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# Overtime Provisions in the Fair Labor Standards Act (FLSA): Frequently Asked Questions

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## Summary

The Fair Labor Standards Act (FLSA), enacted in 1938, is the main federal legislation that establishes general wage and hour standards for most, but not all, private and public sector employees. Among other protections, the FLSA establishes that covered nonexempt employees must be compensated at one-and-a-half times their regular rate of pay for each hour worked over 40 hours in a workweek.

The FLSA also establishes certain exemptions from its general labor market standards. One of the major exemptions to the overtime provisions in the FLSA is for bona fide executive, administrative, and professional employees (the “EAP” or “white collar” exemptions). The FLSA grants authority to the Secretary of Labor to define and delimit the EAP exemption “from time to time.” Under current regulations (established in 2004), to qualify for this exemption from the FLSA’s overtime pay requirement, an employee must be salaried (the “salary basis” test), must perform specified executive, administrative, or professional duties (the “duties” test), and must earn above a salary level threshold (the “salary level” test), which is currently set at \$455 per week.

The Secretary of Labor published a Notice of Proposed Rulemaking (NPRM) in July 2015 to make changes to the EAP exemption. The major changes in the NPRM are raising the salary level threshold from the current \$455 per week to \$970 per week and linking the threshold going forward to a measure of inflation. The NPRM does not propose changing the duties and responsibilities that employees must perform to be exempt. Thus the NPRM would affect EAP employees at salary levels between \$455 and \$970 per week in 2016. The Department of Labor (DOL) estimates that about 14.7 million workers would be affected, including about 4.7 million EAP employees who would become newly entitled to overtime pay.

This report answers frequently asked questions about the overtime provisions of the FLSA, the EAP exemptions, and the NPRM that seeks changes to the EAP exemption.

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## Frequently Asked Questions

This report addresses frequently asked questions related to the overtime provisions in the Fair Labor Standards Act (FLSA) and the exemptions for executive, administrative, and professional employees (the “EAP” or “white collar” exemptions). For a broader overview of the FLSA, please see CRS Report R42713, *The Fair Labor Standards Act (FLSA): An Overview*. For information on the minimum wage provisions of the FLSA, please see CRS Report R43089, *The Federal Minimum Wage: In Brief*.

### What is the FLSA?

The FLSA, enacted in 1938, is the main federal legislation that establishes general labor standards for most, but not all, private and public sector employees. The three main protections provided in the FLSA relate to a minimum wage, maximum hours (overtime), and child labor.

### Who is covered by the FLSA?

The FLSA extends labor standards to individuals under two types of coverage—“enterprise coverage” and “individual coverage.” An enterprise is covered if it has annual sales or business done of at least \$500,000. In addition, the FLSA applies to certain other enterprises—such as hospitals and federal, state, and local governments—regardless of the dollar volume of business. Even if individuals are not employed by a covered enterprise, they may be covered if they engage individually in interstate commerce.<sup>1</sup> Thus, employees are covered if they meet the FLSA criteria for either category.<sup>2</sup>

In addition, the FLSA exempts certain employers and employees from the labor standards in the act, such as state and local elected officials and bona fide executive, administrative, and professional employees. An individual or enterprise is “covered” or “nonexempt” if FLSA protections apply and is “exempt” if FLSA protections do not apply. Finally, coverage in the FLSA is defined in terms of “employer” and “employee.” The latter is defined as “any individual employed by an employer.” Independent contractors, which by definition are self-employed, and thus not employees, would not be covered by the FLSA provisions.<sup>3</sup>

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<sup>1</sup> As DOL notes, the concept of individual coverage is broad in that interstate commerce means “any work involving or related to the movement of persons or things across state lines or from foreign countries.” See <http://www.dol.gov/elaws/esa/flsa/scope/ee2.asp> for guidance. Being engaged in interstate commerce includes not only performing work in the production of goods but also activities in support of such commerce, such as making interstate calls, processing credit cards, and receiving packages. See Department of Labor, Wage and Hour Division, *Fact Sheet #9: Manufacturing Establishments Under the Fair Labor Standards Act (FLSA)*, Washington, DC, July 2008, <http://www.dol.gov/whd/regs/compliance/whdfs9.htm>.

<sup>2</sup> See Department of Labor, Wage and Hour Division, *Coverage Under the Fair Labor Standards Act (FLSA)*, Fact Sheet #14, Washington, DC, July 2009, <http://www.dol.gov/whd/regs/compliance/whdfs14.pdf>.

<sup>3</sup> Employee classification is beyond the scope of this report. For additional information, see David Weil, *The Application of the Fair Labor Standard Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors*, U.S. Department of Labor, Wage and Hour Division, Administrator’s Interpretation No. 2015-1, Washington, DC, July 15, 2015, [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.htm](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm).

It is estimated that approximately 128.5 million, or 89%, of the 144.2 million wage and salary workers are subject to FLSA provisions.<sup>4</sup>

## **What are the overtime pay provisions in the FLSA?**

Section 7(a) of the FLSA specifies the requirements for maximum hours of work and overtime pay requirements. In general, unless an employee is specifically exempted in the FLSA, he or she is considered to be a covered nonexempt employee and must receive pay at the rate of one-and-a-half times the regular rate for any hours worked in excess of 40 hours in a workweek. Employers may choose to pay more than time-and-a-half for overtime or to pay overtime to employees who are exempt from overtime pay requirements under the FLSA.

The FLSA overtime provisions are applied on a workweek basis, which means that an employee's workweek is a fixed and regularly recurring period of 168 hours (i.e., 7 consecutive 24-hour periods). Under the FLSA provisions, overtime pay applies to hours worked in excess of 40 in a workweek. Thus, the law allows some flexibility in daily work hours. For example, an employer could schedule 4 10-hour workdays in a workweek without being required to pay overtime. Similarly, an employee who works a five-day workweek could work four hours one day and nine hours the other four days and not work overtime. On the other hand, averaging of hours over multiple weeks is not permitted in calculating maximum hours and overtime.

## **Are there exemptions to overtime coverage?**

The FLSA statutorily exempts various groups of individuals from FLSA overtime coverage. Some of the exemptions are for a class of workers (e.g., executive, administrative, and professional employees), while others are more narrowly targeted to workers performing specific tasks (e.g., workers employed on a casual basis to provide babysitting services).

Some of the more common exemptions in the FLSA include executive, administrative, and professional employees (the "EAP" or "white collar" exemptions; see next section); commissioned sales employees; farmworkers; motion picture theater employees; motor carrier drivers; and amusement park employees. Many of the broad exemptions from overtime coverage listed here include additional requirements (e.g., salary thresholds) in order for employees to qualify as exempt.<sup>5</sup>

## **What are the "EAP" or "White Collar" exemptions in the FLSA?**

When the FLSA was enacted in 1938, Section 13(a)(1) provided an exemption, from both the minimum wage (Section 6) and overtime (Section 7) provisions of the act, for bona fide executive, administrative, and professional employees (the "EAP" or "white collar" exemptions).

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<sup>4</sup> Department of Labor, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule," 80 *Federal Register* 38552, July 6, 2015. Not all employees in the 128.5 million are covered by all FLSA provisions. For example, employees in motion picture theaters are covered by the minimum wage provisions but not the overtime provisions of the FLSA. Of the 15.7 million individuals (144.2 million minus 128.5 million) not covered by the FLSA, about 12.1 million are self-employed or unpaid workers.

<sup>5</sup> For more details on exemptions in the FLSA, including exemptions from overtime provisions specifically, see <http://www.dol.gov/elaws/esa/flsa/screen75.asp>.

Rather than define the terms executive, administrative, or professional employee, *the FLSA authorizes the Secretary of Labor to define and delimit these terms “from time to time” by regulations.*<sup>6</sup>

The general rationale for including the EAP exemption in the FLSA was twofold. One, the nature of the work performed by EAP employees seemed to make standardization difficult and thus output of EAP employees was not as clearly associated with hours of work per day as it was for typical nonexempt work. Two, bona fide EAP employees were considered to have other forms of compensation (e.g., above-average benefits, greater opportunities for advancement) not available to nonexempt workers.<sup>7</sup>

## **How are the EAP exemptions determined?**

As mentioned, the Secretary of Labor is authorized to define and delimit the EAP exemptions. Although the determinations have changed over time, to qualify for an exemption under Section 13(a)(1) of the FLSA (i.e., not to be entitled to overtime pay) currently, an employee generally has to meet three criteria:

1. The “salary basis” test: employee must be paid a predetermined and fixed salary.
2. The “duties” test: employee must perform executive, administrative, or professional duties.
3. The “salary level” test: employee must be paid more than \$455 per week.<sup>8</sup>

As part of the process of defining and delimiting the EAP exemption, in 2004 DOL also created a “highly compensated employee” (HCE) exemption in which employees earning at least \$100,000 annually are exempt from overtime requirements if they perform at least one of the duties of an EAP employee.<sup>9</sup>

## **What is the “duties” test?**

Job titles alone do not determine exemption status for an employee. Rather, the Secretary of Labor, through issuance of regulations, specifies the duties that EAP employees must perform to be exempt from overtime pay requirements of the FLSA.<sup>10</sup>

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<sup>6</sup> Originally, the FLSA stated that regulations implementing the EAP exemption would be issued by the administrator of the newly created Wage and Hour Division (WHD) of DOL. The Fair Labor Standards Amendments of 1961 (P.L. 87-30) changed the authority to issue regulations from the administrator of the WHD to the Secretary of Labor.

<sup>7</sup> Conrad F. Fritsch and Kathy Vandell, *Exemptions From The Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees*, Minimum Wage Study Commission, Volume IV, Washington, DC, June 1981, p. 240.

<sup>8</sup> This salary threshold was established in 2004 DOL regulations and has not been adjusted since that time. The salary threshold has not been tied to a measure of inflation and has only been adjusted through periodic rulemaking. See Wage and Hour Division, Department of Labor, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 69 *Federal Register* 22122-22274, April 23, 2004.

<sup>9</sup> 29 C.F.R. §541.601. See Wage and Hour Division, Department of Labor, *Highly-Compensated Workers and the Part 541-Exemptions Under the Fair Labor Standards Act (FLSA)*, Fact Sheet #17H, Washington, DC, July 1, 2008, [http://www.dol.gov/whd/overtime/fs17h\\_highly\\_comp.htm](http://www.dol.gov/whd/overtime/fs17h_highly_comp.htm).

<sup>10</sup> See 29 C.F.R. §541. Prior to the 2004 regulations, the duties test consisted of a “short” and “long” version depending on the salary threshold. The 2004 regulations created a “standard” test for each of the EAP categories.

To qualify for the exemption for executive employees, all of the following job duties tests must be met:

- the employee’s primary duty “is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof”;
- the employee “customarily and regularly directs the work of two or more other employees”; and
- the employee “has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.”

To qualify for the exemption for administrative employees, both of the following job duties tests must be met:

- the employee’s primary duty “is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”; and
- the employee’s primary duty “includes the exercise of discretion and independent judgment with respect to matters of significance.”

To qualify for the exemption for professional employees, the following job duties test must be met:

- The employee’s primary duty is the performance of work “requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction”; or work “requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”

## **What is the “salary level” test?**

In addition to the duties test, an employee must earn above a certain salary in order to qualify for the EAP exemption. The current minimum weekly salary threshold is \$455, which was established in the 2004 regulations.<sup>11</sup> That is, a bona fide executive, administrative, or professional employee must also earn at least \$455 per week, which is \$23,660 for a full-year (52 weeks) worker, to be exempt from overtime pay. Otherwise, even if an employee qualifies as a bona fide executive, administrative, or professional employee, that employee would not be exempt from overtime pay (i.e., they would be entitled to overtime pay) if the employee does not earn at least \$455 per week.

Since the FLSA was enacted in 1938, the salary level threshold has been raised seven times, most recently in 2004. Prior to the 2004 increase, the level was last raised in 1975, which marked the longest period without adjustment since the EAP exemption was implemented.

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<sup>11</sup> The current salary threshold levels are specified in 29 C.F.R. §541.600. Prior to the 2004 regulations, the salary threshold varied by the type of employee and the type of duties test.

## **What are the main proposed changes to the EAP exemption included in the recent NPRM?**

On July 6, 2015, a Notice of Proposed Rulemaking (NPRM) was published in the *Federal Register* to define and delimit EAP exemptions.<sup>12</sup>

The primary change in the NPRM is to the salary level test. That is, the NPRM proposes to increase the threshold for exemption from the current \$455 per week to \$970 per week (\$50,440 annually) in 2016. In addition to the increased salary threshold, the NPRM proposes indexing the salary level so that it would automatically be updated in the future. Specifically, the NPRM seeks comments on two possible measures of indexation—the Consumer Price Index for All Urban Consumers (CPI-U) and pegging the salary level to the 40<sup>th</sup> percentile of weekly earnings.

The NPRM also proposes to increase the annual salary threshold for the HCE exemption from \$100,000 to \$122,148.<sup>13</sup>

The NPRM does not propose changes to the current standard duties test but does seek comments from stakeholders regarding the effectiveness of the duties test in screening out bona fide EAP employees.

## **Who would be covered by the regulations in the NPRM?**

The NPRM would expand overtime coverage to EAP employees through a higher salary level threshold rather than through additional classes of employees. As such, EAP employees making between \$455 and \$970 per week in 2016 would become nonexempt (i.e., covered) by the overtime provisions and entitled to overtime pay for hours worked in excess of 40 per workweek.

## **Do the EAP exemptions and the NPRM affect independent contractors?**

No. Because the FLSA applies to “employees”; individuals who are classified as independent contractors are not covered by the FLSA overtime provisions.

## **How does the NPRM become implemented into a final rule?**

As noted, the FLSA authorizes the Secretary of Labor to define and delimit the EAP exemptions periodically. In general, the rulemaking process follows multiple steps in which the relevant federal agency drafts a proposed rule, publishes the proposed rule in the *Federal Register*, receives comments from interested parties, makes changes to the proposed rule, and publishes a final rule.<sup>14</sup> The time between the issuance of an NPRM and final rule varies depending on

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<sup>12</sup> Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 80 *Federal Register* 38516-38612, July 6, 2015.

<sup>13</sup> The HCE exemption applies to employees who are paid on a salary basis, are paid total annual compensation above \$100,000, and who perform at least one of the EAP duties and responsibilities.

<sup>14</sup> For additional and more detailed information on the rulemaking process, see CRS Report IF10003, *Federal* (continued...)



several factors, including the complexity of the rule, the number of comments received, and the response of the agency.<sup>15</sup> The NPRM on overtime exemptions was published on July 6, 2015, which started a 60-day comment period (ending on September 4, 2015) during which interested parties may submit comments on the proposed provisions.<sup>16</sup>

It is worth noting that Congress maintains ultimate control over the promulgation of rules. Congress can pass legislation to repeal rules or compel new rules. In addition, Congress may use other forms of oversight, such as hearings, or may govern the ability of an agency to issue rules through the appropriations process.

## **If the NPRM is implemented, how could employers comply?**

Because the NPRM would increase the salary level threshold for the EAP exemption, a greater number of employees would become eligible for overtime pay. To comply with the proposed regulations, employers would have several options:<sup>17</sup>

- pay overtime to newly covered EAP employees, if they work more than 40 hours in a workweek;
- increase the weekly pay for workers near the proposed threshold (\$970 per week in 2016) to a level above that so that the EAP employees would become exempt and thus not eligible for overtime pay;
- reduce work hours of nonexempt (covered) employees to 40 or fewer so that overtime pay would not be triggered;
- hire additional workers to offset the reduction in hours from nonexempt employees;
- reduce base pay of nonexempt workers and maintain overtime hours so that base pay plus overtime pay would not exceed previous employer costs of base pay plus overtime.

This list is not intended to be exhaustive. Rather it provides some possible channels of adjustment to a higher salary threshold for overtime pay.

## **If the proposed overtime rule becomes final, how many employees are likely to become newly eligible for overtime pay?**

It is difficult to project the number of employees currently exempt under the EAP exemptions who would be entitled to overtime pay under the NPRM. This is due in part to uncertainty about

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*Regulations and the Rulemaking Process*, by (name redacted) and (name redacted).

<sup>15</sup> The Administrative Procedure Act (APA), which governs the DOL NPRM, does not specify the length of the comment period nor does it specify the time between the proposed and final rule.

<sup>16</sup> The last time that DOL promulgated new rules related to the EAP exemptions, the NPRM was published on March 31, 2003. DOL received 75,280 comments and published the final rule on April 23, 2004.

<sup>17</sup> This list of possible responses is neither exhaustive nor mutually exclusive. In addition, the list is not meant to imply equal likelihood of responses.

employer responses, such as increasing salaries above the new threshold to maintain exemption for EAP employees. With caveats, DOL estimates that approximately 14.7 million workers would be affected by the proposed rule. In particular, DOL identifies two groups that would be affected—newly covered workers and workers with strengthened protections.<sup>18</sup> Specifically, DOL estimates the following:

- In the first year under the provisions of the NPRM, about 4.7 million EAP employees would become newly entitled to overtime pay due to the proposed increases in the salary threshold.<sup>19</sup> That is, employees in this group meet the duties test for the EAP exemption but earn between the current and proposed salary thresholds.
- An additional 10 million workers would receive “strengthened” overtime protections, including the following:
  - An additional 6.3 million white collar workers who are paid on a salary basis and who earn between \$455 and the proposed salary threshold per week but do not meet the EAP duties test (i.e., they perform nonexempt work but might be misclassified) would also gain overtime protections since their exemption status would not depend on the duties test. In other words, this group of workers would gain overtime coverage because the higher salary threshold would create a brighter line exemption test and reduce misclassification for exemption purposes.
  - About 3.7 million salaried workers in blue collar occupations whose overtime coverage would be clearer with the higher salary threshold. As DOL notes, this group of workers should be currently covered by overtime provisions but may not be due to worker classification.

## **Are congressional employees covered by the FLSA overtime provisions?**

The application of the provisions of the FLSA is determined by the Congressional Accountability Act (CAA, P.L. 104-1), which was enacted in 1995 and extends some FLSA provisions, including overtime provisions, and other labor and workplace laws to congressional employees. In addition, the CAA created the Office of Compliance, which is headed by a five-member Board of Directors (Board), to enforce the CAA.

If the 2015 NPRM becomes a final rule, the updated overtime regulations would apply to congressional staff if the Board adopts them and Congress approves the Board’s regulations, pursuant to the process established in the CAA.<sup>20</sup> In other words, regulations adopted by the Board do not have legal effect until they are approved by Congress.

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<sup>18</sup> See Department of Labor, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule,” 80 *Federal Register* 38578, July 6, 2015.

<sup>19</sup> This total includes 4,646,000 for the EAP standard salary threshold and 36,200 for the HCE threshold. See Department of Labor, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule,” 80 *Federal Register* 38564, July 6, 2015.

<sup>20</sup> Specifically, Section 203(c) of the CAA requires the Board to issue regulations that “shall be the same as substantive regulations promulgated by the Secretary of Labor to implement” the FLSA provisions that apply under the act to (continued...)

When the Secretary of Labor issued new regulations to update the EAP exemptions in 2004, the Board adopted them; but it does not appear that Congress approved the overtime regulations.<sup>21</sup> Thus, overtime regulations that were adopted by the Board and approved by Congress in 1996, based on DOL regulations originally promulgated in 1975, currently apply to congressional staff.<sup>22</sup> Therefore, in the absence of action by the Board and by Congress, the provisions in the NPRM would not change the status quo.

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congressional employees. The Board may “for good cause” modify the regulations if such a modification would be more effective for the implementation of the protections in the FLSA.

<sup>21</sup> The regulations were submitted to Congress for its approval. The regulations continue to be listed as “Pending Regulations” on the Board’s website. Office of Compliance, “Pending Regulations,” <http://www.compliance.gov/directives/regulations/>.

<sup>22</sup> The regulations became effective on April 16, 1996. A copy of these regulations is available on the Office of Compliance website, <http://www.compliance.gov/directives/final-regulations>.

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