

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



August 2019



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:
 - “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].”



Rule development process

- 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)



Rule development process

- Second pre-draft released November 19, 2018
 - Feedback sessions (Seattle, Yakima, Vancouver)
- Current state
 - CR-102 proposal (June 4, 2019)
 - Proposed rule language
 - Public comment period and public hearings
 - Cost-benefit analysis & small business economic impact statement
 - CR-103 (Tentatively December 2019)
 - Adopted rule language
 - Effective date



Criteria for executive, administrative, & professional exemptions

- At the state and federal level, 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



History of federal and state rule updates

- **1975** federal update
 - Long test: \$155 to \$170 per week
 - Short test: \$250 per week
- **1976** state rules adopted to match 1975 federal criteria
- **2004** federal update
 - Single test \$455 per week
 - Added highly-compensated employees exemption (\$100,000 per year)
- State rules **not updated** to match 2004 federal criteria



History of federal and state rule updates

- 2016 federal update (did not take effect)
 - Single test \$913 per week (\$47,476 per year)
 - Automatic updating mechanism every three years
- Current USDOL efforts
 - 2017 – Request for Information
 - Fall 2018 – “Listening sessions”
 - March 7, 2019 – USDOL issued a notice of proposed rulemaking, increasing the salary level from \$455/week to \$679/week.
 - Deadline for feedback on the notice of proposed rulemaking was May 2019



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(2) – 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 296-128-545 – Salary threshold

- Salary threshold will be set as a multiplier of the state minimum wage
 - 2.5 times the minimum wage for a 40-hour workweek when fully implemented.
 - The 2.5 multiplier will be phased-in over seven years (the phase-in schedule varies by employer size), with phase-in completed for all employers on January 1, 2026.
 - Adjusted annually for inflation using the CPI-W to prevent salary threshold from becoming outdated.
- By 2026, after phase-in is complete, projected that this will equate to \$1,536/week (equivalent to an annual salary of \$79,872, assuming average CPI-W of 2.17%).



Implementation schedule

- Effective date is July 2020, phased in based on employer size

Salary Threshold – Implementation Schedule (multiplier of state minimum wage for a forty-hour workweek)*

Employer size	July 1, 2020	January 1, 2021*	January 1, 2022*	January 1, 2023*	January 1, 2024*	January 1, 2025*	January 1, 2026, and thereafter*
1- 50 Employees	1.25x \$675 <i>15,000 newly affected</i>	1.75x \$965 <i>23,000 newly affected</i>	2.0x \$1127 <i>16,000 newly affected</i>	2.25x \$1296 <i>17,000 newly affected</i>	2.25x \$1324 <i>3,000 newly affected</i>	2.25x \$1353 <i>3,000 newly affected</i>	2.5x \$1536 <i>17,000 newly affected</i>
51+ Employees	1.75x \$945 <i>62,000 newly affected</i>	2.0x \$1103 <i>25,000 newly affected</i>	2.25x \$1268 <i>27,000 newly affected</i>	2.25x \$1296 <i>5,000 newly affected</i>	2.25x \$1324 <i>5,000 newly affected</i>	2.5x \$1503 <i>28,000 newly affected</i>	2.5x \$1536 <i>6,000 newly affected</i>
Total employees affected	77,000	125,000	168,000	190,000	198,000	229,000	252,000

*Projection based on estimated CPI-W increase of 2.17% after 2020.



Potential employer compliance options for employees affected by salary threshold changes

- **Convert current exempt salaried employees to non-exempt, salaried employees and pay overtime**
 - Track hours of work for non-exempt, salaried employees
 - Pay overtime for hours worked over 40 per week
 - Provide other protections associated with the Minimum Wage Act

- **Limit hours worked by employees to 40 per workweek**
 - Convert current salaried, exempt employees to salaried non-exempt or hourly non-exempt
 - Track hours of work and limit hours of work to 40 per week, or less
 - Provide other protections associated with the Minimum Wage Act



Potential employer compliance options for employees affected by salary threshold changes

- **Convert current salaried exempt employees to hourly non-exempt employees**
 - Pay formerly salaried employees on an hourly basis
 - Pay overtime (time and a half the employee's regular rate of pay) for hours worked over 40 per week
 - Provide other protections associated with the Minimum Wage Act

- **Maintain exemption status**
 - Meet salary threshold requirements of proposed WAC 296-128-545 for salaried, exempt workers
 - Ensure employees meet the duties test requirements
 - Maintain exemption from overtime and other Minimum Wage Act provisions for those workers



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



Computer professionals

- Currently exempt if they meet duties test and are paid at least \$27.63/hour
- Proposed rule would align the duties test more closely with the federal test, and update the hourly threshold to 3.5 times the state minimum wage (phased-in over three years)

Employer size	July 1, 2020	January 1, 2021*	January 1, 2022*
1 - 50 Employees	No Change (Stays at \$27.63/hour)	2.75x (\$37.92/hour)	3.5x (\$49.32/hour)
51+ Employees	2.75x (\$37.13/hour)	3.5x (\$48.27/hour)	3.5x (\$49.32/hour)

- May also be paid on a salary basis as required in WAC 296-128-545

*Projection based on estimated CPI-W increase of 2.17% after 2020.



Outside sales

- Harmonizes language with equivalent federal test for outside salespersons
- Retains requirements from state rule that outside salesperson is:
 - Compensated by the employer on a guaranteed salary, commission, or fee basis
 - Advised of the worker's status as an outside salesperson



Rulemaking timeline

- Statewide public hearings
 - Week of July 15th – Tumwater, Seattle, and Bellingham
 - Week of August 5th – Ellensburg, Kennewick, and Spokane
 - August 15th – Vancouver
- Deadline for public comment: September 20, 2019
- Adoption: Tentatively December 2019
- Effective date: July 1, 2020