



UNDERSTANDING THE PROPOSED NEW FLSA SALARY EXEMPTION THRESHOLD

SHRM GUAM BREAKFAST BRIEFING November 15, 2023

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The Proposed FLSA Rule

WHAT DOES IT DO?

- Increases the minimum salary for overtime exempt employees to **\$55,068 per year**
 - *Currently: \$35,568 (States)/\$23,660 (Territories)*
- Applies this new minimum salary level to every U.S. jurisdiction, including Guam and all other territories (*except American Samoa*)
- Increases the minimum salary for Highly Compensated Employees to \$143,988 per year
- Requires automatic updates to the minimum salary levels every 3 years

The Proposed FLSA Rule

WHAT IT DOES NOT DO . . .

- Does not change the 10% cap on inclusion of bonuses, incentives, and commissions in meeting the minimum salary
- Does not change which job classifications may be exempt from overtime (*executive, administrative, professional, etc.*)
- Does not change the duties test. At all.

FAIR LABOR STANDARDS ACT QUICK RECAP



Fair Labor Standards Act

Federal FLSA is found at 29 U.S.C. §§ 201–219

Guam FLSA (also called the “Minimum Wage and Hour Act of Guam”) is found at 22 G.C.A. §§3101–3121

- Minimum Wage and Maximum Hour Standards
- Overtime Pay Provisions
- Defines Exemptions from Overtime
- Guidelines for Record Keeping and Accessibility
- Definitions and Guidance for Wages and Payments
- Penalties for Non-Compliance

Employee Classifications

Non-Exempt Employees

- Employees are not exempt from overtime pay for hours worked over 40 in a work week
- Typically paid on an hourly basis

Exempt Employees

- Employees are exempted from overtime pay and receive the same amount of pay regardless of hours work
- Must pass the salary test and duties test

Paying **Non-Exempt** Employees

Minimum Wage

| Federal | Guam |
|---------|--------|
| \$7.25 | \$9.25 |

Tipped Wage

| Federal | Guam |
|---------|--------|
| \$2.13 | \$9.25 |

Compensable Time

- Work not requested but suffered or permitted to be performed must be paid by employer
- Overtime, even if not approved

Overtime Pay

When to Pay

- Any hours worked over 40 in a work week
- Vacation, Sick, Holiday pay do not count toward OT calculation

Work Week

- Seven consecutive 24-hour periods

Calculating Overtime Pay

- Calculate the regular rate of pay for the week
- Multiply by 1.5 to obtain OT rate
- Multiply OT rate by OT hours

Regular Rate Calculation

| WAGE TYPE | SAT | SUN | MON | TUE | WED | THU | FRI | HOURS | RATE | PAY |
|---------------|-----|------|-----|-----|-----|-----|-----|-------|---------|-----------------|
| Base Hours | 8 | 0 | 0 | 8 | 8 | 8 | 6 | 38 | \$10.00 | \$380.00 |
| Premium Hours | | 2.00 | | | | | | 2 | \$15.00 | \$30.00 |
| OT Hours | | | | | | | 2 | 2 | \$15.38 | \$30.75 |
| | | | | | | | | | | \$440.75 |

Regular Rate

| | RATE | HOURS | PAY |
|------------------------|---------|-------|----------------|
| Regular | \$10.00 | 38 | \$380.00 |
| Premium | \$15.00 | 2 | \$30.00 |
| | | | \$410.00 |
| Divide by Hours Worked | | 40 | |
| Regular Rate | | | \$10.25 |
| OT Multiplier | | | 1.5 |
| OT Rate | | | \$15.38 |

Paying **Exempt** Employees

Requirements

- Exempt employees are paid on a **salaried basis** because they perform executive/administrative/professional type of work (not hourly-rate type of work)
- Both the Salary Test and Duties Test must be met in order to classify an employee as exempt
- Misclassification can result in litigation and repayment of overtime due

Paying **Exempt** Employees

Salary Test (actually 2 separate salary tests)

Salary Basis Test:

Must be paid a **predetermined and fixed salary** on a **weekly or less frequent basis** (e.g. weekly, bi-weekly)

Salary is fixed and must be paid in full regardless of how many days or hours are actually worked

Salary Level Test:

| Federal | Guam | HCE |
|-----------------|-----------------|--------------|
| \$684 weekly | \$455 weekly | \$684 weekly |
| \$35,568 annual | \$23,660 annual | \$107,432 |

Paying **Exempt** Employees

Salary Level Test

IMPORTANT THINGS TO KEEP IN MIND

- Salary level establishes the minimum the employee must be paid in order to be eligible to be exempt from overtime
- If the salary test is not met, the employee is not exempt and must be paid overtime – the duties test doesn't even apply
- Bonuses (non-discretionary), incentives, and commissions can be used to satisfy no more than 10% of the minimum salary level requirement

Paying **Exempt** Employees

Duties Test

- Must be employed as a bona fide executive, administrative, professional, outside sales, or computer employee (a.k.a. “white collar” exemptions)
- Must answer “yes” to all criteria in particular exemption
- **Burden on Employer to Prove Exemption Applies:**
All employees are presumed nonexempt until proven to be exempt

Paying **Exempt** Employees

Duties Test

EXEMPTIONS

- **Executive**

- Employees whose primary duties include tasks like managing processes, production, departments, employees, scheduling, budgeting, and compliance
- Test
 - Does this manager make or influence workforce decisions such as hiring, firing, or promoting?
 - Does this manager direct the work of at least two full-time employees (or four part-time)?
 - Is non-exempt work (hourly-rate work) less than 50% of total work?

Paying **Exempt** Employees

Duties Test

- **Administrative**

- Employees whose primary duties include non-manual work that is directly related to running or servicing a business
- Test
 - Does the employee have operational authority? Can they deviate from procedures, implement policies, or commit the company to action?
 - Does the employee work in the following departments:
 - Finance, insurance, or auditing
 - Operations, purchasing, quality control, human resources, or compliance
 - Marketing, advertising, or public relations
 - Computer network, internet, or database administration
 - Does the employee exercise independent judgment?

Paying **Exempt** Employees

Duties Test

- **Learned Professionals**

- Employees in certain professional career fields
- Test
 - Does the employee perform work requiring advanced knowledge, required by an academic degree?
 - Does the employee use his or her advanced knowledge base to analyze different situations and formulate solutions, without having to rely on well-established techniques or procedures?
 - Is the employee generally considered a professional and not a skilled worker?
 - Law, Medicine, Accounting, Teaching, Engineering, Architecture, Science

Paying **Exempt** Employees

Duties Test

- **Creative Professionals**

- Workers in artistic or creative fields
- Test
 - Does the employee work in a creative or artistic (e.g., music, writing, acting, graphic arts)?
 - Does the employee use imagination or personal talent to create original work?

- **Computer Employees**

- Employees who design computer systems and networks
- Test
 - If compensated hourly, makes at least \$27.63 per hour
 - Does the employee analyze, design, create, modify, develop or test systems or programs?
 - Does the employee work as an analyst, programmer, or engineer?

Paying **Exempt** Employees

Duties Test

Highly Compensated Employees (HCE's) (paid at least \$107,432 annually) have an easier duties test.

HCE Duties test:

The employee's primary duty is office/non-manual work; and

The employee regularly performs at least one of the exempt duties from the duties test.

Example: Employee qualifies as an HCE if she supervises 2 full time employees even though she does not meet all of the other normal duties test requirements.

FLSA Status Wage & Hour Case

Duties, not title, decide workers' FLSA status

Just calling someone a manager has no effect on whether they are eligible for overtime pay. You must always analyze their actual duties to make the exempt or nonexempt call.

Recent case: Topgolf classified its sales managers nationwide as exempt. They received salaries and commissions but weren't eligible for overtime.

The U.S. Department of Labor determined these “managers” didn't meet the Fair Labor Standards Act's supervisory requirements and were, therefore, eligible for overtime. Now

Topgolf must pay \$750,063 in back wages to 255 employees.

Employees can be considered exempt supervisors if they:

- Customarily and regularly direct the work of at least two other full-time employees or their equivalent (e.g., four part-time employees).
- Have the authority to hire or fire employees, or their recommendations carry particular weight.

In addition, employees must be paid at least \$684 a week, and they must be paid in any week they do any work.

Proposed FLSA Rule

| CURRENT RULE | PROPOSED NEW RULE |
|--|---|
| Minimum salary under Salary Level Test is \$684 weekly/\$35,568 annually | Minimum salary under Salary Test is \$1,059 weekly/\$55,068 annually <u>35th Percentile</u> of salaries nationally 55% increase for the States and D.C. |
| Special Salary Level for Territories: \$455 weekly/\$23,660 annually | No Special Salary Level for Territories <u>131% increase for Guam</u> and other territories |
| Required annual compensation for HCE's is \$107,432 | Required annual salary for HCE's is \$143,988 <u>85th Percentile</u> salaries nationally |
| No required automatic updates to minimum salary requirements | Automatic updates to minimum salary requirements every 3 years |

Status of Rule Change

| AGENCY ACTION | TIMING |
|--|---|
| USDOL Issues Notice of Proposed Rulemaking | September 8, 2023 |
| 60-Day Public Comment Period | September 8 – November 7, 2023 (26,281 comments submitted) |
| USDOL Considers Public Comments and Makes Changes if Appropriate *New Salary Level May Change* | No required time period (maybe 8 – 10 months) |
| USDOL Adopts Final Rule *May be Challenged in Court* | Sometime in 2024 (effective 60 days after adoption) |

SHRM Guam's Public Comment



November 7, 2023

Amy DeBisschop
Director, Division of Regulations,
Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., N.W., Room S-3502
Washington, DC 20210

Re: RIN 1235-AA39; Proposed Rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

Dear Director DeBisschop:

SHRM Guam Chapter is an affiliate of the Society for Human Resource Management, the leading voice of the human resources profession. The global organization known as SHRM is the world's largest professional association with more than 300,000 members worldwide and more than 500 affiliated local chapters. SHRM's purpose is to promote the development and advancement of the HR profession. SHRM Guam Chapter was established in 1990 to carry out SHRM's mission in Guam. Our Guam chapter currently has 200 members.

SHRM Guam submits these comments in response to the September 8, 2023 Notice of Proposed Rulemaking issued by the U.S. Department of Labor ("USDOL") under Regulatory Information Number (RIN) 1235-AA39. The proposed rule would: (i) increase the salary threshold for employees classified as exempt from overtime to \$1,059 per week and \$55,068 annually, (ii) increase the salary threshold for highly compensated employees to \$143,988 annually, (iii) provide for automatic readjustments to these salary thresholds every three (3) years, and (iv) apply these new salary thresholds to employees in all U.S. territories (Guam among them) that are subject to the Federal minimum wage.

The proposed rule will have a particularly severe impact on employers from the U.S. territories that are subject to the Federal minimum wage. SHRM Guam, therefore, respectfully requests that USDOL allow an additional 60 days for residents of the U.S. territories to submit comments on the proposed rule.

SHRM Guam Chapter Comment on Proposed Rule
November 7, 2023
Page 6

Conclusion

For the foregoing reasons, SHRM Guam respectfully requests that USDOL allow an additional 60 days for residents of the U.S. territories to submit comments on the proposed rule. We urge the USDOL to reconsider its intention to apply the full increase in salary level to the territories. We request that the increase be phased-in for the territories in the manner described above. We commend USDOL for continuing to safeguard the rights and wellbeing of employees and we thank USDOL for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Yolanda Padrones".

Yolanda Padrones
President
SHRM Guam Chapter

A handwritten signature in black ink, appearing to read "V. Camacho".

Vincent Camacho, ESQ.
President-Elect
SHRM Guam Chapter

SHRM Guam's Public Comment

- Asked to Extend the 60-Day Comment Period
- Objected to the 133% Increase for Guam (too Drastic)
 - Highlighted SHRM Guam's Survey Results:
 - 70% expect more than \$100,000 in added costs
 - 7% expect up to \$1,000,000 in added costs
 - 60% said they will do a combination of layoffs, delayed hiring, or delayed promotions
 - 84% said they will reclassify employees from exempt to non-exempt
- Urged USDOL to Phase-In the Increase over time in the Territories
 - Start with \$684 weekly/\$35,568 annually and with gradual increases

Useful Resources

The Proposed Rule

- [regulations.gov/document/WHD-2023-0001](https://www.regulations.gov/document/WHD-2023-0001)

U.S. Department of Labor Links

Notice of Rulemaking and Explanation of Rule

- dol.gov/agencies/whd/overtime/rulemaking

FAQs Answered by USDOL

- dol.gov/agencies/whd/overtime/rulemaking/faqs

SHRM Links

- guam.shrm.org
- shrm.org
 - shrm.org/ResourcesAndTools/tools-and-samples/how-to-guides

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