

Department of Labor Proposes Significant Increase in FLSA Exempt Salary Threshold

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On August 30, 2023, the US Department of Labor announced a Notice of Proposed Rulemaking, which would increase the white-collar exemption salary threshold for employees to qualify as exempt under the Fair Labor Standards Act (FLSA). The increase, from \$35,568 up to \$55,068, would result in the reclassification of approximately 3.4 million workers as non-exempt, making them eligible to receive overtime payments.

Under the FLSA, to be classified as exempt, employees must satisfy both a duties and salary basis requirement test. Employees who are classified as non-exempt under the FLSA are entitled to overtime pay in the amount of 1.5 times their regular rate of pay for hours worked over 40 in a week. White collar exemptions are available for certain executive, administrative, professional, outside sales, and certain computer professional employees who satisfy the salary basis test. The proposed increase to \$55,068 would set the salary threshold at the 35th percentile of weekly earnings of full-time salaried workers in the lowest wage census region (the South).

In 2016, under the Obama Administration, the DOL attempted to more than double the minimum threshold, from \$23,660 to \$47,476. The increase was overturned by a federal judge in Texas just 10 days before it was set to take effect, on the grounds that the DOL exceeded its authority by raising the threshold too high. The ruling also questioned whether the DOL had authority to set any threshold whatsoever. Effective January 1, 2020, the Trump Administration successfully raised the threshold to its current level of \$35,568.

The [Notice of Proposed Rulemaking](#) also increases the highly compensated employee exemption salary threshold to \$143,988 (from its current level of \$107,432) and provides a mechanism for the automatic updating of both the white collar and highly compensated salary thresholds every three years to reflect then-current earnings data. These automatic updates could be temporarily delayed in the event of unforeseen economic or other conditions.

The DOL will accept comments on the Notice of Proposed Rulemaking for a period of 60 days after its publication in the Federal Register. After the comment period, the DOL will publish a final rule, either in its current form or with revisions, which will include a formal effective date no earlier than 30

days after its publication in the Federal Register. As was the case under the Obama Administration, there are likely to be legal challenges, both concerning the amount of the increase and the DOL's authority.

Whether the final rule is passed in its current form or in a revised form following the public comment period, now is the time for employers to audit their workforce. For those employees currently classified as exempt who earn less than \$55,068, employers should consider whether they will reclassify these employees as non-exempt or raise salaries to satisfy the higher threshold.

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National Law Review, Volumess XIII, Number 244

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