



New Changes on the Horizon for Overtime Pay Rules

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On March 7, 2019, the U.S. Department of Labor (DOL) announced a proposed rule that, if enacted, would make over a million more American workers eligible for overtime. Under current DOL regulations, any employees who earn a salary below \$455 per week (equivalent to \$23,660 annually) are deemed non-exempt and, as such, must be paid overtime (i.e. time and a half) when they work more than 40 hours in any workweek. This salary level was set in 2004. The proposed rule would increase this salary threshold to \$679 per week (equivalent to \$35,308 per year). Put another way, if the proposed rule is enacted, workers who now make between \$455 and \$679 per week who previously may have been classified as exempt, would be deemed non-exempt, irrespective of the duties of their positions, and must be paid overtime for all hours worked in excess of 40 per week.

As many employers will likely recall, there was another DOL overtime rule that was scheduled to take effect in December 2016 that would have increased the salary threshold to \$913 per week (\$47,476 per year). In November 2016, a federal judge in Texas enjoined that rule from taking effect and, as a result, employers have been operating under the 2004 salary levels. This new proposed rule is seen as a middle ground between the current 2004 rule and the 2016 proposed (and failed) rule.

The new proposed overtime rule also contains other changes to current regulations, including:

- Increasing the total annual compensation requirement for highly compensated employees (HCE) from the currently-enforced level of \$100,000 to \$147,414 per year.
- Allowing employers to use non-discretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level.
- A commitment by the DOL to review periodically the salary threshold to determine whether it needs to be modified. Any modification would require another notice-and-comment process. It would not be automatic.

Also notable about the proposed rule is what it does not change. Overtime protections for emergency personnel (i.e. police officers, fire fighters, and paramedics), nurses, laborers, and non-management employees in maintenance, construction and similar occupations will not be affected. Most importantly, the proposed rule will not change the "job duties test" for determining whether employees who make more than the threshold salary are exempt from overtime requirements.

This proposed rule is not law and has no legal effect...yet. Now that it has been promulgated by the DOL, the proposed rule is subject to a 60-day public comment period, during which the public may propose modifications of the rule or propose that it be rejected altogether. If you would like to submit a comment on the proposed rule, you can do so electronically at www.regulations.gov, in rulemaking docket RIN 1235-AA20. After the comment period closes, the DOL will issue a final rule, which will include the rule's effective date, i.e., the date that it will become enforceable.

But, now is a good time for employers to audit their employee overtime classifications and determine specific employees that would be affected by the rule if and when it goes into effect, focusing on those employees who earn between \$455 and \$679 per week. Employers should develop a plan for how they will either address pay increases for those employees (to bring them over the new salary threshold) or re-classify the affected employees from exempt to non-exempt and ensure that they receive appropriate overtime payments once the new rule goes into effect.

If you have any questions about the DOL's proposed rule, or what you should be doing in anticipation of its implementation, you should consult legal counsel.

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