



## The Implications of DOL's Proposed Overtime Rules on Hospitals and Health Systems

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In an era of increasing financial pressure on the administration of hospitals and health systems, the U.S. Department of Labor (DOL) is expected to issue a final rule regarding the overtime provisions in the Fair Labor Standards Act (FLSA) in late 2016 that will significantly expand the number of employees eligible to receive overtime pay. The proposed rule was issued in July 2015.<sup>1</sup> Anticipating the final rule will be substantially similar to DOL's proposed rule, health care providers should be evaluating their workforces now to determine how to comply with the final rule and whether to implement strategic compensation changes regarding those positions most likely to be impacted.

### Background on FLSA

The FLSA requires certain employees to be paid overtime for any hours worked in excess of 40 in a workweek. Employers are not required to pay overtime to all employees; FLSA specifically exempts certain categories of "white collar" workers (e.g., executive, administrative, professional). To be exempt, employees must:

- Be paid a statutory minimum salary threshold of \$23,660 (\$455 per week); and
- Perform certain types of "duties" (i.e., those that involve managing, supervising, or running a business; exercising discretion or independent judgment on significant matters; or performing tasks that require advanced knowledge)

### Proposed Rule Change

DOL is now proposing to increase the salary threshold for white collar exemptions from \$23,660 to \$50,440. This is an attempt to match the earning threshold at the 40th percentile of weekly earnings for full-time salaried employees. Although the salary threshold was raised in 2004, it has never been increased so drastically. The proposed changes include a "mechanism to automatically update the salary and compensation thresholds on an annual basis using either a fixed percentile of wages or the CPI-U (Consumer Price Index for Urban Consumers)." If the rule becomes final, employers will be required to reassess pay levels each year to determine eligibility for overtime exemptions. The initial increase to \$50,440 is expected to expand overtime eligibility for nearly five million employees within the first year of enactment.

DOL also proposes to increase the salary threshold to meet the "highly compensated employee" exemption from \$100,000 to \$122,148, the 90th percentile for full-time salaried employees. All employees who earn less than \$50,440 must be classified as non-exempt regardless of their job duties, and all employees who earn between \$50,440 and \$122,148 are potentially non-exempt, depending on their specific duties. DOL's proposed rulemaking, however, did not recommend any changes to duties analyses for white collar exemptions.

The impact of the proposed rule will be concentrated on mid-level administrative positions within any hospital or health system. Under the present FLSA framework, the positions most often misclassified as exempt are lower-level "white collar" positions within accounting and finance,

<sup>1</sup> See 80 F.R. 38515

human resources (HR), information technology, and management. More of these positions will de facto become non-exempt, particularly within geographic areas where wages are lower. This may result in increased scrutiny on exempt classification of persons with salaries that exceed \$50,440. Consider an example where a hospital employs two “exempt” HR generalists, one with two years of experience earning \$48,000 and one with eight years of experience earning \$53,000. The former individual would automatically become non-exempt under the proposed rule. If significant overtime is worked, the total compensation for the junior employee could exceed the total compensation paid to the senior employee (classified as exempt under the proposed rule). The more senior exempt employee may question the underlying validity of the exemption classification or, at the very least, experience diminished morale.

Other positions that may be impacted by the proposed rule are care workers who do not meet the professional exemption, including some types of registered and licensed professional nurses; social workers; and many nursing home/assisted living employees. These positions historically have been the subject of considerable litigation under FLSA, as DOL has targeted the health care industry for compliance audits since 2010. Employee-side FLSA firms also have feasted on collective action litigation targeting blanket misclassifications of these types of positions as well as automatic deductions of meal breaks and other payroll practices that do not capture all time actually worked.

These and other legal and practical considerations will have to be addressed if the proposed rule is implemented next year. Health care providers would be wise to conduct a proactive review of their compensation and classification practices so they are not caught unprepared.

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