

Who Will Be Entitled to Overtime Under Obama's Expected Rule Change?

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Specifically, the change would amend employers' wage and hour obligations as spelled out in the Fair Labor Standards Act to make overtime compensation available to a wider group of employees who are currently considered "exempt" from the federal law's overtime requirements.

The new rule is expected to extend the availability of overtime compensation for hours worked over 40 in a workweek to managers working at fast-food restaurants, loan officers, computer technicians, and other workers who are currently classified as "executive or professional." The change, if implemented, could affect millions of workers and could take away the flexibility built into the exemption analysis by the current "primary duty" test while reintroducing the inflexible percentage-based test used prior to the 2004 amendments and in states like California.

Just last month, [President Obama took action to raise the minimum wage for certain federal contractors to \\$10.10 per hour](#)—as he noted in today's press conference. The federal minimum wage is currently \$7.25 per hour, but [a number of proposals for an increase have recently been made](#). Many states recently increased [their minimum wages](#) with Washington holding steady with the highest rate at \$9.32 per hour.

According to [Alfred B. Robinson, Jr.](#), a shareholder in the Washington, D.C. office of Ogletree Deakins, “We will know more about the proposal this afternoon when President Obama is expected to issue a memorandum on this subject and make comments. At this point, we know that the administration is focusing on the salary basis test for the Part 541 regulations. Currently the minimum salary requirement is \$455 per week, whether paid on a weekly, bi-weekly, semi-monthly, etc. basis. The administration’s position is that inflation has eroded this salary requirement. It has stated, for example, that approximately 3.1 million people would be entitled to overtime if the threshold had kept up with inflation. We would anticipate that indexing the salary basis amount to the consumer price index or some comparable index is something that the administration will consider closely.”

Robinson, who previously served as the acting Administrator of the Wage and Hour Division (WHD) of the U.S. Department of Labor, continued, “The administration further has said that if the 1974 salary basis had been indexed, then they would approach approximately \$1,000 per week in today’s dollar. In yesterday’s *New York Times* article, the Center on Budget and Policy Priorities, which is a progressive think tank, is advocating a salary level of \$984 a week. This should give you an idea of the direction in which the administration is headed with the salary basis requirement.”

“As for the primary duties tests, it is hard to predict. However, we think there will be percentage requirements—perhaps as high as 50 percent for some exemptions—applied to the amount of time that an exempt employee must perform exempt duties. This could be applied in varying amounts to all exemptions. In addition, last summer, the District of Columbia Circuit Court of Appeals rejected the administration’s interpretation that mortgage loan officers are non-exempt, saying that the administration needed to go through a notice and comment process to change its position. A previous U.S. Department of Labor Wage and Hour Division opinion letter stated that mortgage loan officers were exempt. Thus, we believe that the primary duties tests will be narrowed so that some occupations, like mortgage loan officers, will not meet the duties test for the administrative exemption.”

“Bottom line: Changes to the Part 541 regulations will have to go through the notice and comment period required under the Administrative Procedures Act. The administration has acknowledged that this process will take months (we believe it will take longer) and that it will involve much work (this is an understatement). Finally, we might add that, if the Republicans take control of the Senate this year, then Congress may impede this effort as well.”

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