



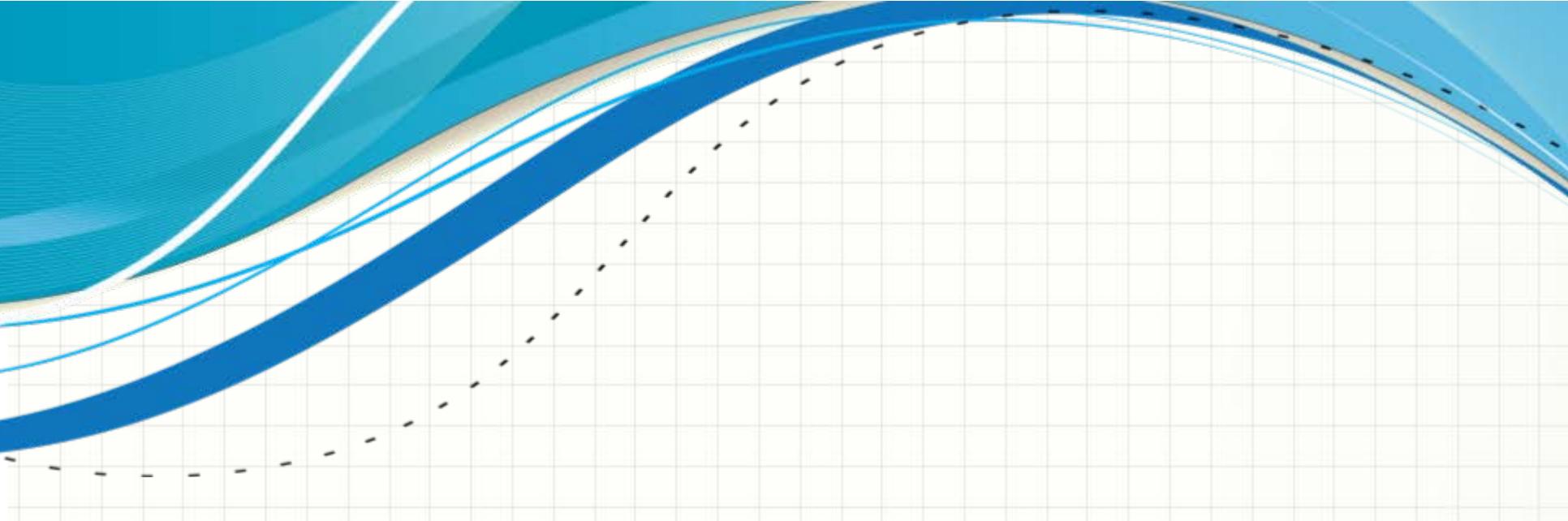
OVERTIME COMPENSATION: CURRENT LAW AND PROPOSED CHANGES TO OVERTIME EXEMPTIONS

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OVERVIEW:

- U.S. Department of Labor has proposed changes to Fair Labor Standards Act (“FLSA”) regulations (Part 541) regarding the so-called “white collar” overtime exemptions.
- Specifically, the proposal increases the minimum salary for qualified, overtime exempt employees from \$455 per week to approximately \$970 per week.
- New change will require employers to revisit employee classifications and make changes as necessary.



**CURRENT LAW: A
(SHORT) REFRESHER**

The Basics:

- In general, the FLSA, 29 U.S.C. §§ 201 *et seq.* requires that employers pay employees a minimum hourly wage (\$6.05 in the CNMI until September 30, 2016) and a overtime premium of 1.5 times the hourly wage for all hours worked in excess of 40 during any given workweek.
- Under current regulations, qualifying executive, administrative and professional employees are exempt from FLSA overtime requirements (the “white collar” exemptions). 29 CFR Part 541.

White Collar Exemptions: (FLSA, Section 13(a)(1) and Part 541)

- Under current regulations, qualifying executive, administrative and professional employees are exempt from FLSA overtime requirements.
- In order to qualify, exempt employees must perform certain duties as prescribed by regulation.
- In addition to performing exempt duties, exempt employees must be paid a salary at a minimum rate of \$455 per week (which equates to \$23,660 per annum).

Executive exemption:

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- Customarily and regularly directs the work of two or more other employees; and
- Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.

See 29 CFR Part 541.100 et seq

Administrative Exemption:

- 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; and
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Administrative Exemption:

- Examples may include employees in the areas of tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, human resources, public and government relations, legal and regulatory compliance, computer network, internet and database administration.
- The exemption does NOT include working on a production line or selling a product in a retail or service establishment, clerical or secretarial work, recording or tabulating data, performing mechanical, repetitive, recurrent or routine work.

Human Resources Manager Example

- Is exempt under the Administrative exemption where the HR Manager formulates, interprets or implements employment policies.
- Minimum standards typically set by exempt Human Resources managers who also make hiring decisions or recommendations.
- However, personnel clerks who “screen” applicants to obtain data about their minimum qualifications and fitness for employment generally do not meet the duties requirement for exemption.

Professional Exemption:

- Primary duty must be the performance of work requiring advanced knowledge;
- In a field of science or learning;
- Customarily acquired by a prolonged course of specialized intellectual instruction; and
- Generally recognized occupations with recognized professional status include: law, accounting, actuarial computation, theology, teaching, medicine, architecture, pharmacy, engineering, sciences.

See 29 CFR 541.300 et seq

Professional Exemption:

- Requires specialized academic training generally evidenced by academic degree.
- High school degree is not sufficient.
- Generally does NOT apply to occupations in which most employees acquire skill by experience.

Other Exemptions:

- Creative Professionals – Performs work requiring invention, imagination, originality or talent.
- Highly Compensated Employees – Total annual compensation of at least \$100,000 and customarily and regularly performs any one or more of the exempt duties described above.
- Outside Salespersons.
- Owner Executives – Employees who own at least a 20% interest in enterprise and are actively engaged in management.
- Computer employees (if earn minimum \$27.63/hour).

See, generally, 29 CFR Part 541

Notes on “Duties” Test:

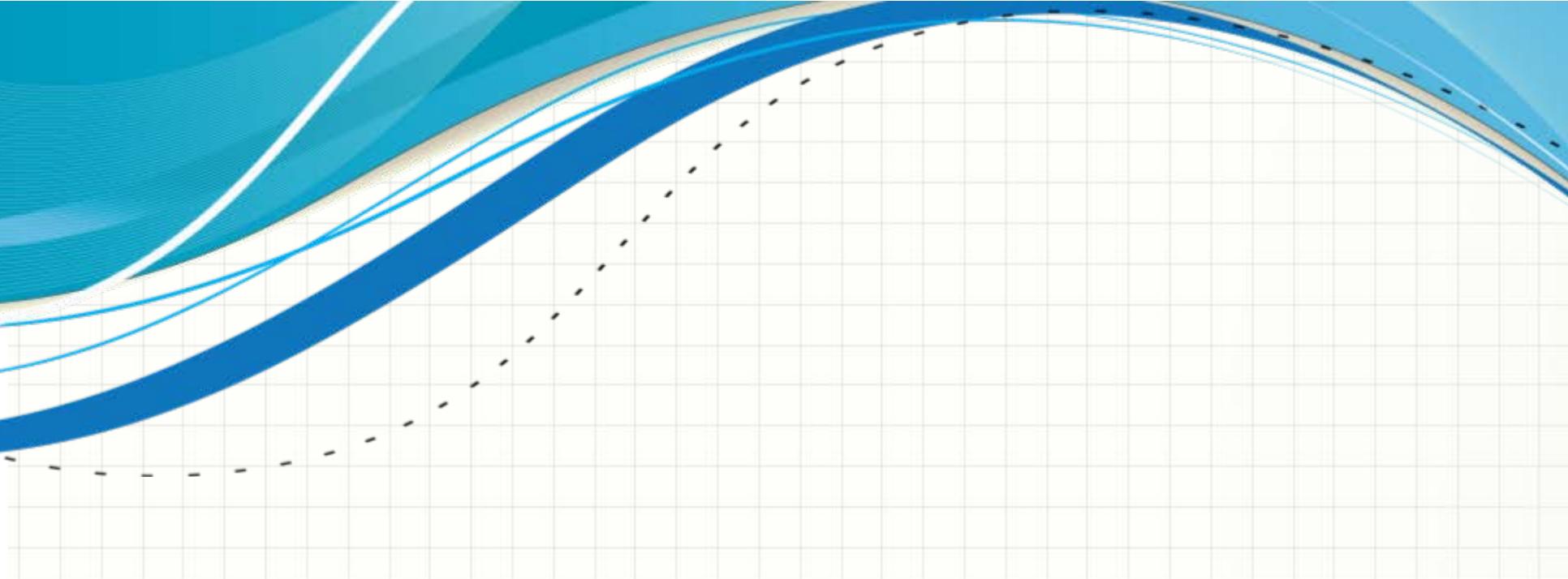
- FLSA currently uses “primary duties” test for each exemption as described above.
- Time spent on exempt duties is not necessarily the deciding factor on whether a particular employee may be classified as exempt.
- For example – concurrent performance of exempt and non-exempt work does not automatically disqualify an employee from exemption.
- However – Executives and managers generally decide themselves when to perform nonexempt.
- Nonexempt employees are generally directed by a supervisor to perform exempt work for defined time periods.

See, e.g. 29 CFR Part 541.700

Notes on Compensation:

- Minimum salary threshold is measured on week-by-week basis, not total yearly compensation.
- Thus, requirements must be met for each pay-period.
- Example: At \$970-a-week minimum, for instance, an employee who was not paid on a "salary basis" at a rate equivalent to at least that amount each pay period would fail to satisfy this exemption component, even if she earned \$60,000 in a year. On the other hand, an employee who was paid \$2,500 on a "salary basis" each semi-monthly pay period would meet this test, even if he earned only \$30,000 in a year because he worked on a seasonal basis for six months.

See 29 CFR Part 541.600, et seq; "Evaluating USDOL's Proposals: Avoiding Dangerous Assumptions" found at <http://wage-hour.net/category/Proposed-Regulations.aspx>



PROPOSED CHANGES

Increased minimum salary threshold -

- New proposed regulations increase the minimum salary for qualifying overtime exempt employees.
- Minimum salary will likely be approximately \$970 per week in 2016 --- which equates to \$50,440 per year for annual employees.
- New regulation will build in annual increases in the minimum salary which may be tied to Bureau of Labor Statistics data or the Consumer Price Index.
- If pegged to BLS data, the Proposed Regulation aims to set the minimum salary at the 40th percentile of weekly wages of all full-time salaried workers.

New Proposed rules may be found at www.dol.gov

Highly Compensated Employees -

- New regulation also increases minimum salary for highly compensated employees exemption to approximately \$122,148.
- Similar to white collar exemptions, the new regulation may build in annual increases tied to Bureau of Labor Statistics or the Consumer Price Index.
- If pegged to BLS data, the Proposed Regulation aims to set the minimum salary for highly compensated employees at the 90th percentile of weekly wages of all full-time salaried workers.

Employees not affected by change -

- Non-exempt employees paid on a salary-plus-overtime basis will not be affected.
- Other exempt employees to which minimum salary requirements do not apply:
 - Teaching professionals;
 - Lawyers;
 - Physicians (including some interns and residents);
 - Outside Sales Employees – salespersons who make sales or obtain orders or contracts for services and are customarily and regularly engaged away from the employer's place of business in performing their duties.

See, e.g., 29 CFR Part 541.303, 541.304, 541.500

Possible changes to “duties” test -

- The proposed regulations do not propose any particular changes.
- However, the Department of Labor asked for comments regarding the “duties” test.
- This may signal additional changes to the current regulations related to the duties tests in place since the 2004 amendments to the white collar exemption.

Possible changes to “duties” test -

- Old test (1994-2004) was the short and long duties test which depended on salary level.
- Current test is “primary duties” test as detailed above.
- Other possibilities?
- California’s 50% test which requires that at least 50% of the exempt employee’s time be spent exclusively on primary, exempt-category duties.



**WHEN WILL NEW
REGULATIONS TAKE
EFFECT?**

Timing -

- The short answer is “We don’t know exactly.”
- Latest thinking and speculation is that new rules will likely take effect in Spring or Summer of 2016.
- Political considerations, including the upcoming presidential election may impact timing.
- Earlier adoption and effective date would provide time for President Obama to resolve, during his term, any Congressional Review Act challenge.

See “When will The Exemption Changes Occur?” (October 23, 2015) and “Finalized Exemption Changes By Spring 2016?” (December 18, 2015) found at <http://wage-hour.net/category/Proposed-Regulations.aspx>.

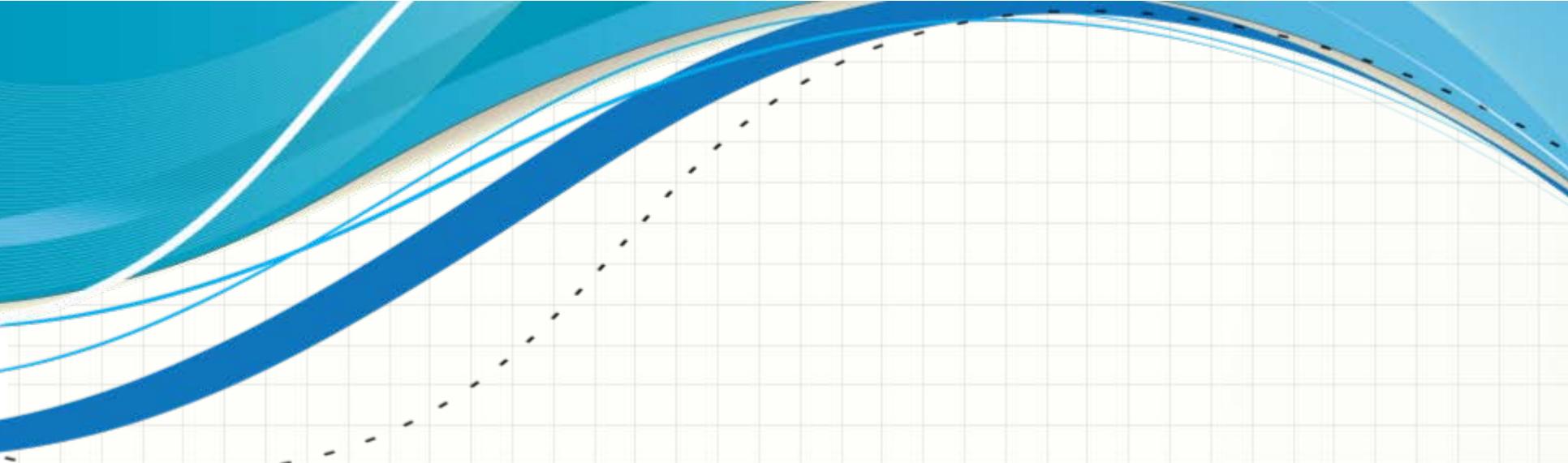
Time for Compliance -

- The 2004 amendments to the white collar exemption provided a 120-day compliance “grace period.”
- However, given the advance notice of these proposed regulations and the extensive notice and comment period, experts expect 60 days.
- Political considerations, including upcoming election and likelihood of Congressional Review Act challenge may shorten the compliance window following publication of the final regulations.
- Some commentators expect a 30-day window to comply with new rules.

See, e.g. commentary found at <http://wage-hour.net/category/Proposed-Regulations.aspx>.

Annual Salary Adjustment Timing

- Once the Proposed Regulations are implemented, annual salary adjustments will be announced 60 days before the end of the year each year.
- The Secretary of Labor will publish the new minimum salary levels for executive, administrative and professional employees and for highly compensated employees in the Federal Register.
- Employers will need to adjust quickly to annual changes to remain compliant.



**WHAT SHOULD
EMPLOYERS DO?**

Don't Panic:

- Don't wait until new rules take effect to try and make workforce compliant.
- New rules provide an opportunity to review current employees and classifications to ensure that they are in compliance with current rules.
- **AUDIT YOUR EXEMPT WORKFORCE DECISIONS.**
- Do your currently exempt employees really meet the primary duties tests?

Have a plan:

- Consider your options and develop a plan to bring your workforce into compliance with the new rules.
- Make adjustments to classifications, salary structure and hiring plans now.
- Explain prior classification decisions and changing salary structures to affected employees.

Consider options:

- In order to avoid paying premium overtime compensation, employers may have to make adjustments.
- Increase salaries of exempt-category employees.
- Re-classify formerly exempt employees as hourly employees.
- Hire additional employees.
- Adjust compensation packages.
- Adjust work schedules of current employees.

Increase salaries -

- The simplest fix is to increase salaries for exempt-category employees to the new minimum threshold.
- This would make for a lot of happy executives, administrators and professionals.
- However, economic realities of CNMI make this option unlikely.

Re-classify employees -

- Employers may re-classify formerly exempt, salaried employees as non-exempt, hourly employees.
- This option sounds simple, but employers must keep in mind the consequences of re-classification.
- Non-exempt employees come with other obligations on employer:
 - **Must maintain accurate time records**
 - **Must pay overtime compensation for any hours worked over 40 in a given workweek**

See resources found at www.dol.gov/WHD/.

Re-structure compensation -

- In addition to re-classifying some formerly exempt employees as non-exempt, hourly employees, employers can consider adjusting compensation packages.
- Salary plus overtime compensation or hourly wage with “built-in” overtime pay that approximates the employee’s prior salary.
- Depends on number of hours formerly exempt employee typically worked, for example:
 - Pay employee \$10 per hour for 40 hours = \$400
 - Plus overtime of 4 hours at \$15 per hour = \$60
 - Total weekly pay is \$460 or roughly equivalent to previous minimum salary of \$455 per week.

See, e.g., “FLSA Exemption Changes: More on Salaried-Employee Alternatives” (May 1, 2015) found at <http://www.wage-hour.net/?tag=/preparing+for+exemption+changes>.

Some Possible Pitfalls -

- May not adjust a fixed salary or an hourly rate from workweek-to-workweek or in each pay period to “back into” a projected amount of compensation.
- May not simply assume that the employee has worked the same number of hours each workweek.
- Must accurately capture and record all of an employee’s hours worked in a workweek and must compute and pay compensation on the basis of those actual hours worked.
- Must be sure that any plan also complies with the applicable requirements of other wage-hour laws.

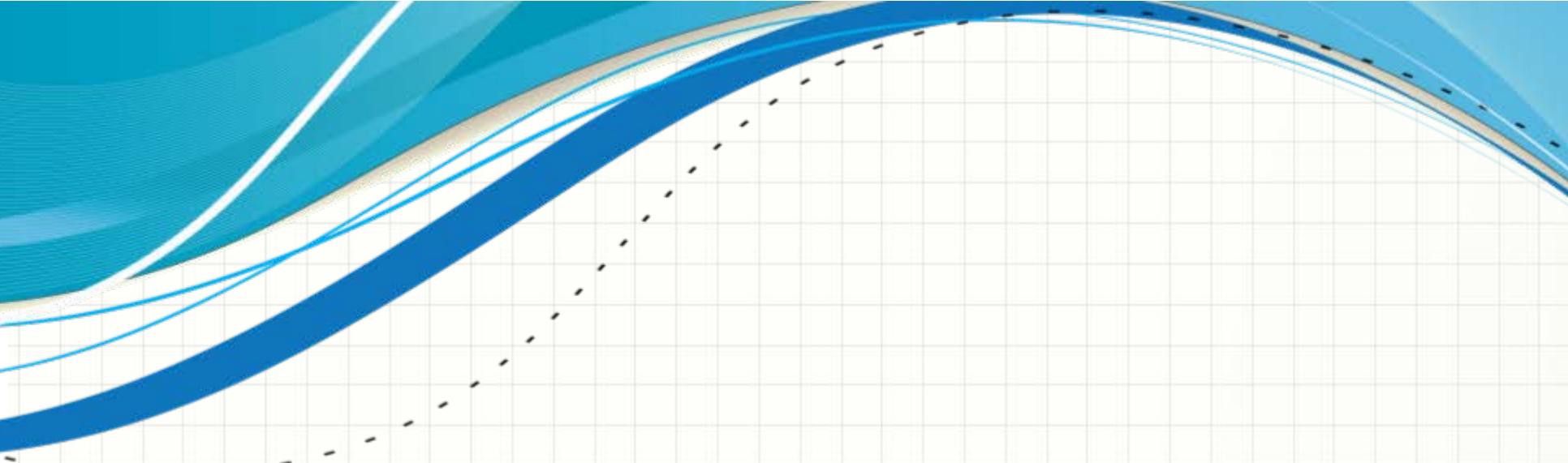
See, e.g., “FLSA Exemption Changes: More on Salaried-Employee Alternatives” (May 1, 2015) found at <http://www.wage-hour.net/?tag=/preparing+for+exemption+changes>.

Summary

- Proposed changes will increase minimum salary threshold for exempt employees.
- Employers should review current policies and classifications to ensure compliance with current rules.
- Employers should create and implement a plan now to get into compliance with new rules.

Resources

- Mark B. Hanson and Ben Petersburg
 - 233-8600
- U.S. Department of Labor website has excellent information
 - www.dol.gov



QUESTIONS?