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The Fair Labor Standards Act (FLSA) Exemption for Executive, Administrative, and Professional Employees

The Fair Labor Standards Act (FLSA) establishes a federal minimum wage for most private and public sector employees and generally requires overtime compensation at a rate of one and one-half times an employee's regular hourly rate for hours worked beyond a forty-hour workweek. While broadly providing these employment protections to most employees, the FLSA also includes exemptions for certain specified employees. Section 13(a)(1) of the FLSA, found at 29 U.S.C. § 213(a)(1), exempts from the statute's minimum wage and overtime pay requirements bona fide executive, administrative, and professional (EAP) employees and authorizes the Secretary of Labor to "define and delimit" this exemption through regulations.

The Department of Labor (DOL) announced plans in its 2023 spring regulatory agenda to issue a proposed rule concerning the agency's implementation of the EAP exemption in August 2023. As the Secretary of Labor considers revised regulations for the EAP exemption, this In Focus reviews the FLSA and examines DOL's current regulations for EAP employees.

Background

Congress enacted the FLSA in 1938 to address and eliminate labor conditions considered detrimental to maintaining "the minimum standard of living necessary for health, efficiency, and [the] general well-being of workers." The exemption for EAP employees reflected Congress's sense that these workers typically earn salaries well above the minimum wage and generally enjoy other forms of compensation—such as above-average fringe benefits and better opportunities for advancement—that set them apart from nonexempt employees entitled to overtime pay.

DOL first issued regulations to implement the EAP exemption in 1938. These regulations identified job duties that the employee had to perform to qualify for the exemption. DOL regulations issued in 1940 added a minimum salary threshold for the exemption. Although the salary and duty standards have changed over time, they continue to form the basis of the exemption. In general, under the current regulations, to be considered an exempt EAP employee, the employee must satisfy a salary test and a duties test. The regulations are codified in part 541 of Title 29 of the *Code of Federal Regulations*.

EAP Exemption Salary Test

In general, to qualify for the EAP exemption under current regulations, an employee must (1) be paid on a salary basis and (2) be paid a salary that is above an amount determined by DOL regulations.

The FLSA considers an employee to be paid *on a salary basis* if the employee regularly receives a predetermined amount on a weekly or less frequent basis that is not subject to reduction either because of variations in the quality or quantity of the work performed or because of absences occasioned by the employer or the operating requirements of the business. DOL regulations provide that the EAP exemption may apply to administrative and professional employees compensated *on a fee basis* (i.e., the employee is paid an agreed sum for a single job regardless of the time required for its completion).

Under DOL's current regulations, an employee must be compensated on a salary basis (or fee basis where permitted) at a rate of not less than \$684 per week (\$35,568 annually) for the EAP exemption to apply. The weekly salary rate is lower—\$455 per week—for employees (other than those employed by the federal government) in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands. The weekly salary rate is \$380 for employees (other than those employed by the federal government) in American Samoa.

Salary Rules for Certain Occupations

The EAP exemption salary test does not apply to physicians, lawyers, teachers, and outside sales workers who may be exempt if they satisfy other duty and credential requirements. Academic administrative personnel may be exempt if paid at a rate of not less than \$684 per week or a salary at least equal to the entrance salary for teachers in the educational establishment at which they are employed. Employees in the motion picture producing industry need not be paid on a salary basis so long as they are compensated at a base rate of at least \$1,043 per week (or a proportionate amount based on the number of days worked) and the duties test requirements (described below) are met.

EAP Exemption Duties Test

In addition to satisfying the salary test, an employee must perform specified duties to qualify for the EAP exemption. These duties vary based on whether an individual is an executive, administrative, or professional employee. DOL's current regulations identify the following duties for exempt EAP employees:

Executive Employees

- The employee's primary duty is "management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof."

- The employee “customarily and regularly directs the work of two or more other employees.”
- The employee “has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.”

Administrative Employees

- The employee’s primary duty is “the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.”
- The employee’s primary duty “includes the exercise of discretion and independent judgment with respect to matters of significance.”

Professional Employees

- The employee’s primary duty is “the performance of work: (i) [r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) [r]equiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”

Highly Compensated Employees (HCEs)

Certain highly compensated EAP employees may be exempt from the FLSA’s overtime pay requirement even if they do not perform all of the duties identified above. Under DOL’s current regulations, an employee paid on a salary basis with total annual compensation of at least \$107,432 is exempted from the requirement if the employee “customarily and regularly” performs any one or more of these duties. DOL maintains that a high level of compensation “is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s job duties.” The agency describes the phrase *customarily and regularly* to mean “a frequency that must be greater than occasional but which, of course, may be less than constant.”

Recent DOL Rulemaking

DOL has revised its regulations on the EAP exemption several times, and the agency has updated the EAP salary threshold nine times, most recently in 2019. The level at which the salary threshold is drawn plays a decisive role in determining the EAP exemption’s scope. All else equal, a *lower* salary threshold is associated with greater coverage of the exemption and fewer employees who would be entitled to overtime pay. This section provides information on DOL rules that updated the salary threshold in 2004, 2016, and 2019. Summary information is in **Table 1**.

The 2004 rule created a single standard duties test and a single salary level for the EAP exemption. For several years prior to the 2004 rule, DOL had employed a dual approach to evaluating an employee’s EAP exemption status. In particular, DOL rules allowed for a *long test*, which paired a lower salary threshold with quantitative limits on an employee’s time in nonexempt work, and a *short test*,

which had a higher salary threshold but applied a less stringent duties test that did not include a quantitative limit on nonexempt work. The 2004 rule applied a single standard salary threshold (\$455 per week), and created a separate salary threshold and duties requirement for HCEs.

The 2016 rule maintained the standard duties test for the EAP exemption. It raised the standard and HCE salary thresholds to \$913 per week and \$134,004 per year, respectively. However, DOL never enforced the rule. Before the rule could take effect, it was challenged in court, and the U.S. District Court for the Eastern District of Texas in *Nevada v. U.S. Department of Labor* blocked its implementation.

The 2019 final rule formally rescinded the 2016 final rule. It also increased the salary threshold from \$455 per week (\$23,660 annually) to \$684 per week (\$35,568 annually); increased the annual salary threshold for the HCE exemption from \$100,000 to \$107,432; allowed up to 10% of the standard salary threshold to be comprised of nondiscretionary bonuses, incentive payments, and commissions; maintained the salary thresholds set by the 2004 rule for the U.S. territories; and increased the base rate level for employees in the motion picture producing industry from \$695 per week to \$1,043 per week.

Table 1. Summary of Salary Thresholds for EAP Exemptions in the 2004, 2016, and 2019 Rules

	2004 Rule	2016 Rule ^{Error!} Reference source not found.	2019 Rule
Standard	\$455/week	\$913/week	\$684/week
HCE	\$100,000 annually	\$134,004 annually	\$107,432 annually
U.S. Territories	\$455/week; American Samoa \$380/week	\$913/week; American Samoa \$767/week	\$455/week; American Samoa \$380/week
Motion Picture Producing Industry	\$695/week	\$1,397/week	\$1,043/week

Sources: CRS analysis of U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 81 Fed. Reg. 32,391 (May 23, 2016); and U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 Fed. Reg. 51,230 (Sept. 27, 2019).

Notes: HCE = Highly compensated employees.

- The 2016 rule was finalized but did not become effective and was eventually invalidated.

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