

March 20, 2019

Department of Labor Proposes New Overtime Rule

On March 7, 2019, the Department of Labor (“DOL”) issued a Notice of Proposed Rulemaking (“NPRM”) that would, if finalized, change the overtime exemption regulations for certain executive, administrative, and professional employees (“white-collar employees”) and raise the overtime exemption threshold for “highly compensated” workers under the Fair Labor Standards Act (“FLSA”). The new proposal is the result of “extensive public input” from in-person listening sessions around the country and over 200,000 comments received through the 2017 Request for Information process.¹

The DOL’s proposed rule would replace the previous final rule, which had been implemented in 2016 during the Obama administration, but was struck down by the U.S. District Court for the Eastern District of Texas in 2017, leaving the 2004 regulations in place. If approved, the new rule would update the overtime exemption regulations for the first time since 2004 and would “make more than a million more American workers eligible for overtime.”² The proposed regulations contain four major changes:

1. Raising the minimum salary level that full-time white-collar employees must earn to be exempt from overtime pay to \$679 per week or \$35,308 per year;
2. Allowing certain nondiscretionary bonuses and incentive payments like commissions to satisfy up to 10 percent of the minimum salary level for white-collar employees;
3. Raising the minimum annual compensation that highly compensated employees must earn to be exempt from overtime pay to \$147,414; and
4. Providing a mechanism to adjust the minimum salary and compensation requirements every four years after a period of public comments each time.³

Once published, the proposed rule will be available electronically at www.regulations.gov, and the public will then have 60 days after publication to comment.

¹ Department of Labor, “U.S. Department of Labor Releases Overtime Update Proposal,” March 7, 2019, available at <https://www.dol.gov/newsroom/releases/osec/osec20190307>.

² Department of Labor, “Notice of Proposed Rulemaking: Overtime Update,” March 7, 2019, available at <https://www.dol.gov/whd/overtime2019/index.htm>.

³ Department of Labor, “U.S. Department of Labor Releases Overtime Update Proposal,” March 7, 2019, available at <https://www.dol.gov/newsroom/releases/osec/osec20190307>.

The History

Under the 2004 law currently in effect, employees with a salary below \$455 per week (or \$23,660 per year) must be paid overtime if they work over 40 hours per week. Certain white-collar employees making over this threshold amount, as well as highly compensated employees who earn a total annual compensation of \$100,000, may be eligible for one of the overtime exemptions.

On May 18, 2016, the DOL under the Obama administration issued a final rule (the “2016 Rule”) that changed the overtime thresholds for white-collar employees and highly compensated employees under the FLSA.⁴ Among other things, the 2016 Rule raised the minimum salary threshold for exemption from overtime pay for white-collar employees to \$913 per week or \$47,476 per year, and for highly compensated employees to \$134,004 annually. The 2016 Rule was set to take effect on December 1, 2016, but was quickly challenged in the courts. Mere days before taking effect, on November 22, 2016, the U.S. District Court for the Eastern District of Texas enjoined the rule. An appeal of that decision was filed shortly thereafter in the U.S. Court of Appeals for the Fifth Circuit. In the meanwhile, plaintiffs moved for expedited summary judgment in the district court, and that court struck down the 2016 Rule on August 31, 2017.

In a stark reversal, before the district court ruled that the 2016 Rule was invalid, the DOL backed away from defending the specific thresholds purposed in the 2016 Rule in its briefing in the Fifth Circuit Appeal on June 30, 2017.⁵ The appeal was voluntarily dismissed on September 6, 2017.⁶

On July 26, 2017, the DOL published a Request for Information regarding potential overtime exemption thresholds, and on August 27, 2018, the DOL announced that it would hold “listening sessions” for those interested in changes to the overtime rule.

⁴ “The Department of Labor Announces Final Rule for Overtime Pay Exemptions Under the FLSA,” Paul, Weiss, May 23, 2016, available at <https://www.paulweiss.com/practices/litigation/employment/publications/the-department-of-labor-announces-final-rule-for-overtime-pay-exemptions-under-the-flsa?id=21949>.

⁵ “Department of Labor Drops Defense of New Overtime Salary Threshold,” Paul, Weiss, August 14, 2017, available at <https://www.paulweiss.com/practices/litigation/employment/publications/department-of-labor-drops-defense-of-new-overtime-salary-threshold?id=24691>.

⁶ “Federal Court Holds Department of Labor Overtime Exemption Rule Invalid,” Paul, Weiss, September 8, 2017, available at <https://www.paulweiss.com/practices/litigation/employment/publications/federal-court-holds-department-of-labor-overtime-exemption-rule-invalid?id=24779>.

The Notice of Proposed Rulemaking

Under the NPRM, employees with a salary below \$679 per week (equivalent to \$35,308 per year) must be paid overtime if they work more than 40 hours per week. This increases the threshold from \$455 per week (or \$23,660 annually), but is about \$12,000 lower than what the Obama administration had proposed in the 2016 Rule. The NPRM used the same method to arrive at this number that was used to calculate the threshold in 2004: tying the salary level to the 20th percentile of full-time worker earnings in the lowest-wage census region (which was and remains the South) and/or in the retail sector nationwide.⁷ The proposal would also allow employers to use nondiscretionary bonuses and other incentive payments (such as commissions) to satisfy up to 10 percent of the standard salary level for white-collar employees.

Once above this threshold, eligibility for overtime depends on job duties, as determined using the “duties test,” which is used to help identify employees who are legitimate executive, administrative, and professional workers that are FLSA-exempt. No changes to the “duties test” have been made.

The NPRM also significantly increases the annual compensation required for highly compensated employees to be exempt from overtime requirements from \$100,000 to \$147,414 per year. This threshold is about \$13,000 higher than what the Obama administration had proposed in the 2016 Rule. And the NPRM, departing from the methodology used in 2004, adopted the 2016 Obama administration’s methodology of arriving at this threshold: using the equivalent to the 90th percentile earnings of full-time salaried workers, projected forward to January 1, 2020.

Significantly, the proposal eliminates the provision proposed by the Obama administration for automatic adjustments to the salary threshold, opting instead for a commitment to engage in “periodic review to update the salary threshold” that would “continue to require notice-and-comment rulemaking.”⁸

Guidance for Employers

The NPRM, if it takes effect, will affect all industries across the country. Many positions that were previously clearly exempt under the old thresholds will become non-exempt. As discussed above, the DOL estimates that the NPRM will change the exemption statuses of over one million workers.

⁷ “Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Defining and Delimiting the Exemptions for Executive, Administrative, and Professional Employees,” U.S. Department of Labor: Wage and Hour Division, March 2019, available at <https://www.dol.gov/whd/overtime/FSOT2019.pdf>.

⁸ Department of Labor, “Notice of Proposed Rulemaking: Overtime Update,” March 7, 2019, available at <https://www.dol.gov/whd/overtime2019/index.htm>.

Currently, white-collar employees making more than \$23,660 are exempt from overtime pay. Under the new rule, the threshold salary for qualifying for the exemption becomes \$35,308. This means that any employees making between \$23,660 and \$35,308 who previously qualified for the exemption are no longer exempt under the new rule, irrespective of their job duties and responsibilities. Similarly, highly compensated employees who previously were exempt and made between \$100,000 and \$147,414 no longer qualify for an exemption.

As with any such changes to the DOL rules, to prepare for and ensure compliance with the new overtime exemption rules, employers should consider taking the following actions:

- Audit payrolls to determine which employees and positions that are currently classified as overtime exempt are or may be affected.
- Update payroll and time-tracking systems to take into account impacted employees.
- Determine whether impacted employees should be reclassified as non-exempt or have their salaries raised above the new minimum salary levels (with particular attention to employees that now fall below the highly compensated employee threshold, but who may not have been evaluated based on the duties test in the past).
- Train new non-exempt employees on tracking and recording their time to account for overtime hours.
- Create a plan to clearly communicate and discuss the overtime rule changes with employees.

Finally, as we have recommended in the past, because minimum salary and compensation requirements will likely be updated in the future (although not automatically), employers should also consider the following actions to ensure long-term compliance with the new overtime rules:

- Analyze whether a restructuring of the organization is necessary to better accommodate anticipated increases in payroll costs such as consolidating roles or reallocating duties.
- Modify compensation and payroll structures to incorporate the capacity to track and comply with automatic minimum salary level and compensation adjustments.
- The DOL has indicated that it is particularly interested in receiving feedback on the mechanism to update the overtime rules in the future. Given that this could have an ongoing impact on employers, employers should consider providing comments to the DOL for consideration during the comment period.

The NPRM can be found here: <https://www.dol.gov/whd/overtime/overtime2019-nprm.pdf>.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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