


SEPTEMBER 14, 2023 | WAGE &amp; HOUR COMPLIANCE

# The Department of Labor Proposes Changes to Overtime Eligibility, Potentially Impacting Millions of Workers

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On **August 30, 2023**, the U.S. Department of Labor (“DOL”) published a [notice of proposed rulemaking \(NRPM\)](#), announcing its plans to significantly expand the number of executive, administrative, and professional employees eligible for overtime pay under the Fair Labor Standards Act (“FLSA”).

In its proposal, the DOL estimates that, in year 1, roughly 3.6 million workers, exempt from overtime pay under the current regulations, would become newly entitled to overtime protection absent some intervening action by their employers. The change would have the biggest impact on retail, food, hospitality, manufacturing, and other industries where many “white collar” salaried workers would lose exempt status. The DOL also estimates that the updated regulations would impose \$1.2 billion of direct costs on employers. 

## Overview of the Executive, Administrative, and Professional Employees Overtime Exemption

Unless specifically exempted under the FLSA, U.S. hourly workers are entitled to be paid no less than time-and-a-half their regular hourly rates for all hours worked in excess of 40 hours a week. The additional income is called “overtime pay.”

Executive, administrative, and professional workers are exempt from that overtime pay requirement provided they satisfy all three of the following tests:

- *The Salary Basis Test.* Employees must be paid a salary – i.e., a predetermined and fixed amount that is not subject to reduction because of variations in the quality or quantity of work performed.
- *The Salary Level Basis Test.* Employees must earn at least \$684 per week, or \$35,568 per year.
- *The Duties Test.* Employees’ duties must primarily involve executive, administrative, or professional duties as defined by the regulations. There is a less restrictive duties test for certain highly compensated employees (“HCE”) – those who are paid at least \$107,432 annually and at least \$684 per week.

Certain exempt employees, such as doctors, teachers, and lawyers, are not subject to either the salary basis or salary level tests.

## Overview of DOL's Proposed Changes to the Overtime Exemption

The DOL plans to make three significant changes to the exemption for executive, administrative, and professional workers:

First, it would increase the standard salary level from \$684 per week to \$1,059 per week (or \$55,068 annualized). When the NPRM was developed, this threshold amount was set to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South), using 2022 data.

When the rule is finalized, the DOL will use the most recent data available, and the threshold amount will increase. If the rule is finalized in fourth quarter 2023, the DOL projects that threshold amount could be as high as \$1,140 per week (\$59,285 annualized). If the rule is finalized in first quarter 2024, the DOL projects that threshold amount could be as high as \$1,158 per week (\$60,209 annualized).

Second, it would increase the HCE total annual compensation threshold from \$107,432 per year to \$143,988 per year, provided workers receive at least the proposed standard salary level discussed above, or \$1,059 per week.

Finally, salary thresholds would be updated every three years to reflect current earnings data. The DOL would be allowed to temporarily delay a scheduled update when unforeseen economic or other conditions warrant.

## Public Comments on the Proposal and Legal Challenges

Stakeholders may weigh in on the proposed rule during the 60-day public comment period, which is currently open and **scheduled to close at 11:59 p.m. ET on November 7, 2023**. After that, the DOL will consider all comments and revise the proposal before the rule is finalized. Once final, the new regulations would likely take effect sometime in 2024.

Legal challenges are anticipated. Stakeholders successfully challenged a similar proposal by the Obama Administration, which in 2016 sought to raise the salary threshold to \$47,476. The U.S. District Court in the Eastern District of Texas found that the updated salary threshold was so high that it made the job duties portion of the exemption test irrelevant. *Nevada v. Dep't of Labor*, 275 F.Supp.3d 795 (E.D. Texas 2017).

In addition, in 2022, [a restaurant owner sued the Department of Labor](#), arguing that the DOL exceeds its authority by imposing the current overtime exemption salary level test. The case is ongoing.

## Potential Impact on State Wage & Hour Laws

States are permitted to have their own wage and hour laws, as long as those laws provide more protections for employees than the federal laws. If the proposed federal regulations survive legal challenges, those updated federal regulations could be more protective than some current state and local laws. In such case, those state and local laws will also need to change.

## Practical Takeaways

Despite the uncertainty, employers should prepare for the proposed rule and consider doing the following:

- Review their employee classifications to determine which of their employees qualify as exempt under the executive, administrative, and professional exemptions.
- Identify whether any of the covered employees make less than \$55,068 per year, as you will need to convert them to non-exempt status if the proposal becomes law.
- Determine how you will track the hours worked by affected employees and manage the payment of overtime.
- If feasible, consider raising affected employees' salaries to at least \$55,068 per year, such that they will remain exempt.
- Review policies and procedures covering affected employees to ensure the guidance and rules contained therein will remain appropriate if those workers become eligible for overtime – e.g., policies that concern the use of company-issued mobile devices or access to company resources, such as email, outside of regular work hours.
- Train affected employees on the company's timekeeping policies and practices.