



March 2019

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Department of Labor Proposes Increased Minimum Salary for Exempt Employees

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Department of Labor Proposes Increased Minimum Salary for Exempt Employees

On March 7, 2019, the U.S. Department of Labor (“DOL”) issued its long-awaited Proposed Rule adjusting the minimum salary required for exempt employees under the Fair Labor Standards Act’s executive, administrative, and professional exemptions. The Proposed Rule replaces a controversial 2016 Obama-era rule that a federal court in Texas enjoined almost immediately after it issued. For employers, the new Proposed Rule includes both good and bad news.

The Proposed Rule would change the minimum weekly salary required for exempt status from \$455 per week to \$679 per week (or \$35,308 annually), which is significantly lower than the \$913 per week required under the enjoined 2016 rule. The Proposed Rule also would allow employers to include nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level and permit certain year-end “catch up” payments, like the 2016 rule.

Unfortunately, the Proposed Rule also would increase the “highly compensated employee” (“HCE”) exception’s salary threshold from \$100,000 to \$147,414 per year. That is higher than the \$134,004 minimum in the 2016 rule.

Finally, unlike the 2016 rule, the Proposed Rule will not automatically increase its salary thresholds in future years. Instead, the DOL announced its intention to revisit the salary minimums every four years through a notice and comment period. This quadrennial review is subject to the Secretary of Labor’s discretion not to propose an increase based upon economic or other factors.

Increasing the Minimum Weekly Compensation Requirement to \$679/Week

The Proposed Rule would set the minimum weekly compensation requirement at \$679 per week for exempt administrative, executive, and professional employees.

In the Notice of Proposed Rule Making, the DOL sought to address a concern expressed by the district court that enjoined the 2016 rule. The court had concluded that the rule’s increase in the minimum salary to \$913 per week was so large that it “untethered the salary level test from its historical justification: setting a dividing line between nonexempt and potentially exempt employees by screening out from the exemption a swath of employees who are unlikely to be bona fide executives, administrators, or professionals because of their compensation level.”



In response to this concern, the DOL stated that the new Proposed Rule would “simply [] update the 2004 standard salary level by applying the same methodology to current data.” Therefore, like the 2004 regulations, the Proposed Rule would “set the standard salary level at approximately the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region [] and in the retail sector.” Absent employer action, the Department of Labor estimates that approximately 1.1 million currently exempt employees will gain overtime eligibility—a decrease from the more than 4 million employees impacted by the 2016 rule’s higher threshold.

Like the 2016 rule, the Proposed Rule also would allow employers to “count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test, provided such bonuses are paid annually or more frequently.”

The Proposed Rule also would permit employers to make “a final ‘catch-up’ payment within one pay period after the end of each 52-week period to bring an employee’s compensation up to the required level.” Under this proposal, an employer must pay an exempt employee “90 percent of the standard salary level (\$611.10 per week), and if at the end of the 52-week period the salary paid” plus eligible bonuses and incentives “does not equal the standard salary level for 52 weeks (\$35,308), the employer would have one pay period to make up for the shortfall (up to 10 percent of the standard salary level, \$3,530.80).”

Increasing the HCE Exception

The Proposed Rule proposes a greater increase to the minimum salary for the HCE exemption than the 2016 rule. Under the current HCE exception, employees who earn at least \$100,000 per year are subject to a less rigorous “duties” test than applies under the standard administrative, executive, and professional employee exemptions. The 2016 rule set the HCE salary threshold at \$134,004 per year. Under the Proposed Rule, that threshold increases to \$147,414 annually. The DOL stated that this threshold is “set [to] the level equivalent to the 90th percentile of fulltime salaried workers nationally”—the same relative metric used by the 2016 rule, but applied to now-current data. The Department estimates the increase will impact approximately 201,000 currently exempt employees.

Future Updates Every Four Years

In an effort to keep the salary metrics current, the 2016 rule included a “mechanism to automatically update the earnings thresholds every three years, applying the same methodology used to initially set each threshold in that rulemaking.” The district court invalidated that provision as “unlawful.” Therefore, in an effort to strike a balance between the need for more frequent updates to the earning thresholds and the district court’s concerns regarding automatic updates, the DOL will hold a notice and comment period every four years before issuing any updates. While this language is initially framed as mandatory (“The Department will publish...”), it later states the “Secretary, in his or her sole discretion, may determine not to undertake the [notice and comment requirement] due to economic or other factors.” Therefore, it remains to be seen how this will work in practice, if approved.

Steps Employers Should Take

The DOL’s final regulations will issue after a 60-day notice and comment period. In the meantime, we recommend that employers:

- Identify the salary levels of employees in your workforce currently classified as exempt under the executive, administrative, or professional exemptions to determine whether they meet the DOL’s proposed \$35,308 annual minimum threshold. Be mindful of job-sharing or



other part-time exempt arrangements in which a currently exempt employee may be earning less than \$35,308, because the proposed rule does not contemplate proration.

- Identify any highly compensated employees earning between \$100,000 and the DOL's proposed \$147,414 threshold who perform duties that make them exempt under the HCE exemption, but perhaps not the standard executive, administrative, or professional exemptions.
- Determine whether to adjust the salaries of or reclassify as non-exempt employees who fall below the proposed minimum salary thresholds.
- Develop an action plan to be ready to implement any changes when the final regulations take effect, including appropriate communications to reclassified employees about timekeeping and meal and rest break requirements.
- Consider aligning with chambers of commerce, organizational associations and trade groups, and legal counsel to submit any comments, concerns, and criticisms to the DOL during the 60-day public comment period.

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