

Podcast

The New Minimum Salary Requirements for Exempt Executive, Administrative and Professional Employees —Your Questions Answered

By Justin R. Barnes & Jeffrey W. Brecher

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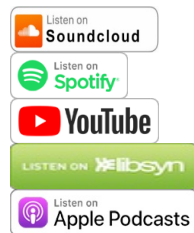
Wage and Hour

Details

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The U.S. Department of Labor's Final Rule increases the minimum salary requirements for white-collar exemptions from minimum wage and overtime pay under the Fair Labor Standards Act.

Jackson Lewis P.C. · The New Minimum Salary Requirements for Exempt Executive, Administrative, and Professional Employees—Your Questions Answered



Transcript

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

The U.S. Department of Labor's final rule increases the minimum salary requirements for white collar exemptions from minimum wage and overtime pay under the Fair Labor Standards Act. The USDOL estimates that 4 million workers will be impacted by the new rule and that it will result in a transfer of \$1.5 billion in wealth from employers to employees in the first year. Beginning July 1, 2027, these salary thresholds will automatically increase every three years.

On this episode of We get work™, we discuss the DOL's highly anticipated final rule, the new rules requirements, offer guidance on compliance strategies, and clarify changes that do not increase payroll costs. We specifically address the questions you raised during our April 29th, 2024 webinar. Today's hosts are Justin Barnes and Jeff Brecher, principals and co-leaders of the Wage and Hour Practice Group. In their joint role, Justin and Jeff help employers navigate through the complexities of wage and hour compliance reviews and defend litigation and government agency investigations. Justin and Jeff, the question on everyone's mind today is, what are the new minimum salary requirements and how does that impact my business?

Thanks, Alitia, and thanks everyone for joining. My name is Justin Barnes and I'm joined by Jeff Brecher and together we lead the Wage and Hour Practice Group for Jackson

Lewis. Today, we're here to talk about the final rule recently issued by the Department of Labor, which increases the salary threshold for the executive administrative professional and highly compensated exemptions. So Jeff, why don't you start off just by telling us what the final rule is?

Yeah, great. So we had a webinar and this is a follow-up podcast to that because we got a bunch of questions and we thought we would go through all those questions. But before we do that, just to level set here, the final rule is increasing the salary threshold for the executive, administrative, and professional exemptions, sometimes referred to as the EAP exemptions or the white collar exemptions. And the final rule, although it's about 350 pages, only does essentially three things. One is it is going to increase the salary level for the standard exemption from 35,568, which is the current annual rate, and it's going to go up in two phases. First to \$43,888 on July 1st, and then a second phase will be on January 1st of 2025 when it goes up to \$58,656. So that's the first change.

The second is the increases to the highly compensated exemption. That is also gonna go up in two phases. First, to \$132,964 on July 1st, and then to \$151,000, approximately, 151,164 on January 1st of 2025. So these are pretty big increases, but those are the two changes.

And then the third is there are going to be automatic increases every three years beginning July 1st of 2027. So a lot of changes with respect to these amounts. It's a pretty substantial increase in January of 2025. So that's what the rule does.

So we're going to kind of go back and forth here, Justin. I'm going to give you a question. These are some of the questions that we received on the webinar. So July 1st, which is the first increase is just really around the corner. It's now May 10th. So we're less than two months away. What should employers be doing now to prepare for both the July increase and then the later January increase?

Thanks, Jeff. That's a great question. And what we suggest is that employers put together a list of all of their exempt employees and go ahead and identify those exempt employees, employees who are currently classified as exempt under these three exemptions, the executive, administrative, and professional exemptions, identify the people who are below both that July 1st increased threshold and the January 1st increased threshold. That way you're identifying the group of people, the population that could be impacted by this. So you identify those people and then you got to decide what am I going to do with them? You can increase their pay to get them above the threshold. And maybe that's a little easier in July, but certainly will be more difficult come the January increase. Or you could decide to reclassify them as non-exempt and start paying them overtime going forward. But you need to identify that group of people and at least start talking about a plan for what you're gonna do to come into compliance on July 1st, certainly, which is right around the corner and then eventually January 1st and be ready to pull the trigger on that plan if the rule does indeed go through. But as we discussed, Jeff, we anticipate that there will be some legal challenges to the rule. So is there a possibility you think that either of these phases, July or January, will get stopped or delayed?

So there definitely is a possibility that the rule could be enjoined or at least one phase of the rule might be enjoined. The first increase, the phase one increase on July 1st is more likely to go forward than the later January 1st, 2025 increase. And that is because the July 1st increase is based on the same methodology that the Trump administration used in the prior rulemaking. So the Trump administration used the 20th percentile of full-time salaried workers in the lowest census region for the standard exemption. And DOL

basically has updated the number using that exact same methodology for the July 1st increase to both the standard and the highly compensated exemption. So it's unlikely probably that that first phase increase will be enjoined, but it may be more likely that the later increase might be enjoined either because it's too drastic of an increase or we might have an election that might result in a change in administration and that increase might be withdrawn.

And there is also the possibility of litigation. So it's possible someone might file a lawsuit in the next few weeks challenging that later increase as well as the first phase, but I do think there's probably a greater likelihood that the second phase would be subject to challenge than the first phase. So that's that. What, Justin, do you think about employers ensuring compliance with state law requirements that might be different than the FLSA? Because we're talking today about the FLSA, but what about state law requirements?

Yeah, it's really important, Jeff, that employers keep in mind that these rules that have been issued by the DOL only impact the thresholds under federal law. And certainly it's a substantial increase. But there are a number of states that have their own overtime laws and minimum wage laws. And those states really can fall into a couple of different buckets. Some of them follow the FLSA expressly. Some of them have their own rules and their own salary thresholds, but otherwise follow the duties test under the FLSA. And some of them have their own salary threshold and their own duties tests. And so it's really important for employers to keep in mind that they need to make sure they're paying attention to state law with respect to these exemptions as well and not to just ignore those state laws and assume compliance with state law just if they're complying with the federal law. So Jeff, on these two phases, we've gotten some questions from some employers about whether they can just wait until phase two.

Employers certainly could wait until phase two to reclassify so long as all of the employees are above the minimum salary level for phase one. So if you are currently above phase one or can easily bump up employees and maybe just a slight adjustment to satisfy the first phase, then you absolutely could wait until January of 2025 to reclassify if that is the path that you're going to take and wait in order to see whether or not that rule is enjoined. You should probably make plans if you're going to reclassify to figure out exactly what your process is going to be once that time frame rolls by, but you can certainly wait. There's no requirement that you must reclassify by July 1st if you already satisfy the July 1st salary level.

So Justin, we've gotten a bunch of questions about whether or not there's grace periods, whether the DOL is going to be lenient in the beginning. Can you comment on whether the rule provides for any grace periods for compliance?

The rule itself does not include any grace periods. So employers need to be prepared to be in compliance immediately. Now, do we expect the Department of Labor to knock on doors on July 2nd? Not necessarily, but employers should be prepared to comply on July 1st and then eventually on January 1st. And those two phases really are the grace period that's given is phasing it into implementations. But people should go ahead and plan to be in compliance as soon as possible.

There's going to be nothing to stop employees from suing if they're not paid the minimum salary level, even if the DOL doesn't come knocking, the employees will have been misclassified at that point and therefore eligible for overtime if they're not being paid the minimum salary level.

That's absolutely right, Jeff. I've heard it referred to as applying to the EAP exemptions. I've heard other phrases used. Can you tell us, Jeff which exemptions exactly this rule applies to?

It applies only to the executive, administrative, and professional exemptions. It does not apply to any other exemption like the outside sales exemption, for example, which does not have a salary requirement. It does not apply to the motor carrier exemption or any other exemption in the FLSA. Only those three exemptions, executive, administrative, and professional. And I should mention also that the professional exemption, which has a salary requirement, itself has an exception to that for doctors, lawyers, and teachers. But other than that, all professional employees must also meet the minimum salary level requirement.

So we also got a lot of questions about part-time employees, Justin. Are part-time employees covered by this? And how would the rule affect part-time employee?

Yeah, I have gotten a lot of questions about part timers and the short answer is yes, this rule applies to anyone who is classified as exempt under those three exemptions, regardless of whether they're part time, full time, double time, whatever you want to call them. Now it's from a practical perspective, if someone is part time, they're likely not working overtime, and they likely are paid enough to exceed the minimum wage. But if we want to keep them classified as exempt on the off chance that they do work overtime one week, then these salary levels have got to be met and there's no sort of reduced or pro rata salary requirement for part-time employees.

We've got some questions about executives with employment contracts. An employee who has an employment contract, whether an executive or any other employee, would still need to have a salary that satisfies the minimum salary level. There is no exception for individuals with employment contracts. So employers could not agree, just like an employer could not agree to pay an employee less than the minimum wage, an employee could not agree with an employer to earn less than the minimum salary level and still be exempt. So it definitely would still apply 100% to employees who have employment contracts. And if you have an employment contract where the amount in the contract is less than the minimum salary level, then you would need to increase the salary for that employee.

So Justin, does the final rule impacted all the duties requirements for the exemptions, whether the standard exemption or the highly compensated exemption?

No, it does not, Jeff. The duties tests remain the same. So for the executive, administrative, and professional exemptions, you've still got to meet the same duties tests. It's only increasing the minimum salary threshold and the same for the highly compensated employee exemption, the same duties test still apply. As much as some people would like some clarification on those duties, the DOL chose not to include any changes to the duties tests.

So on the fact that is changing the salary threshold for, I suppose, for exemptions, executive, administrative, professional, and highly compensated, will employees still only have to meet one of the exemptions or do they need to meet both exemptions?

I've heard some questions from some individuals who are confused in particular about how the highly compensated employee exemption fits into this and whether they have to meet both that and one of the EAP exemptions. So the highly compensated exemption is an exemption that confuses some employers. So let me see if I can clarify that. We refer to

the standard exemptions as the executive, administrative and professional exemptions where the employer must meet the duties requirements for those exemptions and the minimum salary level for those standard exemptions. The standard exemptions require the employer to prove that the primary duty of the employee is an executive, administrative, or professional duty. So that's a primary duty requirement.

The highly compensated exemption is a slight twist on the standard exemptions in that it also has a duties requirement, but instead of requiring the employer to prove that the employee's primary duty is an executive, administrative, or professional, the employer need only prove that the employee customarily and regularly performs one of the exempt duties. So they only need to establish that the employee is doing the work customarily and regularly, which is less onerous than primary duty. And they only have to prove that the employee is performing one of the exempt duties. So it's a relaxed duties test. That's how the DOL refers to it. But it does have this higher salary requirement.

But if you meet the standard exemption, then you are exempt. And if you meet the highly compensated exemption, you are exempt. You don't have to meet both. You only have to meet one of the exemptions. So you could imagine a situation, for example, you might be saying, well, is it possible that you would not meet the standard exemption, but meet the highly compensated exemption? And the answer is yes. You could have employees who have a very high salary and thus, satisfy the highly compensated salary threshold, but they don't have duties that are primarily exempt, but they do perform at least one of the exempt duties. So that's where that comes into effect.

So Justin, the other questions that we were getting are with respect to other forms of compensation that employers can use to satisfy the minimum salary level, like commissions and nondiscretionary bonuses. So what can an employer use to satisfy the salary? Does it all have to be salary?

That's a great question, Jeff. And this is probably the question we've gotten the most, certainly after the webinar we conducted. This is the question that people are asking us the most. And the good news is that employers can use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the standard salary level. So that means that you can use these types of nondiscretionary incentive payments to satisfy up to 10% of the salary level, and the rest of it just has to be made up of the guaranteed salary. And the good thing is that if at the end of the year, an employee has not made enough and incentive payments to satisfy this threshold, the employer can make a final catch up payment. It's got to be paid within one pay period after the end of the year to bring the employee's compensation up to the required level, but they can make that catch up payment. Now, importantly, if you do make that catch up payment in the first pay period of the next year, you got to make sure not to count that catch-up payment towards the next year's requirement. It only counts towards the previous year since it's a catch-up, but it's very convenient that employers can use these non-discretionary incentive payments to satisfy up to 10% of the standard salary level.

Now, one important distinction here is that only applies to the regular standard salary level for the EAP exemptions. For the highly compensated exemption, employees still have to be paid the full standard salary level amount. Anything above that standard salary level amount to reach the total compensation amount can certainly be made up of nondiscretionary incentive payments. But for highly compensated, the full standard lower salary threshold amount has to be paid and cannot be made up of incentive payments. But Jeff, another question we get is, okay, well, what do you mean by nondiscretionary incentive payments? What does that mean?

Yeah, so it's very important that we're only talking about use of nondiscretionary incentive payments. And so the difference between a discretionary bonus, for example, and a nondiscretionary bonus is a nondiscretionary bonus is one that's tied to meeting some kind of performance metrics. This would be any kind of production bonus. For example, if you achieve X amount in sales, you're going to get a bonus of Y. That's a nondiscretionary bonus. Same thing with other forms of incentive compensation. They're all performance-based and they're pre-announced and the employee is essentially working towards meeting that goal and relying on the announcement of the bonus and the amount.

A discretionary bonus is really like a year-end bonus where the fact that the bonus is going to be awarded and the amount of the bonus are not decided until the end of the period and the employee has no prior contractual or other expectation that they are going to receive the bonus. Most bonuses and most other forms of compensation are nondiscretionary. It's more difficult to establish a certain form of compensation is a pure discretionary bonus. So we usually have the opposite where employers have failed to include what would otherwise be a nondiscretionary bonus or other form of compensation in someone's overtime rate. But for purposes of meeting that 10% requirement, it must be non-discretionary. You can't use the discretionary amount that you would just give at the end of the year, like a spot bonus for the company doing well, for example.

So we've covered a lot today, Justin. It can be a little technical, but we have an article on our website discussing the final rule, and our webinar is also on our website. So if anyone wants to view those, you can go there for additional information. The Department of Labor also has additional information.

Thank you everybody for joining us. And if you have any questions, please feel free to reach out to either me or Justin or the Jackson Lewis attorney with whom you work with. Good luck and thank you for joining.

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