

The U.S. Department of Labor's Proposed White Collar Exemption Changes

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Under a new proposed rule from the U.S. Department of Labor (“DOL”), millions more workers would be eligible for overtime pay unless employers pay a much higher salary threshold. As it stands, under the Fair Labor Standards Act (“FLSA”), employees who are paid a salary of at least \$35,568 annually and work in a “bona fide executive, administrative, or professional capacity” — often called “white collar” or “EAP exceptions” — are not covered by the FLSA requirements for employees to receive overtime at a rate of one-and-one-half times their regular rate of pay for time worked beyond 40 hours in a week. If adopted, the new proposed rule — which would be updated every three years — would raise the annual salary level threshold to over \$55,000 for white collar exemptions, and to \$143,988 from \$107,432 for “highly compensated” employees.

What Would Change Under the Proposed Rule?

In addition to extending overtime protections to an additional 3.6 million workers, according to the DOL, the proposed rule would:

- Increase the salary basis test from \$684 per week (\$35,568 annually) to \$1059 per week (\$55,068 annually) for white collar exemptions. The new salary represents the 35th percentile of weekly earnings of full-time salaried workers in the Southern U.S., which is currently the lowest wage Census region.
- Raise the current threshold of \$107,432 per year to \$143,988 per year for “highly compensated” employees. The new “highly compensated” salary is tied to the 85th percentile of salaried workers nationally.
- Ensure employees in U.S. territories (Puerto Rico, the U.S. Virgin Islands, Guam, Northern Mariana Islands) that are subject to the federal minimum wage also have these overtime protections.
- Automatically update the salary thresholds every three years based on the same earnings data available at the time.

It is important to note that under the proposed rule there would be no changes to the duties test for exemptions. The job duties test examines whether the employee's actual job functions meet the requirements of the applicable exemption.

Potential Impact

If the rule goes into effect as proposed, it will have a significant impact on small and midsize businesses, nonprofits, and even entire industries such as retail, hospitality, and healthcare. Employers whose employees' salaries fall between the current threshold and the proposed new threshold may be faced with the decision of whether to increase the salaries for those employees to meet the new salary threshold, or to convert the employees to nonexempt and start paying them overtime. Employers might even get some pushback from employees who

prefer being salaried as opposed to having to keep track of their hours by punching in and out. However, it is important to remember that simply paying an employee a salary, as opposed to an hourly wage, does not by itself mean the employee is properly classified as exempt from overtime pay. Employees must meet both the salary threshold and the duties test (which under the proposed rule remains unchanged) to qualify for an exemption from overtime requirements under the FLSA.

What Happens Now?

Before the rule can become final, it is subject to the notice and comment period for the 60-day period following publication of the proposal. It would not be surprising, however, to see this period extended once or twice given the importance of this rule and the expected volume of comments the agency will receive. Following the comment period, the DOL must consider all comments before publishing a final rule. This means that the current proposal could still change between now and when a final rule goes into effect. A footnote to the proposed rule even suggests that the salary threshold in the final rule could be as high as \$60,209. However, considering the successful challenge to the overtime rule proposed by the Obama administration in 2016, the final rule is certain to face a legal challenge in court. The Obama administration's final rule that was enjoined by a federal judge in Texas would have raised the salary threshold to more than \$900 per week.

Nonetheless, employers should start preparing their plans now for how to comply should the proposed rule be finalized and survive any legal challenge in court. Employers should review each employee's classification and consider how they would treat any employees who are currently classified as exempt between the current threshold of \$35,568 and the newly proposed threshold of \$55,068. Additionally, employers should consider ways reclassification could potentially impact their business (*i.e.*, rise in overtime expenses, turnover, benefits, timekeeping practices) as these changes could have a major impact on labor costs in the coming years. Employers should also consider the impact on employee morale since it may not be possible to simply raise every affected employee's salary to the new threshold. Many employees take pride in being salaried and not having to punch the clock to keep track of their hours worked. Finally, employers should be mindful of other states with overtime laws that have higher or stricter wage and hour requirements (*i.e.*, California, Colorado, Maine, New York, and Washington).

Conclusion

Employers should continue to monitor developments from the DOL as the proposed rule goes through the comment period and any subsequent process before a final rule is published, as well as any legal challenge to the legitimacy of any final rule, as is almost certain to happen.

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