

# EXPERT UPDATE



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## Wage and Hour Update: Big Changes to White Collar Exemption

By Shari Herrle, Director of Compliance

A proposed rule that will greatly increase the number of U.S. workers eligible for overtime pay is under review by the Office of Management and Budget (OMB).

While the new wage and hour rules could be released as early as this month or as late as mid-summer, they will have such a large impact that employers should immediately begin to plan around what we know today.

### White Collar Exemption: Current Regulations

In general, current regulations exempt employees from overtime pay if they are paid a predetermined fixed salary of at least \$455 a week (**\$23,660 a year**) and they perform certain executive, administrative, professional, computer, or outside sales duties.

The salary threshold is not modified annually to account for inflation.

### Proposed salary threshold doubles the salary requirement

Doubling the salary requirement will guarantee overtime pay to most salaried white-collar workers earning less than an estimated \$970 a week (**\$50,440 a year**).

The proposed rule would set the standard salary level at the 40<sup>th</sup> percentile of weekly earnings for full-time salaried U.S. workers and automatically update the salary threshold based on inflation or wage growth.

*Please note that the information contained in this document is designed to provide authoritative and accurate information, in regard to the subject matter covered. However, it is not provided as legal or tax advice and no representation is made as to the sufficiency for your specific company's needs. This document should be reviewed by your legal counsel or tax consultant before use.*

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## Possible definition for primary duty

It is quite possible the regulators will define “primary duty”, subsequently providing a “bright line” to clarify the percent of time an employee must spend on exempt duties. Some experts recommend employers prepare for a definition similar to what is used in California:

*The administrative, executive and professional exemptions require that the employee be “primarily engaged in” the duties which meet the test for exemption. The term “primarily engaged in” means that more than one-half of the employee’s work time must be spent engaged in exempt work.*

Modifications to the duties test were not included in the proposed regulations; however, the DOL’s request for comments indicates they are focusing on this provision.

## Evaluate your workforce now

Determine whether you have any exempt employees making less than \$50,440 a year and prepare for a possible change to the duties test.

If the DOL adopts a test similar to the California test for primary duties, any employee spending less than 50% of the day on exempt work can no longer be classified as an exempt employee.

## Review the Primary Duties required of Exempt personnel

Henderson Brothers has assembled information pulled directly from the DOL’s Fact Sheets for each exempt class into the chart on the following page. The information should help you to get reacquainted with the different exempt classifications and the primary duties required currently for each.

We will update the chart if the regulations change the primary duty test.

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Classification	Primary Duties
Administrative	<ol style="list-style-type: none"><li>1. Performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.</li><li>2. Exercise of discretion and independent judgment with respect to matters of significance.</li></ol>
Executive	<ol style="list-style-type: none"><li>1. Managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.</li><li>2. Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent.</li><li>3. Has authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.</li></ol>

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Classification	Primary Duties
Computer *	<ol style="list-style-type: none"><li>1. Must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing:<ul style="list-style-type: none"><li>• The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.</li><li>• The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.</li><li>• The design, documentation, testing, creation or modification of computer programs related to machine operating systems.</li><li>• A combination of the aforementioned duties, the performance of which requires the same level of skills.</li></ul></li></ol>

\* Salary test also includes reference to an hourly rate of not less than \$27.63

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Classification	Primary Duties
Professional	<ol style="list-style-type: none"><li>1. Primary duty must be performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.</li><li>2. Advanced knowledge must be in a field of science or learning.</li><li>3. Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.</li></ol>
<p>Outside Sales</p> <p>Note: The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed if all the criteria for the exemption are met.</p>	<ol style="list-style-type: none"><li>1. Making sales (as defined in FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.</li><li>2. Customarily and regularly engaged away from the employer's place or places of business.</li></ol>

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