

HR Insights

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Preparing for the DOL's Proposed FLSA Overtime Rule

On Aug. 30, 2023, the U.S. Department of Labor (DOL) [announced](#) a proposed rule to amend current requirements that executive, administrative and professional employees (EAPs) must satisfy to be exempt from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements. If the rule is finalized and implemented, the overtime protections will extend to approximately 3.6 million more workers in the country.

The proposed rule to amend the FLSA white-collar exemptions has been published in the [Federal Register](#). The DOL has established a 60-day comment period for this rule, so those wishing to comment on the proposal must do so through Nov. 7, 2023.

The agency's new overtime rule could significantly affect organizations' operational and compliance costs and increase their litigation risks, so it's critical that employers understand the new rule and its potential impacts on their businesses. The proposal does not impose any new requirements on employers at this time. Still, employers should familiarize themselves with the rule and evaluate what changes they may need to adopt if it is implemented as proposed.

This article provides an overview of the proposed overtime rule, highlights potential changes the new rule could bring and outlines preparations for employers.

Overview of the FLSA's White-collar Minimum Wage and Overtime Pay Exemptions

Under the FLSA, covered employers must pay employees at least the federal minimum wage for all hours worked and overtime pay—at a rate of 1.5 times

their regular pay rate—for all hours worked over 40 in a workweek. However, the FLSA provides several exemptions from minimum wage and overtime pay requirements. The most common are “white-collar” exemptions. These exemptions mainly apply to EAPs but include outside sales personnel and certain computer and highly compensated employees (HCEs).

To qualify for a white-collar exemption, an employee must satisfy the following tests:

- The **salary basis test** ensures the employee is paid a predetermined and fixed salary that is not subject to reduction due to variations in the quality or quantity of work.
- The **salary level test** confirms that the employee meets a minimum specified amount to qualify for the exemption. The current salary threshold is \$684 per week (\$35,568 per year) for EAPs and \$107,432 per year for HCEs. The current salary threshold took effect on Jan. 1, 2020.
- The **duties test** requires that the employee's job duties conform to EAP duties. To satisfy the duties test, an employee's actual work responsibilities must match the description the FLSA assigns to the exemption.



Proposed FLSA Overtime Rule

The proposed rule doesn't impact the duties test for the white-collar FLSA exemptions. The DOL is proposing to increase the standard salary level from:

- \$684 to \$1,059 per week (\$35,568 to \$55,068 per year)
- \$107,432 to \$143,988 per year for highly compensated employees

The rule would enable the DOL to update salary levels automatically every three years without having to rely on the rulemaking process.

With this substantial increase, more workers will likely qualify for overtime pay. However, significant changes to the salary threshold will likely result in legal challenges to the DOL's new overtime rule, which could delay the implementation of any rule changes.

Preparing for the New Overtime Rule

While the proposal doesn't impose any new requirements on employers at this time, employers should become familiar with the FLSA's proposed rule and evaluate what changes they may need to adopt if the rule is implemented as proposed. These include determining whether to increase employees' salaries to maintain their exempt classification or reclassify exempt employees to nonexempt status and pay them overtime for all hours worked over 40 in a workweek, as well as auditing exempt employees' job duties.

Reviewing Employee Compensation

With the anticipated increase to the overtime exemption threshold, employers can review their employees' compensation to determine which of their employees may be impacted. After reviewing affected employees' salaries, employers can prepare for any salary increases and how those increases could impact the broader organization. If the overtime rule becomes final, employers can then decide whether to increase affected employees' salaries to the new threshold to remain exempt or convert them to nonexempt employees.

Auditing Exempt Employees' Job Duties

An employee's job title is not determinative of whether they are exempt under the FLSA. Therefore, to prepare for the new overtime rule, employers can audit their exempt employees' job duties to determine whether the duties and responsibilities those workers are actually performing satisfy the FLSA's duties test for the white-collar exemptions. Employers can then update employee job descriptions and duties to accurately reflect the work those employees perform.

Many states and even some localities have their own overtime requirements that differ from the FLSA. To avoid potential violations and penalties, employers need to be familiar with all laws that apply to their organizations. Employers are encouraged to seek legal counsel to discuss specific issues and concerns.

Employer Takeaways

The general public will be allowed to comment through Nov. 7. If the DOL's overtime rule becomes final, it will significantly impact most employers. Employers might use this proposed rule as an opportunity to revisit their exemption determinations more broadly.

Understanding the FLSA's proposed overtime rule and its potential impacts allows employers to prepare, adapt and set their organizations up for long-term success.

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