

HR Insights

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Preparing for the DOL's New Overtime Rule

In its spring regulatory agenda, the U.S. Department of Labor (DOL) [shared](#) that it intends to issue a proposed overtime rule in May 2023. According to the regulatory agenda, this proposed rule is expected to address how to implement the exemption for executive, administrative and professional employees (EAPs) from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements.

The agency originally planned to publish the proposed rule in April 2022 but then delayed it until October 2022. While the proposed rule is now set to be published in May, there could be further delays based on the DOL's previous postponements. With May fast approaching, now is the time for employers to consider the new overtime rule if they haven't already.

The agency's new overtime rule could significantly affect organizations' operational and compliance costs and increase their litigation risks, so it's critical that employers understand the new rule and its potential impacts on their businesses. Employers can start preparing despite the chance of further delays; the rule change would alter existing laws and significantly impact employers and employees.

This article provides an overview of the current overtime rule, outlines potential changes the new rule could bring and details what employers can do now to prepare.

Overview of the FLSA's White Collar Minimum Wage and Overtime Pay Exemptions

Under the FLSA, covered employers must pay employees at least the federal minimum wage for all hours worked and overtime pay—at a rate of 1.5 times their regular pay rate—for all hours worked over 40 in a

work week. However, the FLSA provides several exemptions from minimum wage and overtime pay requirements. The most common are “white collar” exemptions. These exemptions mainly apply to EAPs, but they also include outside sales personnel and certain computer and highly compensated employees (HCEs).

To qualify for a white collar exemption, an employee must satisfy the following tests:

- **Salary basis test**—This test ensures the employee is paid a predetermined and fixed salary that is not subject to reduction due to variations in the quality or quantity of work.
- **Salary level test**—This test confirms that the employee meets a minimum specified amount to qualify for the exemption. The current salary threshold is \$684 per week (\$35,568 per year) for EAPs and \$107,432 per year for HCEs. The current salary threshold took effect on Jan. 1, 2020.
- **Duties test**—This test requires that the employee's job duties conform to EAP duties. To satisfy the duties test, an employee's actual work responsibilities must match the description the FLSA assigns to the exemption.



New FLSA Overtime Rule

The proposed overtime rule could provide clarity for classifying exempt employees and increasing their salary levels under the FLSA. Some experts believe the DOL may create automatic annual or periodic increases to exempt employees' salary levels by linking them to the consumer price index, allowing exempt employees' salary thresholds to adjust without formal rule-making.

If the new overtime rule expands the duties test to clarify employee classification, many employees who are currently considered exempt would likely no longer qualify as EAPs. As a result, employers would need to modify those employees' job duties for them to remain EAPs.

Additionally, increasing the salary threshold for exempt employees would force employers to decide whether to increase impacted employees' salaries to the new threshold or pay them an hourly wage and overtime for all hours worked over 40 in a workweek. The agency's regulatory agenda did not indicate what the new salary threshold would be, but many experts expected a significant increase—as much as \$10,000 to \$15,000. If this happens, more workers will likely qualify for overtime pay. However, significant changes to either the duties test or salary threshold will likely result in legal challenges to the DOL's new overtime rule, which could delay the implementation of any rule changes.

Preparing for the New Overtime Rule

While the timing of the new overtime rule is still uncertain, prudent employers can act now to start preparing for the anticipated changes to the FLSA's overtime rule. This includes determining whether to increase employees' salaries to maintain their exempt classification or reclassify exempt employees to nonexempt status and pay them overtime for all hours worked over 40 in a workweek, as well as auditing exempt employees' job duties.

Reviewing Employee Compensation

With the anticipated increase to the overtime exemption threshold, employers can review their employees' compensation to determine which of their employees may be impacted. After reviewing impacted employees' salaries, employers can prepare for any salary increases and how those increases could impact

the broader organization. If the overtime rule becomes final, employers can then decide whether to increase affected employees' salaries to the new threshold to remain exempt or convert them to nonexempt employees.

Auditing Exempt Employees' Job Duties

An employee's job title is not determinative of whether that employee is exempt under the FLSA. Therefore, to prepare for the new overtime rule, employers can audit their exempt employees' job duties to determine whether the duties and responsibilities those workers are actually performing satisfy the FLSA's duties test for the white collar exemptions. Employers can then update employee job descriptions and duties to accurately reflect the work those employees perform.

Many states and even some localities have their own overtime requirements that differ from the FLSA. To avoid potential violations and penalties, employers need to be familiar with all laws that apply to their organizations. Employers are encouraged to seek legal counsel to discuss any specific issues and concerns.

Employer Takeaways

If the DOL's new overtime rule becomes final, it will have a significant impact on most employers. Understanding the FLSA's new overtime rule and its potential impacts allows employers to prepare, adapt and set their organizations up for long-term success. Affected employers will want to follow the agency's rule-making process closely.

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