



# USDOL Issues Proposed New Overtime Rule, Likely To Go Into Effect This Time

Insights

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You may recall several years ago when the United States Department of Labor (USDOL) issued revised regulations concerning the “white collar” exemptions to minimum wage and overtime under the Fair Labor Standards Act (FLSA) that were slated to go into effect on December 1, 2016. Among other things, those revisions significantly would have increased the minimum salary requirement for employees who qualify for the “executive,” “administrative,” or “professional” exemptions, from \$455 per week (which annualizes to \$23,660) to \$913 per week (which annualizes to \$47,476 per year).

You also may recall the business community challenged those regulations in the courts and, ultimately, a court prohibited the USDOL from enforcing them. Since that time, the USDOL went back to the drawing board and, on March 7, 2019, finally issued notice of a new proposed rule. The current proposal appears to represent a middle ground: most importantly, it would increase the minimum salary requirement to \$679 per week (which annualizes to \$35,308).

While the new proposed rule is not yet in effect, it is likely to go into effect in the not-so-distant future. What do dealerships need to know about this current proposal?

## **No Effect On Salesman, Partsman, Mechanic, Or Commission-Paid Exemptions**

As you know, the FLSA contains a number of overtime exemptions in addition to the white collar exemptions that may apply to dealership employees, including salesmen, partsmen, mechanics, and those who earn a majority of their compensation over a representative period in the form of commissions. Fortunately, the USDOL’s new rules have no impact whatsoever on these exemptions, and dealers can continue to rely on them as they have in the past.

## **The “White Collar” Exemptions**

To qualify for a white collar exemption, an employee must, in the first instance, satisfy its “duties” test. For example, to qualify for the “executive” exemption, the employee, in fact, must: (1) be primarily engaged in managing your dealership or a customarily-recognized department or subdivision thereof, (2) customarily and regularly direct the work of at least two full-time employees (or their equivalent), and (3) have the authority to hire or fire employees (or make recommendations on such issues afforded significant weight).

Similarly, to qualify for the “administrative” exemption, the employee’s primary duty must, in fact: (1) be the performance of office or non-manual work directly related to the management or general business operations of your dealership, and (2) include the exercise of discretion and independent judgment with respect to “matters of significance.” Fortunately, the USDOL’s new proposed regulations do not impact the white collar exemptions’ duties tests.

If an employee meets the duties test for a white collar exemption, to be exempt, they must also satisfy the “salary or guarantee basis” test; that is, they must be paid a guaranteed amount per week regardless of the number of hours they work (subject to very narrow exceptions beyond the scope of this article). Since 2004, the salary threshold has been \$455 per week. As noted above, the new rules will increase that to \$679 per week.

### **Miscellaneous Other Changes**

In addition to increasing the white collar salary threshold to \$679, the new rules also will (1) provide that employers may attribute nondiscretionary bonuses, commissions, or other incentive payments to satisfy 10 percent of the salary threshold amount; (2) increase the total annual compensation required to qualify for the “highly compensated employee” exemption from \$100,000 to \$147,414; and (3) indicate a commitment by the USDOL to review (and increase) the salary threshold periodically.

### **What Does All This Mean And What Should You Do?**

In the (likely) event this rule ultimately goes into effect, employees currently exempt as “executives,” “administrators,” or “professionals”—generally speaking, your managers and higher-level office employees—earning less than the \$679 per week salary/guarantee (or \$611.10 plus at least \$67.90 in incentive compensation) threshold no longer will be exempt from overtime pay. They will be entitled to one-and-a-half times their regular rate of pay for all hours worked over 40 each week. To maintain the exempt status of any such employees, you will need to increase their salary/guarantee accordingly.

In light of the USDOL’s announcement, you should consider reviewing your white collar employees’ pay plans to determine what, if any, changes you will need to make to ensure compliance if and when this new rule goes into effect. Focus particular attention on your managers to ensure you are in position to pay them a sufficient salary (separate and apart from commissions, which largely don’t count in this analysis). Failure to comply with the FLSA can result in significant time spent defending against class action lawsuits, hefty judgments, and sizeable attorneys’ fees and costs.

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