

Department of Labor Proposes New Changes to Overtime Law

Article
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On Thursday, March 7, 2019, the U.S. Department of Labor (“DOL”) issued its long-awaited proposed rule to change the minimum salary threshold for overtime eligibility. According to the DOL, this proposed rule would make more than a million more American workers eligible for overtime.

First, a little bit of history.

Under currently enforced federal law dating back to the George W. Bush administration, employees with a salary below \$455 per week (\$23,660 annually) must be paid overtime if they work more than 40 hours in a workweek. In 2016, the Obama administration’s labor department issued a final rule to raise the salary threshold for the so-called “white-collared” categories of overtime exemptions—Administrative, Executive, and Professional—to \$913 weekly (\$47,476 annually), and further contained automatic periodic increases to this threshold, without the necessity of further notice-and-comment to and from the public.

The 2016 final rule sparked significant objection from the business community and was enjoined by a Texas federal district court on November 22, 2016. (Given that the rule had a December 1, 2016 effective date, many employers had already implemented changes by the time this injunction was issued.) Since November, 2017, the Fifth Circuit Court of Appeals has held the appeal of the injunction in abeyance pending further rulemaking by the new presidential administration. At his confirmation hearings, current Labor Secretary Alexander Acosta committed to an update of the 2004 overtime threshold, but indicated that he would support a less ambitious increase to that threshold than that proposed by the Obama administration.

The “new” proposed changes.

- Using current wage data projected to January 1, 2020, the proposal would increase the salary threshold for the “white-collared exemptions” from \$455 per week (\$23,660 annually) to **\$679 per week (\$35,308 annually)**.
- There are no proposed changes to the “duties” tests for any of the white-collared exemptions.

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- Unlike the Obama administration's 2016 rule, the new proposed rule does not mandate automatic periodic adjustments to the salary threshold, but rather asks for public comment on the proposed rule's language for periodic review to update the threshold.
- Employers **may** count non-discretionary bonuses (such as non-discretionary incentive bonuses tied to productivity or profitability) and incentive payments (such as commissions) that are paid annually or more frequently to satisfy up to 10% of the standard salary threshold.
- Those professionals who were exempt from the salary test, such as doctors and teachers, will remain so under the proposed rule, and are not entitled to overtime regardless of their salary. The same is true for many non-professional positions, such as police officers, firefighters, paramedics, nurses, and laborers, including non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, and construction workers.
- The "highly compensated" employee's salary threshold for exemption will be raised to \$147,414 from \$100,000. As under the old rules, to qualify for this exemption under the proposed rule, the employee must still perform "office or non-manual work" and must still "customarily and regularly perform" any one of the exempt duties of an executive, administrative, or professional employee.

A cautionary word about classifying employees as "exempt."

Some employers have operated under the incorrect belief that if an individual is "salaried," he or she is exempt from overtime. However, under federal law, exemption status is determined by both the employee's job duties **and** salary, rather than just how the employee is paid.

With only a few exceptions, to fall into one of the "white-collar" exemptions, an employee must perform certain duties and/or have certain responsibilities (the "duties tests") **and** make a minimum weekly wage that is paid on a salary or fee basis (the "salary test"). The Department of Labor has proposed raising the threshold for the salary test for exempt status, but the duties tests remain unchanged in the proposed rule. This means that if your employee meets the "salary test" but not the "duties" tests for one or more exemptions, that employee is not exempt from overtime. While a non-exempt employee can be paid on a salary basis, employers must still track the time of any non-exempt employees and then calculate and pay an overtime (time and one-half) rate for hours worked over 40 in a workweek. A mechanism for tracking such time is especially critical when such employees have the ability to "telecommute" or perform work duties away from the office or worksite.

What's Next?

The DOL has further encouraged any interested members of the public to submit comments about the proposed rule at www.regulations.gov in the rulemaking docket RIN 1235-AA20, and has specifically asked for public comment on the proposed rule's language for periodic review to update the salary threshold. (An update would continue to require notice-and-comment rulemaking.) Once the rule is published by the Federal Register (which we expect to happen this week), the public will have 60 days to comment on the proposed regulation before a final rule is issued.

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