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Proposed changes in white-collar exemptions

On March 31, 2003, the U.S. Department of Labor finally announced its proposed changes to the white-collar exemptions. In addition to increasing the salary requirements, several significant changes in the executive, administrative, and professional tests have been proposed, especially changes to the professional sections. I have developed a comparison of the current tests to the new proposals made on March 31, 2003 (please see list below).

In addition to the proposals outlined above, the Department also proposed a special rule for employees earning \$65,000 or more annually. This equates to \$1,250 per week. These employees earning \$65,000 or more per year would be exempt if they perform an identifiable executive, administrative or professional function as described in the tests. For example, an executive who supervises two or more employees but does not participate in the hiring or firing decisions would be exempt due to the fact that the executive performs an executive function.



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It is important to remember that these are proposals. A reading of the complete text of the proposed changes at 29 C.F.R. Part 541 indicates that the Department seemed to be encouraging comments or counterproposals not only on their proposals but also other issues such as whether an executive who is in sole charge of an establishment should have the salary of \$425 a week waived.

The public has until June 30, 2003, to make comments or other proposals. Written comments may be addressed to Tammy D. McCutchen, Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, or you may send a facsimile of 20 pages or less to 202/693-1432. After the comments have been received and evaluated, the Final Rule, which may be the same or differ significantly from the March 31, 2003 proposals, will be issued. There is no timetable for the issuance of the Final Rule. It may well be into the fall or winter of 2003 before we learn the Department's position on these changes.

Current and proposed duties tests for executive employees

Current short test (salary and duties)

- \$250 per week
- Primary duty of the management of the enterprise or a recognized department or subdivision.
- Customarily and regularly directs the work of two or more other employees.

Proposed standard test (salary and duties)

- \$425 per week
- Primary duty of management of the enterprise or a recognized department or subdivision.
- Customarily and regularly directs the work of two or more other employees.
- Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees is given particular weight).

Current and proposed duties tests for administrative employees

Current short test (salary and duties)

- \$250 per week
- Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.
- Customarily and regularly exercises discretion and independent judgment.

Proposed standard test (salary and duties)

- \$425 per week
- Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
- Holds a position of responsibility with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high-level skill or training.

Current and proposed duties tests for learned professional employees

Current short test (salary and duties)

- \$250 per week
- Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.
- Consistently exercises discretion and judgment.

Proposed standard test (salary and duties)

- \$425 per week
- Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.

Current and proposed duties tests for creative professional employees

Current short test (salary and duties)

- \$250 per week
- Performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

Proposed standard test (salary and duties)

- \$425 per week
- Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Current and proposed duties tests for computer employees

Current short test (salary and duties)

- \$250 per week
- Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.
- Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.
- Consistently exercises discretion and judgment.

Section 13(a)(17) test (salary and duties)

- \$27.63 per hour
- Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) design, development, documentation analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user of system design specifications; or (C) design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B)

and (C), the performance of which requires the same level of skills.

- Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.

Proposed standard test (salary and duties)

- \$425 per week or \$27.63 per hour
- Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) design, development, documentation analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user of system design specifications; or (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B), and (C), the performance of which requires the same level of skills.
- Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.

Current and proposed duties tests for outside sales employees

Current short test (salary and duties)

No separate short test

Proposed standard test (salary and duties)

- Primary duty of making sales; or of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
- Customarily and regularly engaged away from the employer's place or places of business.