



U.S. OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 551

RIN 3206-AN41

Pay Administration under the Fair Labor Standards Act

AGENCY: U.S. Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) proposes to revise the regulations issued under the Fair Labor Standards Act of 1938, as amended (“FLSA” or “Act”). The revised regulations are intended to provide a clearer understanding of coverage under the Act and to ensure that the FLSA's intended overtime protections are fully implemented. By way of this rulemaking, OPM seeks to harmonize OPM’s regulations with revisions made to the Department of Labor’s (DOL) FLSA regulations by updating the salary-based nonexemption level and by providing for future automatic updates to that level consistent with the automatic updating mechanism utilized in DOL’s FLSA regulations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN number ‘3206-AN41,’ using either of the following methods:

Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.

E-mail: FedClass@opm.gov

FOR FURTHER INFORMATION CONTACT: Adam Garcia (813) 616-9296, or email: Adam.Garcia@opm.gov.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management (OPM) is publishing a proposed rule to amend regulations issued under the Fair Labor Standards Act of 1938, as amended (“FLSA” or Act”). The purpose of this amendment is to update and harmonize OPM’s FLSA regulations with certain changes made by the Department of Labor (DOL), Wage and Hour Division, 29 CFR part 541, RIN 1235-AA11, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (Federal Register, Vol. 81, No. 99, dated May 23, 2016).

OPM proposes to update the salary-based nonexemption level, increasing it to the annual rate of basic pay of \$47,476, in order to ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of nonexempt employees, thus making the exemption easier for agency employers and employees to understand. OPM also proposes to make future automatic updates to the salary level to prevent the level from becoming outdated due to the often lengthy passage of time between rulemakings by incorporating the same automatic updating methodology utilized in the U.S. Department of Labor’s (DOL) FLSA regulations.

Background

Part 551 provides the regulations, criteria, and conditions set forth by OPM as prescribed by the Fair Labor Standards Act (“FLSA” or “Act”). OPM's administration of the Act must comply with the terms of the Act, but the law does not require OPM's regulations to mirror the DOL's FLSA regulations. OPM's administration of the Act must

be consistent with the DOL's administration of the Act only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the Act.

The FLSA guarantees a minimum wage and overtime pay at a rate of not less than one and one-half times the employee's regular rate for hours worked in excess of 40 in a workweek. While these protections extend to most employees, the FLSA does provide a number of exemptions. OPM proposes to update and revise the regulations issued under the FLSA implementing the criteria for exemption from the minimum wage and overtime pay provisions. One of the criteria required to qualify as an exempt employee is that the employee must be paid a certain salary level. The salary level required for exemption under OPM's FLSA regulations (5 CFR 551.203) is currently the annual rate of basic pay of \$23,660.

Updates to DOL's FLSA Regulations

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department of Labor to update the overtime regulations regarding executive, administrative, and professional employees, who are exempt from the FLSA's minimum wage and overtime standards. 79 FR 18737 (April 3, 2014). Consistent with the President's goal of ensuring workers are paid a fair day's pay for a fair day's work, the memorandum instructed DOL to look for ways to modernize and simplify the regulations while ensuring that the FLSA's intended overtime protections are fully implemented.

On July 6, 2015, the DOL issued proposed regulations in the Federal Register (80 FR 38515) that updated the salary level under part 541 of title 29, Code of Federal Regulations (CFR), Defining and Delimiting the Exemptions for Executive,

Administrative, Professional, Computer and Outside Sales Employees. The final rule, providing an increase to the salary level to \$913 per week (\$47,476 annually), and providing for automatic updates to the salary level in the future, was issued on May 23, 2016 (81 FR 32391) with an effective date of December 1, 2016. See 29 CFR 541.600, 541.607.

Proposed Revisions to OPM’s FLSA Regulations

In order to maintain consistency with DOL’s updates to the salary level provisions under their FLSA regulations, OPM proposes to revise 5 CFR 551.203 to include the updated salary level (annual rate of basic pay of \$47,476). In addition, OPM proposes to include a new paragraph (c) in section 551.203, providing for future automatic updates to the salary level, consistent with the automatic updating mechanism utilized in DOL’s FLSA regulations. These updates are being proposed to ensure that the FLSA's intended overtime protections are fully implemented.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (Public Law 96-354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.”

The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. These regulations will not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Orders 12866 and 13563—Regulatory Planning and Review

OPM has determined that this rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, “Regulatory Planning and Review”.

Nevertheless, the Office certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563, “Improving Regulation and Regulatory Review.” Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity. The benefits of this proposed rule include simplification of the identification of nonexempt employees, inclusion of a mechanism to prevent the rule from becoming outdated, and harmonization with Department of Labor FLSA regulations. Additionally, the proposed rule provides equity in the treatment of Federal and private sector FLSA minimum wage and overtime pay treatment. The Office does not foresee any burdens to the public.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this proposed rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects in 5 CFR Part 551

Government employees, and wages.

U.S. Office of Personnel Management.

Beth F. Cobert,
Acting Director

Accordingly, OPM proposes to amend title 5, Code of Federal Regulations, part 551, as follows:

PART 551— PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

1. The authority citation for part 551 continues to read as follows:

Authority: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Pub. L. 93-259, 88 Stat. 55 (29 U.S.C. 204(f)).

2. Revise §551.203 to read as follows:

§ 551.203 Salary-based nonexemption.

(a) An employee, including a supervisory employee, whose annual rate of basic pay is less than \$47,476 is nonexempt, unless:

(1) The employee is subject to § 551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status); or

(2) The employee is subject to § 551.212 (Foreign exemption criteria); or

(3) The employee is a professional engaged in the practice of law or medicine as prescribed in paragraphs (c) and (d) of § 551.208.

(b) For the purpose of this section, “rate of basic pay” means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable locality payment under 5 CFR part 531, subpart F, special rate supplement under 5 CFR part 530, subpart C, or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind, such as premium payments, differentials, and allowances.

(c) Beginning on January 1, 2020, and every three years thereafter, the salary-based nonexemption level will be updated to equal the annualized earnings amount of the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region in the second quarter of the year preceding the update as published by the Bureau of Labor Statistics.

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