

FAQs on the New Overtime Exemption Proposed Rule

HIGHLIGHTS

- The salary level for administrative, executive and professional employees would increase to \$35,308.
- The salary level for highly compensated employees would increase to \$147,414.
- The proposed rule does not change the duties test for white collar exemptions.

IMPORTANT DATES

May 18, 2016

DOL final overtime rule issued

November 22, 2016

A federal court in Texas issued an injunction against the 2016 final rule

March 7, 2019

DOL issued a new proposed rule on overtime exemptions

OVERVIEW

On March 7, 2019, the Department of Labor (DOL) issued a [proposed rule](#) that would change the salary thresholds for the “white collar” exemptions under the Fair Labor Standards Act (FLSA) overtime requirements, as follows:

- The minimum salary level for executive, administrative and professional (EAP) employees would increase from \$455 to **\$679 per week (\$35,308 per year)**.
- The minimum salary level for highly compensated employees (HCEs) would increase from \$100,000 to **\$147,414 per year**.

The DOL issued [frequently asked questions](#) (FAQs) in conjunction with the proposed rule to provide more information on the proposed changes.

ACTION STEPS

These changes will not take effect until after a final rule is issued. Employers are not required to comply with the proposal, but should become familiar with it and begin identifying which employees may be affected.

BACKGROUND

The FLSA requires virtually all employers in the United States to pay overtime wages to employees who work more than 40 hours in a workweek. The FLSA contains certain exemptions to the overtime payment requirements, including “white collar” exemptions for EAP employees and HCEs.

Under the currently enforced law (set in 2004), employees with a salary below \$455 per week (\$23,660 annually) must be paid overtime if they work more than 40 hours per week. On May 23, 2016, the DOL issued a final rule that would have significantly increased both the standard and HCE salary levels, starting in December 2016, and included automatic adjustments to these amounts every three years. On Nov. 22, 2016, however, a federal court ruled that the 2016 final rule was unenforceable. Therefore, the final rule never took effect, and the DOL has continued enforcing the 2004 salary levels.

FAQs on the New Proposed Rule

The DOL issued the following FAQs to provide more information on the proposed rule.

Q. What is the proposed rule about?

A. Using a commonsense approach and based on broad-based input, the DOL proposes to update and revise the regulations that it believes would make more than a million more American workers eligible for overtime. The DOL stated that it is committed to an update of the 2004 overtime threshold, and believes this proposal would bring common sense, consistency and higher wages to working Americans.

Q. Who would be exempt from overtime under this proposal?

A. To qualify for exemption, an employee generally must:

- Be salaried, meaning that he or she is paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “**salary basis test**”);
- Be paid at least a specified weekly salary threshold (the “**salary level test**”), set at \$679 per week under the proposed rule; and
- Primarily perform executive, administrative or professional duties, as provided in the Department’s regulations (the “**duties test**”).

Q. Why is the DOL revising its overtime regulations?

A. At his confirmation hearings, Secretary Acosta committed to an update of the 2004 overtime threshold. According to the DOL, this proposal would bring common sense, consistency and higher wages to working Americans. In light of federal court rulings invalidating the 2016 rule, public comments received in response to a July 26, 2017, Request for Information (RFI), and

feedback received at public listening sessions held around the country to receive input on issues related to the salary level test, the overwhelming sentiment was that an adjustment was timely.

Q. What is the estimated economic impact of the proposed rule?

A. The DOL estimates average transfers to employees to be approximately \$429.4 million per year over the first 10 years. The DOL estimates that average annualized direct employer costs will total approximately \$120.5 million per year over the first 10 years, including regulatory familiarization costs, adjustment costs, and managerial costs. (Note: the DOL expects direct costs for employers under this proposed rule to be \$224 million less per year than under the 2016 rule.) Finally, the Department estimates qualitatively that the proposed rule would prevent approximately 211 FLSA lawsuits per year, saving a total of \$138.2 million per year in litigation costs.

Q. How many employees does the DOL estimate will be impacted by the proposed salary level increases?

A. In Year One, the DOL estimates that 1.1 million currently exempt employees who earn at least \$455 per week but less than the proposed standard salary level of \$679 per week would, without some intervening action by their employers, become eligible for overtime. The DOL estimates that an additional 201,100 workers who earn at least \$100,000 but less than \$147,414 per year, and who meet the minimal HCE duties test but not the standard duties test, would, without some intervening action by their employers, become eligible for overtime due to the proposed increase to the HCE total annual compensation level.

Q. How did the DOL arrive at the proposed numbers?

A. The DOL calculated the standard salary amount by applying the same method used to set the standard salary level in 2004—that is, by looking at the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South), and/or in the retail sector nationwide. In applying this methodology, the DOL specifically looked at Current Population Survey (CPS) earnings data from 2015-17 (the most recent data available at the time of the Department’s analysis), and projected the resulting rate forward to January 2020. According to the DOL, the methodology used to set the standard salary level in 2004 has withstood the test of time, is familiar to employees and employers, and can be used without causing significant hardship or disruption to employers or the economy.

For the HCE annual compensation level, the DOL proposes to set the threshold equivalent to the 90th percentile earnings of full-time salaried workers nationwide.

Q. Under the proposed rule, may employers use bonuses to satisfy part of the new standard salary level test?

A. The DOL proposes to allow nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10 percent of the standard salary test

requirement. These bonuses include, for example, nondiscretionary incentive bonuses tied to productivity and profitability. The DOL recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the EAP standard salary level is capped at 10 percent of the required salary amount. The DOL is inviting comments on whether the proposed 10 percent cap is appropriate, or if a higher or lower cap is preferable.

Q. Does the proposed rule change how employers may use bonuses to satisfy the salary level for HCEs?

A. No, the DOL is not proposing changes to how employers may use bonuses to meet the standard salary level component of the HCE test.

Q. How do I comment on this rule?

A. The DOL encourages any interested members of the public to submit comments about the proposed rule electronically at www.regulations.gov, in the rulemaking docket RIN 1235-AA20. Comments must be submitted by 11:59 pm 60 days from the Federal Register publication in order to be considered.

Q. When will these changes take effect?

A. The proposed rule is only a proposal. Any changes would not take effect until after publication of a final rule.