

February 2016 Compensation Connections



This is part two of a series on recent changes being made by the US Department of Labor (DOL) that change how employers should be thinking about their employees and pay. It is not legal advice.

PROPOSED RULE-MAKING TO UPDATE FLSA

The regulations defining the exemptions for “White Collar” employees in the Fair Labor Standards Act (FLSA) are expected to change later this year due to President Obama’s Presidential Memorandum directing the Department of Labor to update the regulations defining which workers are protected by the FLSA’s minimum wage and overtime standards. The memorandum instructed the Department to look for ways to modernize and simplify the regulations while ensuring that the FLSA’s intended overtime protections are fully implemented.

The regs were last updated in 2004, and the current salary threshold for exemption is \$455 per week (\$23,660 per year). The Department “seeks to update the salary level required for exemption to ensure that the FLSA’s intended overtime protections are fully implemented, and to simplify the identification of nonexempt employees, thus making the executive, administrative and professional employee exemption easier for employers and workers to understand and apply.” Watch out, we’re the government and we’re here to help...

Key Provisions of the Proposed Rule

The Proposed Rule-making focuses primarily on updating the salary and compensation levels needed for white collar workers to be exempt. Specifically, the Department proposes to:

1. Set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers (\$921 per week, or \$47,892 annually);
2. Increase the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers (\$122,148 annually); and
3. Establish a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption.

There is no exception or exemption for small or nonprofit businesses.

The Department's proposal picked the 40th percentile of weekly earnings for full-time salaried workers "to represent the most appropriate line of demarcation between exempt and nonexempt employees." According to the DOL, this salary level minimizes the risk that employees legally entitled to overtime will be subject to misclassification based solely on the salaries they receive, without excluding from exemption an unacceptably high number of employees who meet the duties test. As proposed, this would raise the salary threshold from \$455 a week (the equivalent of \$23,660 a year) to about \$970 a week (\$50,440 a year) estimated for 2016. This is certain to have some effect on employers, probably small employers more so than larger employers, and – hold your breath – those that rely more on variable pay and pay for performance to achieve their objectives for total cash than those that believe more in the equal distribution of wealth. My words, my opinion.

The Department is also proposing to automatically update the standard salary and total annual compensation requirements of highly compensated employees to ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers. I would agree with their premise that experience shows that the salary level test is an effective measure of exempt status only if it is up to date. However selection of the 90th percentile seems flawed in a number of ways, not the least of which is application of a statistical variability to a whole host of industries and company types and sizes. I know many of my clients would have only a handful of employees qualify under this new higher standard for exemption based on salary.

The Department also sought comment on the possibility of including non-discretionary bonuses to satisfy a portion of the standard salary requirement. Again, this seems out of touch with reality as the majority of bonuses are considered discretionary (no matter what the plan document says) so would not help to satisfy any earnings threshold. Another factor being considered as "in-the-mix" is the proliferation and use of electronic devices that employees use to stay connected when not at work. The DOL promises to ask for more information on this aspect of work in the 21st century later this month. Don't hold your breath if they're still looking for their pagers!

And your state regulations may be more or less strict than these proposed at the federal level. Generally, whichever is most favorable to the employee will be applied. For example, a few years back when making changes to exemption status for engineering employees in California, one employer lowered their annual bonus target in consideration of now having to pay overtime due to California's stricter regs. In Oregon, employers who are interested can do more research here: [Click Here](#)

As you probably know, the external environment (in this case regulation) can have an undesirable impact on your compensation strategy. Stay tuned and stay alert, these changes are flying under the radar for the most part but are sure to have an effect on your business and your compensation programs. One way to get out in front of these changes

would be to start reviewing your job descriptions for accuracy, and consider how changes to exemption status might change how you view total cash compensation for some employees.

The time to think through your plan and approach is now, and although we cannot be sure of the final outcome, everyone is sure to feel some effect.

My Consulting Practice

Last year I published my “Top 10 Reasons Why I like Working for Myself.” It doesn’t get older, it just gets better! There are a lot of “do what you love” quotes out there. This one is one of my favorites:



I’m a corporate refugee. After over 30 years working for others (some good experiences, some not as much) I’ve found something that I really enjoy and gives me the satisfaction every day that what I’m doing for my clients matters. Sure, if you want to be legalistic about it, I still work for others, but I have more freedoms now than I ever did in corporate roles.

There is classic advice typically given when people are thinking about hanging out their shingle for the first time. Some of it I’ve taken and some I have not. Some of the words I’ve chosen to ignore (at least for now) and why:

1. Narrow your niche. The thinking here is mostly that you need to differentiate yourself from your competition. Unfortunately, that eliminates many aspects of this work that I really enjoy! I know that there are others out there that may be better at one aspect or another of compensation than I am, but I believe, and I’d tell anyone this, that one of my chief differentiators is that I have the breadth over my career that enables me to see around corners into areas that may not even be the subject of the work. So I’m usually open to most any aspect of the work where I believe my knowledge and experience will add value for the client.
2. Balance marketing and delivery. Find ways to look for new business while delivering work already in hand. Overall this is good advice, and certainly starting out something to continue to keep in focus. I’ve been blessed with many referrals from clients and friends since I’ve been doing this, and I’m going to continue to rely on that faithfulness rather than worry too much about marketing. This newsletter is about the extent of the marketing I do, which is just to remind folks every now and then that I’m still out here.
3. Spend carefully and manage your money. This one was already pretty much a no-brainer for me, but becomes sort of the “anti-creed” in the sense that I rely more on others now to help be successful. I have a great accountant that helped me save a bundle on taxes last year. I have a payroll provider that does a great job for about 1/3

the cost of the leading brand. My first year I did my newsletter myself, now I have a service that manages it all for me. My first attempt at a website was my doing, until I came across a fellow here in Portland who did a total revamp for me. All these things and more are done behind the scenes now, and that gives me more time to – as the saying goes – do what I’m loving to do!

I have more and more friends who are being affected by layoffs, and at points in their lives where starting over gets difficult. My own father was laid off from the only company he ever worked for after a 30 year career, and it affected him deeply. Early in my career I read a book by Noel Tichy called “Control Your Destiny or Someone Else Will.” It’s an in-depth look at the Jack Welch era at GE but it always impressed on me to never take for granted not only how you earn your living but whether it provides satisfaction and enjoyment as well.



Jim Harvey is Founder and Principal Consultant for Columbia Compensation Consulting LLC. His 30+ years’ experience encompasses high-tech, aerospace, utility and health care industries, specializing in leading companies in the formulation and execution of their rewards strategies in support of business objectives. His global work experience and collaborative reputation includes translating business needs and ideas into tangible and measurable deliverables, and a hands-on results-

oriented attitude with a strong track record of driving large-scale projects through to delivery and implementation.

At Columbia Compensation Consulting, you are working with someone with over 30 years of expertise in executive, equity, incentive, sales and base compensation. My consultative style includes a D-T-S approach to working with clients: D for Do, since most clients have already identified the need and are looking for specific deliverables; T for Teach, where those opportunities present themselves and transferring knowledge to the client can enable self-sufficiency in the future, and S for Support either through ongoing retainer support or coaching of those then delivering. For more information please visit www.columbiacomp.com.