

Flawed Logic Of DOL's Proposed White Collar Salary Test

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The U.S. Department of Labor has proposed that the salary test for the white collar exemption to the Fair Labor Standards Act more than double from \$455 per week to \$970[1] per week.[2] In the notice of proposed rulemaking, the DOL argues that this historically high salary threshold will effectively distinguish between employees who do and do not satisfy the duties requirements of the FLSA's executive, administrative and professional exemption. However, what is not considered is the likelihood that, by adopting such a high salary threshold, many employees whose jobs satisfy the duties requirements would also have to be classified as nonexempt.

DOL's Rationale for 40th Percentile Threshold

The proposed rule sets the salary test at the 40th percentile of the nonhourly pay distribution because the DOL believes the higher salary threshold "adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating a return to the more detailed long duties test." [3]

However, that argument hinges on the premise that a large fraction of the employees who would *pass* the current salary test but *fail* the proposed salary test (i.e. those with weekly earnings between \$455 and \$970) would also *fail* the duties test. In fact, neither the relationship between salaries and job duties within a white collar occupation nor the correlation between salaries and job duties across different occupations are known to the DOL. There are no DOL surveys that report either a worker's exempt status or whether a worker's job duties satisfy the EAP duties test.

Even as recently as the 2004 final rule, the DOL itself emphasized that it "has consistently held (and

continues to hold) the view that job titles and job descriptions cannot be used to determine the exempt status of any particular employee.”[4] However, the starting point for the DOL’s analysis is a 1999 U.S. Government Accountability Office report that estimates the number of employees eligible for the white collar exemption using occupation groups (which are even less informative than job titles and job descriptions) created by “DOL officials.”

In that study, white collar occupations were grouped into mutually exclusive categories based on the “likelihood that the positions would include managerial or professional duties”: 10 percent or less, 10 to 50 percent, 50 to 90 percent and 90 to 100 percent.[5] For example, “Occupational Therapists” were placed in the category representing a 10 to 50 percent likelihood that the position would include managerial or professional duties while “First Line Supervisors of Retail Employees” were placed in the 50 to 90 percent category.

Empirical Evidence that Contradicts DOL’s Assumptions

Although it is not possible through available data to explicitly test the relationship between salaries and job duties, empirical evidence exists that contradicts the DOL’s assumptions for some of the classifications of occupation titles used in the 1999 GAO study.

For example, the DOL placed the occupation “First Line Supervisors/Managers of Office and Administrative Support Workers” in the category corresponding to 90 to 100 percent of employees with sufficient managerial and professional duties to pass the duties test, yet 51 percent of employees in this occupation will likely fail the new salary test.[6]

In addition, there is evidence that the relationship between salaries and job duties is much more nuanced than the DOL assumes. For example, the median pay of “Occupational Therapists” is more than twice as high as the median pay of “First Line Supervisors/Managers of Retail Sales Workers,” yet the DOL places “Occupational Therapists” in the 10 to 50 percent category for managerial and professional duties, while 50 to 90 percent of the positions in “First Line Supervisors/Managers of Retail Sales Workers” were determined to include managerial and professional duties.[7] Second, within a given occupation, there are substantial pay differences based on geographical region and pay differences between larger and smaller cities that are unlikely to be related to differences in job duties. For example, the median pay of “First Line Supervisors/Managers of Retail Sales Workers” is 50 percent higher in New York City than in Little Rock, Arkansas.[8] The weaker the relationship between salaries and EAP duties, the more likely the new higher salary test would require employees whose duties qualify for the EAP exemption to be classified as nonexempt.

These results are inconsistent with the DOL’s assumption that employees below the new threshold are really nonexempt and suggest that the new salary test may be too high to be an effective method of identifying nonexempt employees.

Conclusion

The DOL’s justification for the historically high salary test for the white collar exemptions to the FLSA is based on the assumption that workers who will fail the new salary test would also fail the duties test. However, comparisons of the likelihood of passing the duties test based on the 1999 GAO study to average salaries by occupation demonstrate that assumption does not always hold. Furthermore, many employees who perform EAP duties but work in lower-paid regions and smaller cities will be denied the white collar exemption, even though employees in nearly identical jobs in higher paid regions and larger

metro areas will be classified as exempt.

An increase in the salary test threshold may well be warranted, but the drastic increase currently proposed could cause millions of employees to lose their white collar exempt status, even though they work in occupation groups for which DOL officials determined that a majority of positions include managerial or professional duties (occupations in the 90 percent or more and 50 to 90 percent categories).

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[1] The DOL's analysis of the economic impact of the rule relies on data from 2013 when the 40th percentile of the nonhourly pay distribution was \$921 per week. Based on recent trends in salaries, \$970 per week is expected to be the salary test threshold when the new rule takes effect in 2016.

[2] In addition the DOL has proposed that the minimum salary threshold be automatically increased each year.

[3] Page 38,517 of "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule," 29 CFR Part 541, *Federal Register*, Vol. 80, No. 128, Monday July 6, 2015.

[4] Page 22,199 of "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule," 29 CFR Part 541, *Federal Register*, Vol. 69, No. 79, Friday April 23, 2004.

[5] See page 41 of the GAO report to the Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, "Fair Labor Standards Act, White-Collar Exemptions in the Modern Work Place," September 1999.

[6] This calculation is based on nonhourly employees in this occupation in the 2013 current population survey, the same data set used by the DOL in its economic analysis in the NPRM. In other words, we found that 51 percent of nonhourly full-time employees in this occupation earned less than \$921 per week in 2013.

[7] According to the 2014 Occupational Employment Statistics survey (a survey of establishments rather than households), the median annual pay of "Occupational Therapists" was \$78,810, while it was only \$37,860 for "First Line Supervisors of Retail Employees."

[8] This calculation is based on the 2014 Occupational Employment Statistics survey; the median annual salary in the New York City metro area was \$46,360 and the median annual salary in the Little Rock, Arkansas, metro area was \$30,890.