

Rulemaking on Minimum Wage Act Exemptions for Executive, Administrative, Professional, & Outside Sales Employees

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Overview

- **Minimum Wage Act (Chapter 49.46 RCW)**
 - Minimum wage
 - Overtime (time and a half) for hours worked over 40 per week
 - Tips and service charges
 - Paid sick leave
 - Protection from retaliation/discrimination
- **Applies to most employers and employees, except those who are specifically exempt from the law.**



Overview

- Exemption for “white collar” salaried workers (RCW 49.46.010(3)(c) and RCW 49.46.130(2)(a)):
 - “Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director [of labor and industries].”
- State regulations (WAC 296-128-500 to 540)
- Very similar to federal rules under the Fair Labor Standards Act (29 CFR 541) implemented by the US Department of Labor (USDOL).



Criteria for executive, administrative, & professional exemptions

- Since 1940, the federal regulations implementing the exemption have generally required each of three tests to be met for the exemption to apply:
 - **Salary Basis Test:** The employee must be paid a predetermined, fixed salary.
 - **Salary Level Test:** The amount of salary paid must meet a minimum specified amount.
 - **Duties Test:** The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations.



1975-76

2004

2016-17

2018



- Federal rules updated by USDOL in 1975.
- Two duties tests:
 - Long test (lower salary level, more stringent duties test)
 - Short test (higher salary level, less stringent duties test)
- Salary levels:
 - \$155 per week – long test (executive, administrative)
 - \$170 per week – long test (professional)
 - \$250 per week – short test
- State rule adopted to match federal criteria in 1976.



1975-76

2004

2016-17

2018



- Federal rules updated by USDOL in 2004.
- USDOL replaced the short and long duties tests with a single standard test that did not include a cap on the amount of nonexempt work that could be performed.
- Salary level:
 - \$455 per week
- Added Highly Compensated Employees exemption.
- State rule was **not updated** to match federal criteria in 2004. Standard more favorable to employee applies.



1975-76

2004

2016-17

2018



- Federal rule update by USDOL was to take effect December 1, 2016.
- Single duties test unchanged from 2004 rules.
- Salary level:
 - \$913 per week
 - Some changes to types of payments that count towards the salary level
 - Automatic updating mechanism
- L&I held stakeholder meetings to scope update to state rule.



1975-76

2004

2016-17

2018



- November 22, 2016 – US District Court of the Eastern District of Texas grants preliminary injunction, effective nationwide, preventing the rule from taking effect.
- August 31, 2017 – US District Court of the Eastern District of Texas holds that the final rule exceeded USDOL’s authority.
- USDOL appealed the decision, but the appeal has been stayed.



1975-76

2004

2016-17

2018



- L&I filed CR-101 preproposal statement of inquiry March 20, 2018.
- Department solicited feedback from stakeholders beginning April 2018.
 - Data
 - Scoping questions
 - Draft rule concepts
- Initial pre-draft released October 5, 2018
- Feedback sessions (Tumwater, Everett, Richland, Spokane)



Upcoming state rule process

- Second pre-draft released November 19, 2018
- Feedback sessions

November 27 10 a.m. – Overview 10:30 a.m. - 12:30 p.m. – Feedback Session The Swedish Club, Stockholm Room 1920 Dexter Avenue N. Seattle, WA 98109	November 28 10 a.m. – Overview 10:30 a.m. - 12:30 p.m. – Feedback Session Hilton Garden Inn, Cascade Room 401 E. Yakima Avenue Yakima, WA 98901	November 29 10 a.m. – Overview 10:30 a.m. - 12:30 p.m. – Feedback Session L&I Vancouver Office 312 SE Stonemill Drive, Suite 120 Vancouver, WA 98684
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- Comment deadline December 14, 2018



Upcoming state rule process

- CR-102 proposal (Early 2019)
 - Proposed rule language
 - Public comment period
 - Public hearings
 - Cost-benefit analysis & small business economic impact statement
- CR-103 (TBD)
 - Adopted rule language
 - Effective date



Key elements

- The department currently intends to propose a rule that will raise the salary threshold to between 2 and 2.5 times the state minimum wage for a forty hour work week.
- The department currently intends for the updated rule to have an effective date of January 1, 2020.



Questions for stakeholders

1. Should the department consider phased-in implementation based on employer size?
2. Should the department consider a higher salary threshold in higher-wage areas?
3. What definition of primary duty should be included in the rules?
4. What criteria for the duties tests, if any, should differ between the federal and state rules?



Formatting key

Plain text. Shows rule language as it would appear after proposed edits.

Dark red italics. Shows rule language that the department is scoping and evaluating for additional changes, and is of particular interest for stakeholder input.

DRAFTING NOTE: Comments regarding the drafting of the rule or stakeholder input appear here.



Salary level

- Threshold level for executive, administrative, and professional employees
- Rule draft ties threshold to state minimum wage on a weekly basis for a full-time worker

Multiplier	2019 (\$12/hr)	2020 (\$13.50/hr)	2021 (TBD)
<i>2 times</i>	\$960/wk	\$1080/wk	Adjusted for inflation using Consumer Price Index for Urban Wage Earners & Clerical Workers (CPI-W)
<i>2.5 times</i>	\$1200/wk	\$1350/wk	



Duties tests

- **WAC 296-128-510(1) – Executive**
 - Also includes WAC 296-128-510(2): Business owners
- **WAC 296-128-520(1) – Administrative**
 - Also includes WAC 296-128-520(2): Academic administrators
- **WAC 296-128-530(1) – Professional**
 - Also includes WAC 296-128-530(2): Teachers
 - Also includes WAC 296-128-530(3): Law or medicine
- **WAC 296-128-535(1) – Computer professionals**
- **WAC 296-128-540(1) – Outside salespersons**



WAC 296-128-510(1) – Executive

(1) The term "individual employed in a bona fide executive . . . capacity" in RCW 49.46.010(3)(c) shall mean any employee:

(a) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight; and

(d) Who is compensated on a salary basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities.



WAC 296-128-510(2) – Owners

(2) The term "individual employed in a bona fide executive . . . capacity" in RCW 49.46.010 (3)(c) shall also include any employee:

(a) Who owns at least a bona fide twenty-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management; and

(b) The requirements of WAC 296-128-545 do not apply to the executive employees described in this subsection.



WAC 296-128-520(1) – Administrative

(1) The term "individual employed in a bona fide . . . administrative . . . capacity" in RCW 49.46.010 (3)(c) shall mean any employee:

(a) Whose 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

(b) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance; and

(c) Who is compensated on a salary or fee basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities.



WAC 296-128-520(1) – Academic administrators

(2) The term "individual employed in a bona fide . . . administrative . . . capacity" in RCW 49.46.010 (3)(c) shall also include any employee:

(a) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof; and

(b) Who is compensated on a salary or fee basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed.



WAC 296-128-530(1) – Professional

(1) The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010 (3)(c) shall mean any employee:

(a) Whose primary duty consists of the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor; and

(b) Who is compensated on a salary or fee basis at a rate of not less than the amount specified in WAC 296-128-545, exclusive of board, lodging, or other facilities.



WAC 296-128-530(2) – Professional

(2) The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010

(3)(c) shall also include any employee:

(a) With a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed; and

(b) Who is compensated on a salary or fee basis.



WAC 296-128-530(3) – Professional

(3) The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010(3)(c) shall also include any employee:

(a) Who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(b) Who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

...

(e) The requirements of WAC 296-128-545 do not apply to the law or medicine professionals described in this subsection.



WAC 296-128-535 – Computer professionals

(a) Who is a computer system analyst, computer programmer, software engineer, or other similarly skilled worker; and

(b) Whose primary duty consists of one of the following:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or

(ii) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or

(iii) The design, documentation, testing, creation or modification of computer programs related to machine operation systems; or

(iv) A combination of the aforementioned duties, the performance of which requires the same level of skills; and



WAC 296-128-535 - Computer professionals

- Allows computer professionals paid on an hourly basis to meet exemption.
- FLSA exemption level was 6.5 times federal minimum wage at the time it was set.

Multiplier	2019 (\$12/hr)	2020 (\$13.50/hr)	2021 (TBD)
3 times	\$36/hr	\$40.50/hr	Adjusted for inflation using Consumer Price Index for Urban Wage Earners & Clerical Workers (CPI-W)
4 times	\$48/hr	\$54/hr	



Question 1 (WAC 296-128-545)

Assuming an effective date of January 1, 2020, should the department consider a phased-in implementation of the new threshold for employers based on employer size? What phase-in schedule should the department propose?

- a. What method would you recommend to define employer size?
- b. When would you recommend the updated threshold take effect for all employer sizes?



Question 2 (WAC 296-128-545)

During a phase-in period and/or once the rule is fully implemented, should the department consider adopting a higher salary threshold in higher-wage cities, counties, or areas of the state?

- a. What method would you recommend for defining which areas would be subject to a different threshold?
- b. Would you recommend a different phase-in schedule apply to these higher-threshold areas? How should the implementation schedule differ?



Question 3 (WAC 296-128-505(4))

What definition of “primary duty” (found in WAC 296-128-505(4)) should be included in the rules?

(4) “Primary duty” means the principal, main, major, or most important duty that the employee performs.

(a) Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.



Question 3 (WAC 296-128-505(4))

What definition of “primary duty” (found in WAC 296-128-505(4)) should be included in the rules?

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Employees who spend more than fifty percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than fifty percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion. The burden falls on the employer to demonstrate that the employees meet the primary duty requirement.



Question 4

What criteria for the duties tests, if any, should differ between the federal and state rules?

The draft reflects two types of changes – some that provide further alignment with the federal criteria for the duties tests for executive, administrative, professional, computer professional, and outside sales employees, and other changes that would retain or develop elements specific to Washington State in specific areas.



Resources and feedback

- Rulemaking engagement site
 - Employment Standards Rulemaking and Policy Development
→ Learn About EAP Exemptions
 - <https://lni.us.engagementhq.com/learn-about-eap-exemptions>
- EAP Rules Inbox:
 - EAPRules@LNI.WA.GOV
- Rulemaking contacts:
 - Joshua Grice: (360) 902-6711, joshua.grice@LNI.WA.GOV
 - Allison Drake: (360) 902-5304, allison.drake@LNI.WA.GOV