

PUBLICATION

Round 2: The Trump DOL Reveals Its Proposed Overtime Rule

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The U.S. Department of Labor's (DOL) highly anticipated changes to the overtime provisions of the federal Fair Labor Standards Act (FLSA) were published on Thursday, March 7, 2019 ("proposed Overtime Rule"). The DOL proposes increasing the minimum salary threshold for the so called "white collar" exemptions from \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually). All employees who are paid a salary falling below the proposed salary threshold will be categorically non-exempt — that is, eligible for overtime for all hours worked over 40 in a work week.

The proposed Overtime Rule also provides that employers may include non-discretionary bonuses, incentive payments and commissions to satisfy up to 10 percent of the proposed higher salary threshold (the "10% Rule"). Under the 10% Rule, an employer would be required to compensate exempt employees at a "standard salary level" of \$611.10 per week, which is 90 percent of the proposed salary threshold of \$679 per week. If an employee's compensation falls short, the DOL proposes to allow employers to make a final "catch-up" payment within one pay period after the end of a 52-week period to bring an employee's compensation up to the required salary threshold level of \$679 per week.

Finally, the DOL proposes to raise the salary level for the FLSA's Highly Compensated Employee Exemption ("HCE Exemption"). Generally, to be exempt under the HCE test, an employee currently must earn at least the required regulatory amount, which is \$100,000 annually, of which \$455 must be paid on a salary or fee basis, and must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, professional or administrative employee. The DOL proposes to change the HCE Exemption compensation level to \$147,414, of which \$679 must be paid weekly on a salary or fee basis.

The DOL estimates that 1.1 million workers will now be eligible for overtime under the proposed Overtime Rule. These proposed changes are considered a more moderate approach than the ill-fated 2016 DOL proposal. In 2016, the Obama administration's DOL published revisions to the overtime regulations that nearly doubled the salary threshold to \$913 per week (\$47,476 annually). In addition, the 2016 proposal included automatic increases to the salary threshold every three years. The new proposal does not include an automatic increase, but instead, the DOL is asking the public to provide input on whether and how the DOL should update the overtime requirements every four years.

A federal judge enjoined the 2016 overtime rule, and the question still remains as to whether the DOL has the authority to even increase the salary threshold. As with previous proposed changes to the overtime law, it is already a beacon for controversy (and possible future legal challenges). Business groups are concerned about rising payroll costs, and workers' advocates argue the rule does not go far enough to protect American workers.

"Exemption" from Overtime Under the White Collar Exemptions – Not Just A Salary Test

The FLSA requires employees to be paid at least the federal minimum wage for every hour worked and overtime for any time worked in excess of 40 hours in a work week. In addition, the FLSA provides strict record-keeping requirements for employees to track their working hours. There are employees, however, that are "exempt" from the FLSA's minimum wage, overtime and record-keeping requirements. Although everyone

has been focused on the salary level threshold because of the myriad of controversy around the DOL's proposals, the salary level threshold is just one of the requirements that must be met for exemption from overtime. In fact, the "white collar" exemptions depend upon three things:

1. How an employee is paid – salary basis

The first requirement for exemption is that the employee must be paid on a "salaried basis," meaning the employee receives a fixed, guaranteed minimum amount for any work week in which the employee performs *any* work. Simply stated, there is no change in salary regardless of the hours worked.

2. How much an employee is paid – salary level/threshold

Besides being paid on a salary basis, to qualify for an exemption, the employee currently must be paid a minimum of \$455 per week (\$23,660 annually). Meeting the salary threshold alone does not qualify an employee for exemption for overtime.

3. What kind of work the employee does – job duties test

An employee who meets the salary basis and salary level/threshold tests is exempt only if the employee also performs exempt job duties. There are three primary "white collar" exemptions: Executive, Administrative, and Professional. Regardless of the job title, the employee must meet each job duty requirement under one of the exemption categories to satisfy this test.

To qualify for exemption from overtime under the white collar exemptions (i.e., the Administrative, Professional, and Administrative Exemptions), all three of these tests must be satisfied. A salaried employee is not the same as an "exempt" employee, although the two phrases are often used interchangeably. Although there is often confusion over the job duties test, neither the 2016 overtime rule or newly proposed Overtime Rule changed the job duties.

What Should We Do Now?

As many learned during the last round of proposed changes to overtime, it is a long bumpy road to a final, enforceable overtime rule. This is just a proposed rule and the first step in an extended rule-making process. Many factors are still in play. There is a 60-day comment period, and changes can be made before a final rule is published. The final rule may also be subject to legal challenges. The DOL ambitiously states that new overtime regulations will be effective by January 2020, but with a presidential election on the horizon, the future of the overtime rule is still in flux. Depending on which party occupies the White House in 2020, the \$47,476 threshold may even re-emerge again. At a minimum, now is the time to start preparing. It is important to understand exemptions and its impact on your structure, budget and employees. Here are some initial steps to take right now:

1. Identify employees who will need to be reclassified, i.e. current employees who are currently exempt but paid less than \$35,308.00 annually.
2. Determine the number of hours the employee works. This seems simple, but exempt employees are not required to track their hours; therefore, employers may not be fully aware of the hours an exempt employee is working.
3. Analyze the financial impact. Will you raise pay to the new threshold level, reclassify as nonexempt and pay overtime, or lower pay to offset the overtime requirement?
4. Review job descriptions and tasks of impacted positions to determine whether certain exempt tasks may be reassigned or maintained with the current position.

5. Consider how pay changes or other changes in job assignments may impact your organization. Will you need to make process or structural changes?
6. Develop administrative plans to ensure compliance when the regulations become official. This means you will need to prepare and train your managers.
7. Lastly, don't hesitate to seek legal help to ensure compliance and help maneuver through the DOL regulations and classification changes. These rules are complex, and there are serious financial consequences if you are found to be in violation of them.

Join us on March 21 to learn about the U.S. DOL's latest iteration of the salary threshold for an employee to qualify as exempt from overtime under the FLSA and how it may impact your business. We will also update you on the DOL's proposed new "joint employer" test under the FLSA and share the latest news on proposed changes to the "regular rate" regulations. [Register here.](#)

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