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# DOL Proposes Updated Overtime Exemptions Rule

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On September 8, 2023, the U.S. Department of Labor's (DOL) [proposed new rule](#) on the "white collar" overtime exemptions was published in the Federal Register, triggering a sixty-day public comment period before the rule can be finalized. The new rule will be codified in a revised 29 C.F.R. Part 541 and will amend those provisions setting minimum levels of compensation for certain minimum wage and overtime exemptions.

## Background

The source of the DOL's authority to engage in rulemaking with respect to the "white collar" exemptions—those that relate to executive, administrative, learned and creative professional, outside sales, and computer employees—arises from [Section 13\(a\)\(1\) of the Fair Labor Standards Act](#) (FLSA), which authorizes the Secretary of Labor to "define[] and delimit[] from time to time by regulations" the definitions of what it means to be employed "in a bona fide executive, administrative, or professional capacity." Historically, those definitions have included both compensation and duties tests. Under the [current regulations](#), with limited exceptions, exempt executive, administrative, and professional (EAP) employees must be compensated on a salary or fee basis at a rate of not less than \$684 per week (\$35,568 annualized). In addition, in a [separate regulation](#) for "highly compensated employees," an employee with total annual compensation of at least \$107,432 is deemed exempt if the employee "customarily and regularly" performs any one or more of the exempt duties or responsibilities of an EAP employee.

The last time the DOL increased the compensation levels for exemption was in 2020, when the minimum salary for exemption as an EAP jumped from \$455 per week (\$23,660 per year) to the current level. The 2020 increase was the first in fifteen years. Many have been expecting a revised overtime rule since President Biden took office in January 2021, following an election campaign that included a host of promises to expand worker rights and protections. In the fall of 2021, the DOL targeted April 2022 for issuance of a proposed new rule. While the agency appeared focused on raising the minimum salary for exemption, some—including both employer and employee advocates—were hoping for a broader revision of Part 541, including more clarity and examples in certain of the duties tests for exemption. For better or worse, the changes in the proposed new rule are limited to increasing threshold compensation levels.

## Proposed Rule Changes

Under the proposed rule:

- The minimum salary for exemption as an EAP employee increases from \$684 (\$35,568 annualized) to \$1,059 per week (\$55,068 annualized) as of the effective date of the new rule.
- Three years after the effective date of the new rule, and every three years thereafter, the minimum salary for exemption as an EAP employee will increase to an amount not less than the 35th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region (the so-called “standard salary level”).
- There are no other changes to the current salary minimum provisions, including to the [exceptions](#) for teachers, academic administrative employees, lawyers, and physicians, or to the alternative method of paying computer employees on a minimum hourly basis.
- The minimum total annual compensation level for exemption as a “highly compensated employee” increases from \$107,432 to \$143,988, with triennial increases such that the amount reflects the annualized earnings amount of the 85th percentile of full-time non-hourly workers nationally.
- Not fewer than 150 days before each triennial update of the minimum salary and compensation levels described above, the DOL will publish a notice in the Federal Register stating the updated amounts, each tied to data published by the Bureau of Labor Statistics.

The comment period will close on November 7, 2023. At some point after that period closes, the DOL will issue a final rule with an effective date, which likely will not be until sometime in 2024.

## **No Impact on More Protective State Laws**

Employers must be mindful of both the FLSA and state law when structuring their wage and hour compliance practices. Unlike certain other federal laws, the FLSA does not preempt state laws that provide more expansive rights or greater protections to employees. As the DOL [explains](#), the purpose behind the FLSA is to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide. As such, if the rule is finalized as proposed, it will have no impact on employers in states where the compensation levels for exemption are already higher than under the FLSA. In New York, for example, the minimum salary for exemption as an executive or administrative employee in New York City, Long Island, and Westchester County is currently \$1,125 per week (\$58,500 annualized). In California, exempt employees must earn no less than two times the State's minimum wage for full-time work—currently, \$64,480 annualized—to meet the state's EAP employee exemption test. In many states, however, the proposed new rule (if finalized) will require employers to choose between implementing a substantial salary increase for many exempt employees or reclassifying them as overtime-eligible, tracking their hours, and paying them a premium for weekly hours worked over forty.

## **Playing Catch-Up at Year-End**

Under the [2020 rule changes](#), up to 10% of the salary minimum can be satisfied through nondiscretionary bonuses, incentives, and/or commissions that are paid annually or more frequently. Employers can make a “catch up” payment at the end of the year (or within one pay period after the end of employment, if employment ends midyear) to bring an employee up to the current \$684-per-week minimum. This percentage allowance is unchanged in the proposed new rule, effectively permitting employers to pay EAP employees a weekly minimum salary of \$953.10 (provided there's a later payment of bonuses, commissions, or incentives covering the final 10% of the minimum salary).

## **Legal Challenges Ahead?**

Back in 2016, the DOL—then under the administration of President Obama—issued a final rule raising the minimum weekly salary for exemption from \$455 to \$913.

A consortium of state attorneys general immediately challenged the rule in court, arguing (among other things) that the new rule increased the minimum salary threshold to such an extent that it was no longer a plausible proxy for the job duties of an EAP employee and therefore exceed the DOL's statutory authority to "define and delimit" what it means to be an EAP employee. A [federal district court in Texas agreed](#), holding "it is clear Congress defined the EAP exemption with regard to duties" and the DOL "does not have the authority to use a salary-level test that will effectively eliminate the duties test" by excluding many employees who perform exempt duties. Weeks before the new rule was scheduled to take effect on January 1, 2017, the court enjoined the rule on a nationwide basis. An appeal followed but was abandoned by the new administration after President Trump took office.

The 2020 rule change, which implemented a more modest increase in the minimum salary for exemption than the unsuccessful 2016 amendment (approximately 50%, as opposed to the Obama DOL's more than 100% increase), went into effect without any successful legal challenges. The current proposed new rule reflects an increase that, at approximately 55%, is more aligned with the 2020 increase than the increase in the enjoined 2016 rule. That said, given the relatively short time that has passed since the 2020 increase, as well as the proposed rule's built-in triennial increases, challengers may revive the argument that the DOL is exceeding its statutory authority to "define" the EAP exemptions.

## Public Comments

The sixty-day public comment period will close on November 7, 2023. As of November 1st, [more than 14,870 comments](#) have been submitted to the DOL. Not unexpectedly, comments from both small and large businesses and their advocates raise concerns about the proposed rule's financial impact, particularly at a time when inflation and rising interest rates are creating independent fiscal challenges for employers. For example, the American Health Care Association and National Center for Assisted Living [notes](#) that while its member institutions "certainly understand what DOL is trying to accomplish here, and fully support appropriate overtime pay[,]" there is concern on how many additional [financial] requirements the [long term care] industry will be able to bear." The American Council on Education, writing on behalf of a consortium of higher education associations, [notes](#) that "[a]lready under enormous financial pressure, we expect that institutions will face a number of potentially disruptive challenges, particularly depending on the timing and method for implementation of the proposed changes including, but not limited to: absorbing the increased costs that come with much higher salaries for exempt employees; expanded overtime payments; implementing effective monitoring of remote work, which vastly

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expanded since the last increase; and other costs and disruptions from transitioning traditionally exempt employees into nonexempt status.”

Comments from worker advocates support both the proposed immediate increase in the minimum salary for exemption as well as automatic triennial increases. For example, the AARP notes in [its comment](#) that “the [DOL’s] proposed salary increase to \$1,059 per week, or \$55,068 annually for a full-year worker, is a positive step towards bringing the salary threshold up to date for today’s economy and reducing the ever-widening gap between inflation and the value of real wages” and that “an automatic update mechanism will help reduce the problem of decades passing before the salary test is re-evaluated.”

A number of trade and employer organizations have asked the DOL to extend the sixty-day comment period to allow more time for them to collect and analyze data from their member institutions and to fully evaluate the impact of the proposed rulemaking.

The DOL, with a new head of its Wage and Hour Division confirmed by the Senate in October 2023 after a nearly three-year vacancy, will have every incentive to finalize the new overtime rule and have it become effective before the 2024 election cycle. If the final rule tracks the proposed rule without material changes and survives any judicial challenges, employers across the country—for the third time in seven years—will have significant decisions to make regarding their compensation practices for the many currently exempt employees whose salaries are below the proposed new threshold.

**Allan S. Bloom**, who leads Proskauer’s Wage and Hour Practice Group, is a nationally recognized litigator and advisor who represents employers, business owners, and management in a broad range of employment and labor law matters. Allan has successfully defended a number of the world’s leading companies against claims for unpaid wages, employment discrimination, breach of contract and wrongful discharge. He has secured complete defense verdicts for clients in front of juries, as well as injunctions to protect clients’ confidential information and assets.

Allan is co-chair of PLI’s March 2024 program, Understanding Employment Law 2024. [Register now](#) to attend in person or virtually.

			
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