

## **DOL Announces Much-Anticipated Proposal to Increase Minimum Salary for Executive, Administrative, and Professional Employees to at Least \$55,068 Per Year**

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On August 30, 2023, in one of the U.S. Department of Labor's most highly anticipated rulemakings of the year, the Wage and Hour Division announced the details of its forthcoming Notice of Proposed Rulemaking regarding the salary requirements of the Fair Labor Standards Act's overtime exemption for executive, administrative, and professional employees. In short, the Department has elected to go big, with the soon-to-be-published draft rule containing the following key elements:

1. Increasing the minimum salary for the basic executive, administrative, and professional exemptions from the current level of \$684 per week (\$35,568 per year), which went into effect in September 2019, to at least \$1,059 per week (\$55,068 per year), an increase of nearly 55%;
2. Increasing the minimum salary for the highly compensated variants of these same exemptions from the current level of \$107,432, also established in September 2019, to \$143,988 per year, an increase of more than 34%; and
3. Automatically updating these compensation thresholds every three years.

The Department estimates that the new proposed salary levels will render non-exempt 3.4 million individuals who are exempt today if their salary does not increase to satisfy the new \$55,068 threshold, and that approximately 200,000 individuals will cease to qualify for the highly qualified exemption.

The Department also makes clear in footnote 3 of its proposal that it based its numbers on salary data from calendar year 2022, and that it plans to update the basic salary level when it issues its Final Rule. The Department indicates that based on current data, the level it would use if issuing the Final Rule now would likely be in the range of \$57,616 to \$60,209 per year. Given the Department's method of calculating these figures, it appears that the more time that elapses between now and when the final Rule issues, the higher the ultimate figure will be.

This new proposal is very likely to face substantial legal challenges. First, by setting a salary threshold that excludes from exempt status 3.4 million individuals whose duties the Department assumes are exempt, the proposal arguably conflicts with the pertinent statutory text and exceeds the Department's regulatory authority. Historically, the Department has applied the salary threshold to

weed out individuals whose pay was so low that they are very unlikely to engage in exempt job duties, thereby avoiding unnecessary inquiries into job duties. This current proposal, however, fundamentally changes the nature and purpose of the salary threshold by excluding individuals who plainly do perform exempt work.

Second, the provision for automatic triennial updates to the salary levels without going through full notice-and-comment rulemaking each time arguably violates the Administrative Procedure Act by making substantive changes to the regulations without following the required procedures. That concern led the Obama Administration to eliminate a similar provision from its 2016 final rule on the same subject after proposing triennial updates in the initial proposed rule.

Third, the proposal invites a challenge to the statute's broad delegation of rulemaking authority to the Secretary of Labor to prescribe all of the standards for these exemptions under the non-delegation doctrine. The statute itself arguably provides little to no guidance to the Department with respect to defining these exemptions, which may amount to an unconstitutional delegation of legislative authority to the Executive Branch.

Finally, the proposal may face a challenge to the Secretary's authority to require a salary at all in light of the statute's reference to an employee's employment in a bona fide executive, administrative, or professional capacity. Justice Kavanaugh raised this concern during the October 2022 oral argument in *Helix Energy Solutions Group, Inc. v. Hewitt*, which may cause the lower courts to take this issue more seriously than courts have in the past.

We anticipate that the Department will formally publish the proposed rule in the Federal Register in the next few days, followed by a 60-day comment period, which the Department may well end up extending upon request. Stay tuned for further developments.

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