proposed regulations generally recommend setting the minimum salary level for these exemptions at the 40th percentile of weekly earnings for full-time employees based on Bureau of Labor Statistics data, which is currently \$921 per week or \$47,892 annually. The Department estimates that, by the time the final rule is issued in 2016, this amount will increase to \$970 per week or \$50,440 annually. Under the Department’s proposal, these minimum salary levels will be adjusted upwards on an annual basis using either the percentile of weekly earnings or inflation. Notably, the proposed regulations do not change the fact that teachers are not subject to any salary level requirement under the FLSA. Further, under the proposed regulations, computer employees may still be paid on an hourly basis at a rate of not less than \$27.63 per hour.

The proposed regulations would also raise the compensation requirement needed to qualify for the highly compensated employee exemption to equal the 90th percentile of weekly earnings, or \$122,148 annually (90th percentile of weekly earnings for full-time salaried workers for 2016). This salary level will also be adjusted on an annual basis.

The Department also asked for comments related to whether non-discretionary bonuses should be included in the calculation of weekly salary in order to meet the new proposed threshold. Currently, the Department considers base salary only in evaluating whether the employee meets the salary threshold.

No Changes to Type and Amount of Exempt Duties. Prior to the proposed regulations being released, many observers also believed that the proposed regulations would tighten the rules regarding which “duties” an exempt employee may undertake. Some observers believed the FLSA rules would be reworked to require that a certain percentage of an employee’s time be spent on exempt tasks. In the end, however, the Department decided not to make any specific proposals to revise the duties test at this time.

Instead, the Department has requested public comment on whether changes should be made to the duties test, and if so, what they should be. The Department expressed concern that many employees who are classified as exempt are actually performing a disproportionate amount of non-exempt work. Based on this concern, additional, significant changes could be on the horizon when the final rule is published.

Next Steps. The Department has established a 60-day period for the public to submit written comments to the proposed rule. The comments are currently due on or before September 4, 2015. After this comment period, the Department will review the submitted comments and issue a final rule, which could be finalized and in effect by 2016. Because the Department has the power to issue the rule without Congressional approval, many expect the rule to be challenged in court. Regardless, the new rule could be finalized and in effect by 2016.

What To Do Now

It is important to note that these regulations are only proposed changes. School districts should keep a close eye on the progress of these proposed FLSA regulations -- they could change over the next several months. Districts should anticipate that the final regulations may contain not only changes to the salary level test, but also likely changes to the duties test as well. It is unlikely, however, that any final rule will alter the rule that the salary level requirement does not apply to teachers.

Two important steps right now include:

- **Review Job Descriptions, Handbooks, Contracts, and Policies.** Take an inventory of and review all job descriptions, contracts, board policies, and handbook provisions. Districts should review how they currently classify employees and develop contingency plans in order to ensure compliance if and when the new regulations become effective.
- **Provide Training.** Train administrators and supervisors to make sure that they know the rules related to wage and hour issues and the potential impact of the proposed regulations.

There are a number of different options for school districts if they determine that an employee who was exempt under the former regulations now may be nonexempt under the proposed regulations. For example, a school district does not necessarily need to maintain the employee’s exempt status by increasing the employee’s salary; instead, it could identify that employee as nonexempt and decide to limit the hours of that employee to avoid having to pay overtime. However, if a district continues to assert that the employee is exempt, the district must be able to show that the employee meets every requirement of the exemption.

It is important to note that the proposed regulations will certainly not impact every position within a school district (e.g., many support staff will still be nonexempt, and many administrators and teachers will still be exempt). However, it is advisable to identify any impact that the regulations may have on certain positions and the potential impact of future budgeting or hiring. In 2004, the Department gave employers only 120 days to comply, and it may again provide a short grace period once the proposed regulations are finalized. Therefore, attention to these changes is important right now.

For more information about this topic, please contact Rick Verstegen, the author of this article, or any of the Boardman & Clark, LLP School Law Practice Group attorneys listed on the next page.

B & C News and Events

July 29-31, 2015

Mike Julka will present “Dealing with Challenging School Board Members: Legal Principles and Strategies for the District Administration” as part of the Wisconsin Association of School District Administrators (WASDA) Legal Seminar, held at the Stone Harbor Resort in Sturgeon Bay, WI. For more information, [visit the WASDA website](#).

July 29, 2015

JoAnn Hart and Tess O’Brien-Heinzen will present “Disciplining Students with Behavioral Issues” as part of a live webcast for National Business Institute (NBI). For more information, [visit the NBI website](#).

August 11, 2015

Rick Verstegen will present “K-12 Student Records Management: Mastering FERPA, NCLB, and PPRA Record Handling Requirements and Avoiding the Penalties” as part of a webinar for EducationAdminWebAdvisor. For more information, visit the [EducationAdminWebAdvisor website](#).

■ Michael J. Julka	(608) 286-7238	■ Richard F. Verstegen	(608) 286-7233	■ David P. Weller	(608) 286-7235
■ James K. Ruhly	(608) 283-1738	■ William L. Fahey	(608) 286-7234	■ M. Tess O’Brien-Heinzen	(608) 283-1798
■ Steven C. Zach	(608) 283-1736	■ David E. Rohrer	(608) 286-7249	■ Rhonda R. Hazen	(608) 283-1724
■ JoAnn M. Hart	(608) 286-7162	■ Frank C. Sutherland	(608) 286-7243	■ Todd J. Hepler	(608) 286-7160
■ Douglas E. Witte	(608) 283-7529	■ Jennifer S. Mirus	(608) 283-1799		

Disclaimer: Boardman & Clark LLP provides this material as information about legal issues. It does not offer legal advice with respect to particular situations and does not purport that this newsletter is a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions. In addition, this material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Boardman & Clark LLP recommends the use of legal counsel on specific matters.