

Here We Go Again – DOL Unveils “New” Overtime Rule

Again?

In a case of what must feel like déjà vu for employers, on March 7, 2019, after conducting “listening sessions” across the country and receiving tens of thousands of comments from the public, the United States Department of Labor (“DOL”) issued a much-anticipated proposed rule (“Proposed Rule”) that, according to its estimates, would result in more than one million additional American workers becoming eligible for overtime pay.

First, some brief background. Generally speaking, the Fair Labor Standards Act (“FLSA”) mandates employers to compensate its employees at a rate of one and one-half (1 ½) times their regular rate of pay (“overtime pay”) for all hours worked in excess of 40 each week. However, under the FLSA’s executive, administrative, and professional exemption (“White Collar exemption”) employees are exempt from overtime pay if they are able to pass a “Salary” Test and a “Duties” Test. The Proposed Rule affects only the Salary Test. The current Salary Test became effective in 2004 under the Bush administration and requires a White Collar exempt employee to be paid at least \$455 per week (which equates to \$23,660 per year).

Didn’t this already happen?

Yes. A larger increase was proposed and enacted for White Collar employees but stopped before becoming effective. In May 2016, the DOL under President Obama attempted to increase the salary threshold to \$913 per week, or \$47,476 annually. This change would have allegedly made over 4 million people newly eligible for overtime. However, in November 2016, literally weeks before the rule was set to go into effect, and after many employers had been working for months to plan for this change, a Federal District Court in Texas blocked the Obama-era rule from taking effect. The DOL was sent back to the drawing board and now, nearly 3 years later, has come forth with a new Proposed Rule that increases the Salary Test to \$679 per week, which amounts to \$35,308 per year. This new threshold certainly appears to be an attempted middle-ground compromise between the \$23,660 Bush-era salary threshold and the \$47,476 Obama-era salary threshold.

Some Specifics:

Here are some of the notable provisions from the Proposed Rule:

1. As mentioned above, the Proposed Rule increases the minimum salary required for an employee to qualify for the White Collar exemption from the currently-enforced level of \$455 per week to \$679 per week, which amounts to \$35,308 per year.
2. The Proposed Rule allows employers to use nondiscretionary bonuses and incentive payments, including commissions, that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level with an opportunity for a “catch up” payment at the end of the work year.
3. The Proposed Rule increases the total annual compensation requirement for “highly compensated employees” (“HCE’s”) from the currently-enforced level of \$100,000 per year to \$147,414 per year.

Increased Salary for Highly Compensated Employees

Interestingly, the new rule proposes a less employer-friendly increase to the salary basis for the highly compensated employee exemption. HCE’s performing office or non-manual work are exempt from overtime pay if they customarily and regularly perform *at least one* of the duties of an exempt executive, administrative or professional employee. As stated above, the Proposed Rule increases the total annual compensation requirement for HCE’s from the currently-enforced level of \$100,000 per year to \$147,414 per year. The proposed \$147,414 HCE threshold is *higher* than the Obama-era rule of \$134,004.

What's Not Included in the Proposed Rule?

What's not included in the Proposed Rule is almost as noteworthy as what is included. Despite significant push from workers' advocacy groups, the Proposed Rule does not provide for different salary thresholds for each geographic region to account for cost-of-living differences. In addition, the Proposed Rule does not offer any changes to the Duties Test, nor does it mandate increases in the salary threshold over the years.

Will the Proposed Rule become Law (and when)?

The Proposed Rule has been submitted to the Office of the Federal Register for publication. Once published, the general public will have 60 days to submit comments. If the Proposed Rule survives public comment, then it will become law but likely will not be effective until 2020. Only time will tell whether the new Proposed Rule will be challenged in Court as was the Obama-era rule.

Whether the Proposed Rule is challenged or not, employers would be wise to plan ahead to the extent the employer did not do so in 2016 and still have exempt full-time employees who earn less than the new salaried threshold. Employers have several options in responding to the Proposed Rule. Two options include: increasing salaries to retain exempt status; or reducing or eliminating overtime hours.

The [Partridge Snow & Hahn Employment Law Team](#) is fully updated on these and other related issues and is available to answer to your questions.

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