

Department of Labor Releases Proposed FLSA Overtime Rules Changes; Final Rule Expected to Impact Millions

Article By:

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The **Department of Labor** has released its long-awaited notice of proposed rulemaking updating the **Fair Labor Standards Act's** white collar overtime exemptions. The DOL released the proposed rule on Tuesday morning and will invite interested parties to submit written comments over the next two months. The revisions would more than double the minimum salary threshold for the law's white collar exemptions, which the White House expects would immediately entitle approximately five million additional workers to overtime pay, and they also provide for future automatic increases. We take a look at the proposal and its potential implications below.

Brief Background

The FLSA requires most employers to pay their employees at least the minimum wage for each hour worked and to provide overtime pay at a rate of time-and-a-half for any hours worked in excess of 40 per week. The Act, however, exempts some workers from its overtime protections. The DOL has proposed to revise the regulations relating to the most important of these exemptions for executive, administrative, professional, outside sales and computer employees – known generally as the “white collar” exemptions. To qualify for these exemptions, the employee must satisfy certain job duties tests and receive a minimum weekly salary.

What the Proposed Rules Say

The salary level threshold, which the DOL last updated in 2004, currently stands at \$455 per week (or \$23,660 per year). According to the DOL, this salary level threshold serves as the “best single test” of exempt status, but if left unchanged, its effectiveness “as a means of determining exempt status diminishes as the wages of employees entitled to overtime increase and the real value of the salary threshold falls” – which is exactly what the DOL believes has occurred. In response, the DOL has proposed the following:

- Increasing the salary level to an amount equal to the 40th percentile of earnings for full-time salaried workers. The DOL projects that by 2016, when the final rule would go into effect, the salary level would be at or near **\$50,440** – which is more than **double** the current threshold. (It would similarly raise the salary level for highly compensated employees from \$100,000 to ~\$122,000).

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- Preventing the new salary level from becoming outdated by installing a mechanism that would **automatically update** the salary level on an annual basis either by using a fixed percentile of wages or the consumer price index. The DOL has invited the public to comment on the proper methodology. Requiring the salary threshold to continue to increase automatically is particularly important in the DOL's view because it will tend to keep employees who spend significant amounts of time on non-exempt duties from becoming exempt simply because their salary increases keep pace with inflation or with the economy generally.

This proposed rule, if adopted, will likely affect most business, but its impact will be particularly acute in certain sectors, such as the retail and hospitality sectors and among non-profits, where salaries tend to be relatively lower than in other sectors. It would also be significant in parts of the country where lower market wage rates prevail. The DOL says it accounted for this impact when determining the new threshold, but that its target will help ensure that the "FLSA's intended overtime protections are fully implemented," and will "simplify the identification of overtime-eligible employees, thus making the exemptions easier for employers and workers to understand." The DOL also acknowledged that employers might seek to monitor work and hours more closely to minimize or avoid paying the overtime premiums for newly overtime-eligible employees. But the DOL minimized this issue, concluding that "most affected workers do not currently work overtime, and there is no reason to expect their hours worked to change when their status changes from exempt to nonexempt." Whether that proves to be true remains to be seen.

What the Proposed Rules Don't Say

The proposed rules are just as notable for what they don't say. Although most commentators expected the DOL to also propose revisions to the white collar exemptions' duties tests, the DOL declined to do so at this time. Instead, it asked the public to comment on whether the current job duties tests are "working as intended" to properly screen out bona fide white collar workers. The DOL suggested that increasing the salary threshold for the exemptions and providing for automatic increases might obviate the need to reexamine the duties tests by making it less likely that employees who are primarily engaged in non-exempt work will be misclassified as exempt. Further, it is entirely possible that information provided during the public comment period may cause the DOL to reconsider its position and make adjustments to the duties tests. So while employers aren't out of the woods yet, they can breathe a momentary sigh of relief on this issue.

The DOL also invited comment on whether employers should be able to include non-discretionary bonuses when determining an employee's salary level. Some employers rely on these bonuses as part of compensation and believe it would be unfair to exclude them from the calculation.

Finally, explaining that it was beyond the scope of this rulemaking exercise, the DOL did not address overtime issues related to the use of electronic devices. The DOL did say, however, that it understands the importance of this issue and that it would therefore publish a "Request for Information" in the near future asking relevant stakeholders to comment on how employees' use of electronic devices outside of regular working hours should affect overtime pay.

What's Next?

These *proposed* rules are just that: proposed. The public has 60 days to comment and then the DOL may modify them, but in either case, any final rule will likely not become effective until next year. Regardless of where the DOL comes out, employers must always remember to review the wage and

hour laws of the states in which they operate. Some state laws (e.g. California) make more individuals overtime-eligible than the FLSA.

Employers anticipating that their employees will be affected by the proposed rules may want to start planning now. Reclassification will require an effective rollout plan, which will include proper documentation of the reclassification and careful implementation and training regarding modified recordkeeping and other policies affecting employees and their managers. Employers are well-advised to consider an effective communication plan – one that includes a properly-tailored message to affected (and possibly unaffected) employees regarding their overtime eligibility, proper timekeeping policies (including regarding the use of electronic devices) and information on whether their pay, work schedules, and other benefits (e.g. PTO) have been affected.

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