

Guest Article: U.S. DOL Accepting Public Comments On Proposed Overtime Rules

[Editor's Note: From time to time, we publish guest articles that we think inform readers on timely and relevant issues related to employer-employee relations. This guest article by Karen Rezendes, Attorney at Law, Lozano Smith, sheds light on the proposed overtime rule.]

We have received a number of questions regarding the overtime rules that apply to school district employees and the status of the new proposed federal overtime regulations.

In California, there are two sources of statutory law that govern overtime pay for public school district employees: (1) the federal Fair Labor Standards Act (FLSA); and (2) the California Education Code. (29 United State Code [U.S.C.] § 203 et seq. and California Education Code Sections [E.C.] 45127-45133.5)

Over 40 Hours in a Week—FLSA

The FLSA requires non-exempt employees to be paid overtime at a rate of not less than one and one-half times the employee's regular rate of pay for hours worked over forty (40) in a workweek. (29 U.S.C. § 207, subd. [a][1])

Over 40 Hours in a Week and 8 Hours in a Day—California Education Code

As for state law, public school district employees are not subject to the overtime requirements included in the California Labor Code, which have been interpreted by courts not to apply to public sector employees. (*Johnson v. Arvin-Edison Water Storage Dist.* [2009] 174 Cal.App.4th 729.) However, public school district employees are subject to overtime requirements as set forth in the California Education Code.

Generally, the California Education Code provides that classified employees are entitled to overtime compensation or compensatory time off at a rate of at least time and one-half the regular rate of pay for any time required to be worked in excess of eight (8) hours in any one day and in excess of forty (40) hours in any calendar week, with certain exceptions. (E.C. 45127, 45128, 45131)

Collective bargaining agreements with classified employee units also likely address overtime compensation and may provide greater overtime benefits than those included in the federal FLSA and/or in the California Education Code.

Public school district employers must review the exemption rules under both the FLSA and the California Education Code in order to determine whether an employee is exempt from overtime pay.

FLSA's Exemptions to Overtime Requirements

The FLSA allows several classes of employees to qualify as exempt from the FLSA's over forty (40) hours in a week overtime rules, including persons employed in a bona fide executive, administrative or professional capacity, or in a high-level computer position. There are also exemptions for "highly compensated" employees who satisfy certain requirements and for persons employed as bona fide teachers as demonstrated through a "duties" test. (29 Code of Federal Regulations [C.F.R.] §541.303)

With the exception of certain named professions that are subject to unique rules, such as teachers, in order to be exempt under the current FLSA overtime exemption rules which were adopted in 2004, an employee must:

- (1) receive at least a minimum specified salary amount ("salary level test");
- (2) be paid on a salary basis ("salary basis test"); and
- (3) the employee's job must primarily involve specified duties as defined by the FLSA regulations ("job duties test").

Currently, the 2004 federal regulations implementing the FLSA overtime rules provide that employees with a salary below \$455 per week or below \$23,660 annually must be paid overtime if they work more than 40 hours per week, (see "[Department of Labor Issues a Notice of Proposed Rulemaking on Overtime Rules](#)," in the March 22, 2019, *Fiscal Report*).

In 2016, the prior federal Administration unsuccessfully tried to adopt new overtime regulations which would have increased the minimum salary required for an overtime time exemption to \$47,476 per year. The 2016 proposed regulations resulted in a lawsuit challenging the legality of the regulations. The U.S. Department of Labor (DOL), under the current federal administration, decided not to seek implementation of the prior proposed regulations and proposed new overtime regulations instead.

On March 7, 2019, the DOL issued a Notice of Proposed Rulemaking (NPRM) to update and revise the 2004 overtime regulations applicable to the FLSA.

Under the proposed new FLSA exemption regulations, to qualify for a FLSA exemption, an employee generally must:

- Also be salaried, meaning the employee is paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”);
- Be paid at least a specified weekly salary threshold (the “salary level test”), currently \$455 per week/\$23,660 annually, proposed in the NPRM to increase to \$679 per week/\$35,308 annually; and
- Primarily perform executive, administrative, or professional duties, as provided in the federal DOL’s regulations (the “job duties test”)

The proposed new FLSA exemption regulations also increase the applicable salary threshold for exempt “highly compensated” employees from \$100,000 a year to \$147,417 a year.

If the proposed new NPRM overtime rules are implemented, the DOL estimates that in the first year, 1.1 million currently exempt employees who earn at least \$455 per week but less than the proposed salary level of \$679 per week would, without some intervening action by their employers, become eligible for overtime.

Before becoming final, the proposed new federal overtime regulations are subject to a 60-day notice and public comment period. After considering any comments, the DOL will issue a final rule, which may or may not differ from the proposed new regulations.

California Education Code Exemptions to Overtime Requirements

As with the FLSA, the California Education Code also provides for certain exemptions to the general overtime requirements. A classified employee may be exempt from the overtime rules if the employee is employed in a supervisory, administrative, or executive position specified by the Board (or personnel commission, if applicable) as excluded from overtime provisions (E.C. 45130). The position must clearly be a management position, and the Board must certify in writing “that the duties, flexibility of hours, salary, benefit structure, and authority of the positions or classes of positions are of such a nature that they should be set apart from those positions which are subject to the overtime provisions.” Further, the Board must also certify in writing that the employees in these excluded positions “will not be unreasonably discriminated against as a result of the exclusion.”

The California Education Code does not provide entitlement to overtime pay for certificated employees and, as discussed above, teachers are specifically exempt from the federal overtime pay requirements to the extent that they satisfy the required duties test.

An example of a typically overtime exempt classified employee is a school district classified human resources director. Such administrators can be exempt from overtime pay under the California Education Code if they perform supervisory, administrative or executive work as specified by their board-adopted job description. The new question will be what happens if the minimum salary for an overtime exemption increases under federal law. If the classified human resources director’s pay is below the FLSA minimum salary test, then even if they perform supervisory administrative or executive work, they will be entitled to overtime pay for work over forty (40) hours in a workweek under federal law. Since overtime questions involving classified management employees are fact intensive, it is important that school districts consult with their legal counsel regarding their unique situations.

In anticipation of the federal DOL’s proposed new regulations, employers should review all employees that may be impacted by the new regulations, if approved, and take the steps that are necessary to remain in compliance with the FLSA’s overtime requirements. In addition to reviewing the job descriptions to determine if such positions would satisfy the job duties tests, school district employers should also consider whether they must either (1) raise employees’ salaries to comply with the new salary level test of \$679 per week/\$35,208 per year in order to continue to satisfy exemption requirements, or (2) reclassify such employees as non-exempt and provide overtime pay for work over forty (40) in a week. Note also that employers have a duty to bargain with the applicable exclusive representative prior to making changes to the wages, hours, and other terms and conditions of employment for represented employees.

The DOL is accepting written comments on the proposed rule before May 21, 2019, which can be submitted by clicking [here](#). More information on the NPRM can be found [here](#). We will likely not see a final rule until 2020.

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