

DOL Increases to Exempt Employee Salary Requirements will Impact Employers Regardless of Legal Challenges

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On April 23, 2024, the Department of Labor (“DOL”) announced a final [rule](#) (the “Rule”) increasing the salary threshold employers must pay to most exempt workers. Given the anticipated litigation over the Rule and the potential that the Rule is struck down, employers may be tempted to ignore this news. However, this approach is blind to the practical mechanisms of how wage and hour enforcement works and how such claims arise. Employers are well advised to get up to speed on the development to avoid unnecessary risk to their organizations.

What the Rule States

As most employers know, in order for an employee to be considered exempt from federal overtime requirements, the employee must pass a duties test (performing specific duties to fit into one of the existing exemptions). In addition, for most of the exemptions, the employee must also be paid a minimum salary.

The Rule sets an increase to the salary minimum of employees in the three major exemptions (the executive, administrative and professional exemptions). The Rule increases the salary minimum from the current \$684 per week (\$35,568 annualized) to \$844 per week (\$43,888 annualized) on July 1, 2024 and \$1,128 per week (\$58,656 annualized) on January 1, 2025. The Rule sets forth automatic increases starting July 1, 2027 and every 3 years thereafter. The increases would be announced by the DOL 150 days in advance and would be set at the 35th percentile of full-time salaried employees in lowest-earning census region at the time of the increase.

Under the Rule, in order to be considered “highly compensated” and thus qualifying for less scrutiny on the duties part of the three major exemptions, employees would have to be paid \$132,964 per year by July 1, 2024 and \$151,164 per year by January 1, 2025. This threshold would also be subject to the three-year increases based upon the same metric at the 85th percentile.

The duties tests are unaffected by the new Rule and the Rule does not provide increases for other exemptions such as attorneys, computer employees, outside salespeople, doctors and teachers. The Rule also does not preempt the ever-increasing state laws which require a higher salary to be exempt from state wage and hour laws, such as California, Colorado, New York and Washington.

The Rule will Be Challenged

It is inevitable litigation will ensue as soon as the final version of the Rule is published. In 2016, the DOL attempted to raise the salary threshold to \$913 per week but a federal court issued a nationwide injunction stopping the 2016 rule implementation. Thereafter, the DOL rescinded the rule to replace it with the current 2019 rule. The current 2019 rule was also challenged but so far has been upheld (the case is still on appeal). There is no reason to believe similar challenges will not be brought, which could delay the implementation and could strike the Rule down altogether.

The Rule is Still Significant

In addition to the risk of being unprepared should the Rule not be enjoined during the litigation or ultimately upheld, there are other risks to turning a blind eye to the development. First and foremost, the DOL will remain

the agency that will audit employers and make determinations if someone fits within an exemption. If the rule is struck down, this means the salary alone cannot be the basis for a determination of misclassification by the DOL. However, it also signals that the DOL will not look extremely carefully at the duties of employees below the Rule's salary threshold. The DOL has made abundantly clear in the 374-page preamble that it feels the new thresholds would be more than fair as a bright line rule for exempt status. In fact, the preamble specifically notes that the revised salary level will strengthen the protection of workers who do not meet the duties test currently but are over the current threshold, as their misclassification will be obvious to both the employee and employer. Thus, if the Rule is struck down the employer who pays less will not be defenseless, but better be confident that the duties of those employees below the new threshold are truly exempt.

Secondly, the news of the Rule is anticipated to be widespread. The day after the Rule was published, the CNN headline read "[m]illions more salaried workers will be eligible for overtime pay under final Biden rule." The DOL has also released headline grabbing estimates that the Rule will result in a \$1.5 billion dollars of increased payments in the first year from employers to employees to comply with the rule due to increased overtime paid to employees who are now classified as nonexempt and salary increases.

Due to the press, employees under the threshold will expect to be affected and will be more likely to talk to attorneys or the DOL if they are not (even if the reason they are not is subsequent legal challenges), resulting in more scrutiny as to whether their duties are truly exempt.

Employer Next Steps

Contrary to what employers often conclude, employers are also not advised to simply raise the salary of exempt workers to the new threshold. Handing out unwarranted raises for the same work is a bad business model and not legally required.

The immediate step employers should take is to look carefully at the employees they now classify as being administrative, executive or professional making between \$684 a week and \$1,128 a week and scrutinize their duties, with a more careful eye to those below the more immediate \$844 threshold. The administrative exemption, in particular, lends itself to challenges on the duties part of the test given that part of that test is that an employee must have independent judgment on matters of significance, a low salary does beg the question as to how significant the decision making really is. Employers who are not in the South and instead are in a higher earning Census region should be mindful that is even more of an issue.

For those employees identified who do not clearly fit within the duties test, employers should consult with legal counsel to obtain more guidance and if a gray area remains, consider whether (and when) it makes sense to make a change and understand all of their options. These options include:

(A) Converting gray area employees in the risky salary range to hourly employees. While an employee must fit a duties and salary test to be exempt, anyone can be paid as an hourly employee. This option is easy and straightforward to do for employees who do not frequently work much overtime. An employer simply has to have a handle on how much time the employee works and choose an hourly rate that (even with occasional overtime) does not result in the employee netting more money than they previously made. For example, an employee who regularly works 42 hours a week could easily be paid the \$15 minimum wage in Massachusetts and still only bring home \$684 or less as long as the employee did not work over 3.73 hours of overtime in a week. Many employers may save money paying workers hourly given that nonexempt workers do not have to be paid for non-working time. With the trend of workers putting in less hours, getting more PTO and focusing on work life balance, employers may be surprised to learn their full-time salaried employees are actually working far less than 40 hours per week. Further, if these employees start making money on an hourly basis, they may be more inclined to work more hours. The downside of this option is that employers will still have to carefully track hours worked and abide by non-exempt obligations such as meal breaks (and in Rhode Island, overtime on Sunday and holidays). In addition, employees may be disgruntled to see their earnings set out on an hourly, lower rate basis.

(B) Similar, to option (A), employers can convert employees to be hourly as set forth above, but also guarantee

them a minimum salary (as long as they still pay overtime at the hourly rate). This will help with the workers being less disgruntled and potentially allows for some mitigation of damages if time tracking fails to capture all hours. However, this method does not have the potential cost savings and still requires the burden of meticulous time tracking and lunch breaks.

(C) Employers can also convert employees to hourly but use the fluctuating workweek calculation to compensate the workers. Under the fluctuating workweek calculation, the employer sets a salary for all hours per week and then divides the weekly salary by the number of hours worked that week, paying only half the rate for overtime. For example, if a previously exempt employee making \$700 per week in Rhode Island is converted to a nonexempt employee guaranteed \$700 for all hours worked, the salary would cover up to 50 hours and still be within the \$14 minimum wage. Further, the overtime is calculated at $\frac{1}{2}$ the rate, so if 50 hours were worked, would be an additional \$70 dollars ($700/50 \times \frac{1}{2} \times 10 = 70$), for a total of \$770 being owed. The upside of this method is that it is more acceptable to employees because they are still guaranteed a salary and results in less overtime costs for those who frequently work overtime. The downside of this method is that nonexempt time tracking and lunch breaks still apply, there is no cost savings when an employee works less hours, the fluctuating workweek method requires very clear communication regarding how someone is compensated and some state wage and hour laws do not allow it.

(D) Employers of course can increase the employee's salary if the employee fits clearly within the duties test. This might be the easiest option to avoid the headaches of other nonexempt employee compliance rules and may make sense if the salary is close to the new threshold. In such a case, employers can wait to see if the litigation impacts the Rule and then be ready to increase the wage when the time comes. In addition, even if the salary is not particularly close to the new threshold but the employer is confident about the duties portion of the exemption test, the employer could assign the employee additional responsibilities and work to avoid simply paying more and getting nothing additional.

The above options are not exhaustive and employers will also need to review the status of anyone who was classified as exempt due to the highly compensated employee rules but is now below the new thresholds. Employers are encouraged to review their records now to identify potential employees that could be impacted by the Rule and consult with their legal counsel to be fully informed as to their options.

The [Employment & Labor Practice Group](#) at [Partridge Snow and Hahn LLP](#) is available to answer questions about the Rule. For more information or assistance with the new salary thresholds, please connect with [Alicia Samolis](#), [Sean Fontes](#), [Morgan Hedly](#), or [Michael Gamboli](#).

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