

LEGAL UPDATES

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# DOL Proposes Substantial Increase in Salary Threshold Levels for Overtime Exemptions

On August 30, 2023, the Department of Labor (DOL) issued a proposed rule regarding the Fair Labor Standards Act (FLSA) overtime exemptions, most notably increasing the standard salary threshold for the so-called “white collar” exemptions from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year).

The proposed rule will be open for comment from the public for 60 days, and the DOL will then issue its final rule, which is expected to take effect sometime in 2024. Whenever the new rule takes effect, its validity is likely to be challenged in court.

## Key points

The proposed rule would increase the standard salary threshold from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year).

The proposed rule would increase the HCE total annual compensation threshold (the level at which a relaxed duties test is applied) from \$107,432 to \$143,988 per year.

The proposed rule would continue the use of non-discretionary bonuses and incentive payments to satisfy up to ten percent of the standard and special salary thresholds under certain circumstances.

The proposed rule would not change the existing job duties tests for any exemption.

The proposed rule would apply the standard salary thresholds for employees in all U.S. territories (except for American Samoa, which would keep a special salary level), and it would increase the special salary level for the motion picture industry.

The proposed rule would include a new mechanism that would automatically increase the EAP salary threshold every three years.

The proposed rule is expected to take effect sometime in early 2024.

The two most recent increases to the salary thresholds have been challenged in court, and the proposed rule will likely be challenged as well.

## **Increased salary thresholds for executive, administrative, and professional (EAP) exemptions**

The proposed rule would increase the minimum salary levels necessary to qualify for the executive, administrative, and professional (EAP) exemption to \$1,059 per week from the current level of \$684 per week. The proposed threshold was calculated using the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region (currently the South).

The proposed rule would also increase the highly compensated employee (HCE) threshold to \$143,988 per year (of which at least \$1,059 must be paid weekly on a salary or fee basis) from the current level of \$107,432 per year. The proposed HCE threshold was calculated using the 85th percentile of full-time salaried workers nationally.

The DOL estimates that the proposed salary thresholds will result in **approximately 3.4 million workers** either becoming eligible for overtime or receiving salary increases to remain exempt.

## **Bonuses**

The proposed rule makes no change to the current rule allowing employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to ten percent of the standard or special salary level for the exemptions.

## **Automatic future salary threshold updates**

In the proposed rule, the DOL includes a new mechanism to automatically update the minimum salary levels every three years by adjusting the EAP threshold to remain at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region and adjusting the HCE threshold to keep it at the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally.

Under the proposed rule, the DOL would provide notice of the new salary thresholds for each automatic update at least 150 days before they take effect.

## **Salary levels for U.S. territories and the motion picture industry**

Currently, the DOL applies special salary levels for U.S. territories that are lower than the standard threshold elsewhere. The proposed rule would apply the standard salary levels in all U.S. territories other than American Samoa, which would keep a special rate until its minimum wage reaches the federal minimum. The proposed rule would also raise the base rate for employees in the motion picture industry from \$1,043 to \$1,617 per week (or a proportionate amount based on the number of days worked).

## **Subject to Judicial Challenge**

Whenever the new rule takes effect, its validity is likely to be challenged in court, and the outcome of such a challenge is uncertain. The Obama Administration's 2016 overtime rule (which set the threshold at \$47,476 per year) was invalidated by a Texas federal court shortly before taking effect. The Trump Administration rescinded the 2016 rule when it raised the salary threshold to the current levels in January 2020. A challenge to the Trump Administration's rule is currently pending in federal court in Texas.

## **What this means to you**

Employers should begin to chart a course to comply with the proposed rule, which is likely to take effect in 2024. To do so, we recommend that employers take the following actions:

Review current employees' compensation to determine whether any exempt employees will fall into the band of compensation between the current and the proposed thresholds.

Use this time to review the duties of all exempt employees, particularly those whose compensation will be at the bottom of the proposed exempt salary range, to confirm whether they are properly exempt.

Carefully strategize the conversion of any exempt employees who have fallen below the threshold to non-exempt, and consider tracking time and limiting work away from the office to minimize the financial impact of overtime.

## **Contact us**

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If you have questions about the proposed DOL overtime exemption rule or would like assistance in performing a wage-and-hour audit to ensure compliance with the existing rules and to plan for the changes ahead, contact A.J. Weissler, Joe Glynias, Scott LeBlanc, or your Husch Blackwell attorney.