

Department of Labor Introduces New Proposal to Revise Salary Threshold

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On August 30, the Department of Labor (DOL) issued a Notice of Proposed Rulemaking seeking to increase the white-collar exemption salary threshold — that is, the amount an executive, administrative, or professional employee must earn to potentially qualify as exempt under the Fair Labor Standards Act (FLSA) — from \$35,568 to \$55,068 per year. The proposed rule would also increase the highly compensated employee salary threshold from \$107,432 to \$143,988 per year, and would introduce an automatic updating mechanism.

Background

Under the FLSA, employees are entitled to overtime premiums for hours worked in excess of 40 in a workweek unless they fall within an exemption under the law. Employees who are exempt from the FLSA's overtime premium requirement are typically referred to as "exempt" employees, while employees entitled to overtime premiums are typically referred to as "nonexempt" employees.

One of the most common exemptions under the FLSA is the white-collar exemption, which applies to employees employed in bona fide executive, administrative, or professional capacities. Such an employee is exempt from the FLSA's overtime premium requirement if they satisfy three distinct tests. First, the employee must be paid on a salary or fee basis; if the employee is paid by the hour or if the employee's pay otherwise varies with the quality or quantity of their work, the employee does not satisfy this requirement. Second, the employee must earn at least \$684 per week, or \$35,568 per year. Third, the employee must perform the job duties of an executive, administrative, or professional employee, as outlined in the regulations to the FLSA.

The FLSA also exempts highly compensated employees, defined as employees who earn at least \$107,432 per year (including at least \$684 per week on a salary or fee basis). To qualify for the highly compensated employee exemption, an employee must be employed in an office or nonmanual role and must customarily and regularly perform just one of the delineated duties of an executive, administrative, or professional employee.

The DOL's Proposal

The proposal would revise the regulations to the FLSA as follows:

- It would increase the salary threshold for the white-collar exemption from \$35,568 per year (\$684 per week) to \$55,068 per year (\$1,059 per week);

- It would increase the salary threshold for highly compensated employees from \$107,432 per year (including at least \$684 per week on a salary or fee basis) to \$143,988 per year (including at least \$1,059 per week on a salary or fee basis); and
- It would establish an automatic updating mechanism whereby every three years, the salary threshold for the while-collar exemption would adjust to the 35th percentile of weekly earnings of full-time nonhourly employees in the lowest-wage Census Region, and the salary threshold for the highly compensated employee exemption would adjust to the 85th percentile of full-time nonhourly employees nationally.

The DOL estimates that its proposal would extend overtime premium entitlements to roughly 3.6 million employees. The changes would apply across the U.S. and to certain U.S. territories.

What Happens Next, and How Should Employers Prepare?

In accordance with the Administrative Procedure Act, the proposed rule will be open to public comment for 60 days once the rule is published in the Federal Register. The DOL will then review the comments and publish a final rule. We anticipate legal challenges to the rule, as was the case when the DOL proposed increasing the salary threshold from \$23,660 to \$47,476 in 2016 (it was later increased to its current figure, \$35,568, in 2020), which could further delay the process. Troutman Pepper will provide an update if and when these changes are set to take effect.

Although publication of the final rule is not yet imminent, employers should take this opportunity to begin preparing. We recommend starting by determining which employees would be affected by the rule — that is, identifying how many employees classified as exempt currently earn less than \$55,068 per year (or, for highly compensated employees, less than \$143,988 per year). Employers should then strategize as to how they would prefer to treat these employees moving forward — namely, whether to reclassify the employees as nonexempt and begin paying them overtime, or whether to raise their salaries to or above the new threshold to maintain their exempt status. Now is also a good time to review exempt employees' job duties to ensure that they otherwise qualify for exemption.

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