

DOL Finalizes and Issues New Overtime Rule, Sets Minimum Annual Salary at \$35,568

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The U.S. Department of Labor (DOL) has issued a new Final Rule updating the minimum salary requirements for the “white collar” (executive, administrative, and professional) overtime exemptions. The new rule goes into effect on January 1, 2020.

Under the Final Rule, the annual salary level for the executive, administrative, and professional exemptions will increase to \$35,568, or \$684 per week. This is a slight increase from the amount set forth in the proposed rule issued in March 2019 (\$679 per week or \$35,308 per year). The new minimum salary represents a 50% increase from the current level of \$23,660 (\$455 per week). It is well below, however, the \$47,476 (\$913/week) salary level proposed by the Obama administration, which a federal district court held was invalid and issued a permanent injunction blocking the rule. The DOL rejected proposals to establish regional salary levels or separate industry-specific salary levels.

Under the new Final Rule, the annual minimum compensation for highly compensated employees (HCEs) also will increase, but significantly less than had been proposed. The new minimum compensation for HCEs will increase only from \$100,000 to \$107,432. The March 2019 proposed rule had set the minimum compensation for HCEs at \$147,414, even higher than the Obama-era rule, which set the minimum compensation level at \$134,004. Notably, a less rigorous duties requirement applies to HCEs — they need only perform any one of the exempt duties of an executive, administrative, or professional employee to qualify for the exemption.

Consistent with the Obama-era rule, employers will be permitted to use *nondiscretionary* compensation, including commissions, to satisfy up to 10% of the new standard salary level. Unlike the Obama-era rule, however, under the new Final Rule *nondiscretionary* compensation may be paid *annually* rather than quarterly, providing employers with more flexibility in paying exempt employees *nondiscretionary* bonuses and commissions to satisfy the salary level requirement. The new Final Rule also permits a catch-up payment at years-end, up to 10% of the standard salary level (*i.e.*, \$3,556.80), if the employee has not earned sufficient *nondiscretionary* pay to satisfy the required salary. By contrast, for HCEs the standard salary level (\$35,568) must be met *without* including *any* *nondiscretionary* pay, although such pay can be included in meeting the annual compensation requirement of \$107,432. DOL acknowledged comments addressing potential litigation regarding whether particular forms of compensation were “discretionary” or “nondiscretionary.”

The DOL has not made any changes to the duties test and has not provided for any automatic increases, although it anticipates updating the salary level every four years through notice-and-comment rulemaking. The Obama-era rule called for automatic increases every three years.

In setting the new proposed salary level, the DOL employed the same methodology used when it increased the salary level to \$455 per week in 2004, that is, using the salary level for the 20th percentile for full-time salaried workers in the lowest census region (the South) and in the retail industry nationwide. The DOL estimates that approximately 1.2 million currently exempt workers who earn more than \$455, but less than \$684, per week will be impacted by the new Final Rule, and that 102,000 current HCEs will be affected by the increase in the minimum HCE compensation. By comparison, the Obama-era rule was anticipated to impact more than four million workers who otherwise would have satisfied the duties requirements of the executive, administrative, and professional exemptions.

The new salary levels will not apply to employers in Puerto Rico, the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands, where the current \$455 salary level will continue to apply.

Employers with exempt workers who currently earn more than \$455, but less than \$684, per week, and who satisfy the duties requirements, may comply with the new rule by either increasing employee salaries to the new level; limiting hours to preclude overtime work; and/or by reclassifying employees as non-exempt. Moreover, employers also must consider how the new rule interacts with the corresponding exemptions under the myriad of state laws. Some states do not have overtime laws; others incorporate the FLSA as it stands; others incorporate the FLSA's overtime provisions but with higher salary requirements; and others have their own exemptions and salary levels without reference to the FLSA.

Anticipating potential future litigation challenging the Final Rule, DOL has formally rescinded the 2016 Obama Rule (which had been enjoined by a district court), ensuring that if the Final Rule is challenged, the only regulation in effect would be the 2004 regulations. "[E]ven if the substantive provisions of this final rule revising part 541 are invalidated, enjoined, or otherwise not put into effect, the Department intends the 2004 final rule to remain operative, not the enjoined 2016 final rule that it is rescinding," the DOL stated.

The January 1, 2020, deadline for compliance may be a challenge for some employers. Employers need to identify any currently exempt employees who will not satisfy the new minimum salary threshold and then determine whether to either reclassify them as non-exempt or adjust their salaries. When adjusting salary levels, employers must consider the impact on other exempt employees who also may request an increase, as the gap between their salary and other salaried workers diminishes. Industries most likely affected by the change include retail, hospitality, and the non-profit sector.

If you have any questions about the Final Rule or any other wage and hour questions, please contact the Jackson Lewis attorney(s) with whom you regularly work.

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