

Lawyer Insights

Preparing For Potential Changes To DOL's Overtime Rules

By Juan Enjamio and Daniel Butler
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Currently, the Fair Labor Standards Act sets the minimum salary for workers to be lawfully classified as exempt from overtime pay at \$684 per week. In addition, workers must perform certain duties to be considered eligible for an exemption.

It is an open question, however, whether the current salary threshold and duties tests will remain intact. The U.S. Department of Labor has stated that it intends to promulgate new rules governing the salary and duties tests that determine which workers are exempt from overtime.

Specifically, the agency indicated that it is reviewing the regulations at Title 29 of the Code of Federal Regulations, Section 541, which implement the exemption of bona fide executive, administrative and professional employees from the Fair Labor Standards Act's minimum wage and overtime requirements."¹

Should the DOL propose new rules, businesses will need to prepare for potential impacts to their payroll structure. Although it is probably too early in the regulatory process to implement changes now, it is a good idea for businesses to factor into future projections and plans the possibility that salary and duties modifications may be required.

This article will provide an overview of the current overtime exemption rules and the litigious background behind it, outline the range of possible rule changes that the Department of Labor is likely considering, and offer suggestions for employers.

Current Overtime Rule

The current salary minimum for overtime exemption is \$684 per week — \$35,568 annualized — which was amount finalized in 2019. Prior to that rule, the salary threshold was \$455 a week — \$23,660 annualized. That level had been in effect since 2004.

Of note, in 2016 during the Obama administration, the DOL promulgated a rule raising the threshold to \$913 per week, or \$47,476 per year. But that rule was struck down in August 2017 by a federal court shortly before its effective date.

The primary rationale behind the court's ruling was that the threshold raise was too high and therefore made the duties test effectively irrelevant, which undermined the statute's intention that employees in bona fide executive, professional or administrative capacities qualify for exemption.

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Two years and one presidential administration later, the department finalized the current threshold, \$684 per week or \$35,568 per year. Of note, neither the rescinded 2016 rule nor the current rule made any changes to the duties tests, which have remained the same since 2004.

Possible Rule Changes

Most observers expect that the DOL will raise the salary threshold. There is less consensus on whether the department will also alter the duties tests.

For the salary threshold, stakeholders have proposed a wide range of increases; Reps. Mark Takano, D-Calif., and Bobby Scott, D-Va., have pushed for a threshold as high as \$82,732 per year by 2026,² while others have proposed an increase to that previously proposed by the Obama administration — \$47,476 per year.

Also on the table is whether the department will propose automatic annual increases in line with an economic indicator such as the consumer price index.

There has been less analysis of the department's intention with regard to the duties test. Generally, Section 13(a)(1) of the FLSA states that employees can qualify as exempt from overtime if they are employed in bona fide executive, administrative or professional capacities.

The current tests for determining whether an employee's job fits into an executive, administrative or professional role have been unaltered since 2004. These tests generally focus on factors such as an employee's supervisory responsibilities, significance of decision making, ability to exercise discretion, educational background, and skill and experience required.

States generally follow the FLSA duties test for their own wage and hour laws, but a few states impose additional requirements.

For example, in California an employer can only apply the exemption to employees who are actually engaged in exempt-type tasks and duties more than 50% of the time.

The FLSA instead focuses on an employee's primary duty. It is possible that the DOL may try to codify this 50% rule, or similar state wage and hour laws, in the FLSA.

Delay in Proposing Rules

Interestingly, the DOL initially stated that it would propose new regulations in April and then in October of this year. Both projected deadlines have passed. There is no announced rationale for the delay, but many observers speculate that it might have to do with concerns about inflation.

The delay could also simply be a reflection of prioritization as the department released this past October proposed rules that seek to codify independent contractor classifications, another area of frequent litigation in wage and hour law.³

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Steps Employers Can Take Now

It is difficult to predict what the department will ultimately propose with regard to new overtime regulations. Regardless, there are a few steps that employers can take now to ensure that they are in a good position to react to the department's ultimate action.

First, employers should try to ascertain what positions may be affected by a raise in the minimum salary threshold. Companies can start this process by identifying all exempt positions that fall within a salary range of \$35,568 to \$47,476, the amount proposed by the department during the Obama administration approximately six years ago.

Although the department may choose a different threshold, this range of salaries would probably capture most employees that would be affected by the department's final proposal.

For positions that fall within that salary threshold, employers should consider whether they would prefer to reclassify those positions to nonexempt and track overtime hours, or raise the salary to comply with a new threshold. Although there is no current need to reclassify employees or raise salaries based on speculation, employers should begin thinking about these possibilities.

For any positions that may be affected by a salary threshold raise, employers should not evaluate each position in a vacuum but rather evaluate the position in the context of the entire workforce. Because application of the duties tests can often turn upon a position's role within an organization, any reclassification of one position may impact how a court analyzes the duties position for another role.

For example, if managers of a certain division of the company are reclassified to nonexempt, but equivalent managers in other divisions remain exempt because their divisions generate higher salaries, it may be more difficult to justify the exemption for the higher paid managers if the company classifies one group of managers as exempt and another as nonexempt, assuming the duties are consistent across divisions.

With regard to the duties tests, it is difficult to make predictions. It is, however, reasonable to assume that any proposed changes would be designed to increase, not decrease, the amount of workers who can receive overtime.

Thus, to the extent any current positions are misclassified as exempt or are at risk of being misclassified, employers should expect that any new rules will only magnify or expose those risks. Accordingly, companies should audit their current FLSA compliance to examine potential shortcomings.

Ultimately, the best action for employers to take now is to ensure compliance with the current FLSA rules and closely monitor developments with the DOL. Regardless of what the department decides to do, it will be much easier to comply with any future rule changes if the current workforce is free of any existing misclassifications.

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Notes

1. <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1235-AA39>.
2. <https://takano.house.gov/imo/media/doc/2021-03-25%20Takano%20Scott%20Adams%20Brown%20Overtime%20Letter%20to%20Walsh%20-%20FINAL%20with%20signatures.pdf>.
3. <https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>.

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