

lower end of the current range of salaries” to determine an appropriate salary level for the standard test—although we settled upon on the lowest 20 percent, rather than the lowest 10 percent, because of the proposed change from the “short” and “long” test structure in the proposed rule and because the data included some salaried employees who would not meet the duties tests for exemption. Applying this analysis, and also considering adjustments to the current salary levels for inflation, the Department proposes a standard salary level test of \$425/week. Under this level, approximately the bottom 20 percent of salaried employees would fall below the minimum salary requirement and be automatically entitled to overtime pay.

Proposed special rule for highly compensated employees. The proposed regulations also include in § 541.601 a special, streamlined rule for employees paid \$65,000 or more annually. Under this proposed rule for highly compensated employees, employees paid \$65,000 or more annually and performing non-manual work would be exempt if they have an identifiable executive, administrative or professional function as described in the standard duties tests. These highly compensated employees would not have to meet all the elements of the standard duties test to qualify for the exemption as a highly compensated employee. For example, an employee who supervises two workers but does not participate in any hiring or termination decisions in the company would still be exempt because the employee has a function that is identifiable as an executive function. In addition, the proposed special rule for highly compensated employees would permit counting base salary, commissions, non-discretionary bonuses and other non-discretionary compensation in determining whether an employee earns \$65,000 or more annually. To qualify as a highly compensated employee under the proposed regulation, any commissions or non-discretionary bonuses would have to be settled and paid out to the employee as due on at least a monthly basis. An employee who works only a portion of a year, whether because the employee begins work during the year or leaves before the end of the year, must be guaranteed a *pro rata* portion of the \$65,000 annual guarantee. The *pro rata* portion should be based upon the number of weeks the employee works in such a position. If an employee's total annual compensation does not total at least the guaranteed \$65,000 by the end of the year, the proposed regulation

would allow the employer to make a payment by the next pay period sufficient to bring the employee to the guaranteed level. The employer is not required to make this payment; however, if the employer elects not to make the one-time payment, the employee is not exempt as a highly compensated employee.²⁰

To determine an appropriate salary level for highly compensated employees, the Department looked to points near the higher end of the current range of salaries and found that the top 20 percent of all salaried employees earned above \$65,000 annually. This level is consistent with setting the proposed standard test salary level at the bottom 20 percent of salaried employees.

Puerto Rico, Virgin Islands and American Samoa. Prior to the Fair Labor Standards Amendments of 1989 (Pub. L. 101–157), Puerto Rico, the Virgin Islands, and American Samoa were subject to wage order proceedings under the Act, in lieu of the FLSA minimum wage, and consequently lower salary test levels traditionally were established for employees in these jurisdictions. The 1989 Amendments removed Puerto Rico and the Virgin Islands from the Act's wage order proceedings, and provided that the U.S. mainland minimum hourly wage rates under section 6(a)(1) of the Act would apply in Puerto Rico and the Virgin Islands. For this reason, the proposed regulations would apply the mainland salary test level of \$425 per week in Puerto Rico and the Virgin Islands. Employees in American Samoa remain subject to wage order proceedings under the Act. Consequently, the proposed regulations would apply a special, lower salary test level of \$360 per week for executive, administrative and professional employees in American Samoa. This special salary level maintains approximately the same ratio to the mainland test in the current regulations (84% for executive and administrative workers). Similarly, the proposal would apply a special test for highly compensated employees in American Samoa of \$55,000 annually. Comments are invited on whether the 84 percent ratio is appropriate.

Comments on salary levels. The Department invites comments on these proposed salary levels and on any alternative salary level amounts or methodologies for determining the appropriate salary level. In addition, the

²⁰ Of course, if all of the requirements in either the executive, administrative or professional employee tests established in §§ 541.100, 541.200 or 541.300 are satisfied, the employer still would be able to claim the appropriate exemption.

Department invites comments on the alternative of removing the salary tests from the regulations entirely and on how the regulations could be structured without the need for any specific salary amounts (relying only on duties tests, for example). The Department also invites comments on the alternative of adopting a “salary only” test for highly compensated employees. Under such an alternative, for example, employees performing non-manual or office work and earning a total annual compensation over a certain amount would automatically be considered exempt, without any reference to the employee's duties.

Salary Basis Test

Under the current regulations, to qualify for the executive, administrative or professional exemption, an employee must be paid on a “salary basis” as defined in § 541.118. The employee must regularly receive a predetermined amount of salary, on a weekly or less frequent basis, that “is not subject to reduction because of variations in the quality or quantity of the work performed.” Thus, with a few exceptions described below, the employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

The salary basis test prohibits an employer from making deductions from the salary “for absences occasioned by the employer or by the operating requirements of the business.” In other words, “if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.” However, the employee does not have to be paid for any work week in which he or she performs no work.

The current salary basis test also prohibits deductions from pay for disciplinary problems, performance issues or for absences caused by jury duty, attendance as a witness, or temporary military leave (although employers may take offsets for jury or military pay) in any week in which an employee performs any work.

The current regulations contain several exceptions to these salary basis rules: An employer may make deductions from the guaranteed pay “when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident.” Deductions also are permitted for absences of a day or more due to sickness or disability, if taken in accordance with a *bona fide* plan, policy or law (workers compensation, for example) providing wage