



# Update on the Proposed Amendments to the FLSA

C. Clayton Gill

ISB Employment & Labor Law Section

January 27, 2016

MOFFATT  
THOMAS

[www.moffatt.com](http://www.moffatt.com)

# C. Clayton Gill

Clay Gill takes on each of his clients' issues as if they were his own. His passion and creativity distinguish him from most lawyers. On the litigation front he excels at trial strategy. His business and financial background makes him a strong candidate for all commercial litigation matters. On the transactional front, his experience in corporate formation, corporate governance, commercial contracts, employment law, and insurance makes him an ideal candidate for small or medium sized companies looking for an outside general counsel.



MOFFATT  
THOMAS

# Exemptions from FLSA's Minimum Wage and Overtime Rules

1. Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
2. The amount of salary paid must meet a minimum specified amount (the "salary level test"); and

# Exemptions from FLSA's Minimum Wage and Overtime Rules (cont'd)

3. The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "primary duties test").

# Issues Raised by President Obama

1. What is the appropriate salary level for the EAP exemptions?
2. What, if any, changes should be made to the EAP primary duties tests?
3. How can the regulations be simplified?

# The Problem As Perceived by the DOL

- “Failure to update the overtime regulations has left an exception to overtime eligibility originally meant for highly-compensated executive, administrative, and professional employees now applying to workers earning as little as \$23,660 a year. For example, a convenience store manager, fast food assistant manager, or some office workers may be expected to work 50 or 60 hours a week or more, making less than the poverty level for a family of four, and not receive a dime of overtime pay. Today’s proposed regulation is a critical first step toward ensuring that hard-working Americans are compensated fairly and have a chance to get ahead.”

# Key Findings from DOL Stakeholder Meetings

1. Employers spent considerable sums readjusting their work force to meet primary duties tests set forth in 2004 amended FLSA regulations. Employers would rather deal with the current primary duties tests than uncertainties that would arise from any changes to the regulations.
2. Employers want nondiscretionary bonuses (e.g., incentive payments) to be included in minimum salary thresholds.

# Key Findings from DOL Stakeholder Meetings (cont'd)

3. Employers fear that bright line primary duties tests or caps on time performing non-exempt tasks will force them to do away with working supervisors, i.e. managers who pitch in to relieve pressure off of hourly workers.
4. Many employers fear loss of morale for less senior managerial employees who will lose exempt status.



# Key Findings from DOL Stakeholder Meetings (cont'd)

5. Employee stakeholder groups noted that salary thresholds have not increased since 2004 and the current minimum salary threshold is below the poverty level for a family of 4.
  - Many employee stakeholder groups want salary thresholds to be indexed annually to avoid delays associated with the rule making process.

# Key Findings from DOL Stakeholder Meetings (cont'd)

6. Employee advocates believe that employers are taking advantage of exempt employees by requiring them to spend an inordinate amount of time completing routine non-exempt tasks for which they receive no overtime.
  - This group is advocating for a cap on total number of hours spent on non-exempt duties or a bright line test on percentage of time spent performing exempt tasks versus non-exempt tasks.

# Proposed Amendments to FLSA (June 30, 2015)

1. Minimum salary threshold will initially be pegged at 40th percentile of weekly earnings for full-time (at least 35 hours a week) salaried employees as reported by the Bureau of Labor Statistics, estimated to be \$970 week or \$50,440 annually in 2016.
  - Current salary threshold is a weekly wage of at least \$455, which equates to annual salary of \$23,660.
  - “The Department has long recognized the salary level test ‘as the best single test’ of exempt status.”

# Proposed Amendments to FLSA (June 30, 2015) (cont'd)

2. Highly compensated (“HCE”) threshold will initially be pegged at 90th percentile of salaried employees’ total compensation as reported by the Bureau of Labor Statistics, currently \$122,148.
3. Minimum salary thresholds will automatically re-adjust each year.
  - DOL will probably adjust by applying the Consumer Price Index (CPI-U) given the widespread acceptance of its methodology by economists as a reliable economic indicator.

# Proposed Amendments to FLSA (June 30, 2015) (cont'd)

4. No changes to the primary duties tests, but rather request for comments on whether primary duties tests should be modified given the increase in salary thresholds.

# Other Likely Changes

1. Bright line percentage of primary duties test (>50% of time spent performing exempt tasks).
  - California has already adopted a bright line primary duties test.
2. Allowing a portion of the EAP minimum salary threshold to include nondiscretionary bonuses received by the employee.
  - DOL exploring two options: (1) including nondiscretionary bonuses, but only if they are paid monthly; or (2) limiting amount of nondiscretionary bonuses to 10% of EAP minimum salary threshold.
3. Adding additional illustrative examples on how the exemptions apply to particular occupations.

# What Ideas Were Rejected

1. The DOL rejected a proposal to return to a longer primary duties test with a lower EAP minimum salary threshold (like the pre-2004 regulations). DOL did not believe this followed President's directive to simplify the FLSA regulations.

# Statistics Published by SHRM

1. 53% of organizations review employee classifications (i.e., exempt vs. non-exempt) as position becomes available.
2. 39% of organizations review employee classifications annually.
3. 6% of organizations never review employee classifications.



# Statistics Published by SHRM (cont'd)

4. If salary threshold is increased to 40th percentile, 1% of employees will need to reclassify more than 75% of workforce, 3% will need to reclassify 51 to 75% of workforce, 20% will need to reclassify 25 to 50% of workforce, 76% will need to reclassify less than 25% of workforce.
5. 34% of organizations anticipate hiring more employees to mitigate overtime risks.

# Statistics Published by DOL

1. 144.2 million wage and salaried workers in United States, 43 million of whom are white collar salaried employees
2. 21.4 million of current white collar salaried employees will be impacted by proposed amendments to FLSA regulations.

## Statistics Published by DOL (cont'd)

3. 36,000 employees who meet the current highly compensated exemption (\$100,000) are below the 90th earnings percentile (\$122,148).
4. DOL anticipates that \$1.2 billion in earnings will be transferred from employers to employees after implementation of proposed amended regulations.

# DOL Projections – 2025

1. By 2025, another 5.1 to 5.6 million employees will be impacted by annual increases in EAP minimum salary threshold.
2. Another 33,000 to 42,000 employees will be impacted by the HCE threshold.

# Likely Consequences of Amended Regulations (SHRM)

1. Employers will button down overtime policies.
  - Tighten rules for use of electronic devices after hours, i.e., checking e-mail and accessing company's network remotely.
2. Employers less likely to implement flexible working schedules for full-time employees.

# Strategies for Compliance

1. What impact will reclassifying exempt status to non-exempt status have on your employee's morale?
2. Can you afford to increase wage to EAP minimum salary threshold?
3. Adjusting compensation system so that employee is paid comparable overall wage through modified hourly rate with anticipated overtime wages.

# Strategies for Compliance (cont'd)

4. Educating and training supervisors on ways to effectively mitigate overtime risks.
5. Understand that FLSA risks only apply to employees who are not paid at least the minimum wage for each hour they work and who work more than 40 hours in the defined workweek.
6. Be aware of risks associated with nondiscretionary bonuses and impact on regular rate used to calculate overtime pay.

For more information or questions,  
please contact:

*C. Clayton Gill*

MOFFATT THOMAS

101 S. Capitol Blvd., 10<sup>th</sup> Floor  
Boise, ID 83702

*ccg@moffatt.com*

*(208) 345-2000*

*1-800-422-2889*

*www.moffatt.com*