# Planning for 2023: Consider Reviewing Employee Salaries Before the Labor Department Issues a New Overtime Rule

Insights
11.10.22

As you plan your 2023 budgets, you may want to account for a potential increase in the exempt salary threshold under an anticipated new federal overtime rule. The Department of Labor (DOL) initially aimed to release the proposal in April and delayed it again to October — but as of today, the rule is still pending. Perhaps the rule has been delayed due to concerns about inflation and how the change would impact small and midsize businesses, or perhaps the administrative process is just taking longer than the agency originally anticipated. But now that the midterm elections are over, we expect the DOL to move swiftly to update the overtime regulations. The proposal will likely include a substantial hike in the exempt salary threshold for white collar employees and could potentially include other changes. What do you need to know about the pending rule? And how can you prepare for the impact it will have on your business?

**Refresher on the Rules**

Before we talk about the potential changes coming down the pike, let's discuss the current rules and how we got here. Under the federal Fair Labor Standards Act (FLSA), employees generally must be paid an overtime premium of 1.5 times their regular rate of pay for all hours worked beyond 40 in a workweek. To be exempt from the overtime pay requirement, employees must meet the following three criteria for the administrative, executive, and professional exemptions (which are collectively known as the white-collar exemptions):

1. Be paid on a salary basis;
2. Be paid at least the designated minimum weekly salary; and
3. Perform certain duties.

Currently, the salary threshold for exempt employees is $684 a week ($35,568 annualized), but we expect the DOL's pending proposal to raise the rate to somewhere around $900-$1,000 a week (which works out to be $46,800 to $52,000 when annualized). That's a pretty big jump that will require some planning if you have exempt employees who earn less than the anticipated proposal.

**Controversial Proposal**

Why do we expect such a large raise to the rate? Before we answer this, you have to keep in mind this administration's goal: it wants to make more employees eligible for overtime. An easy way to do that is to raise the minimum weekly salary.

The current rate — which took effect on January 1, 2020 — represented the first change to the threshold in a decade. However, the final increase was much lower than the Obama administration's proposed rate of $913 a week, which was ultimately blocked by a court ruling which said the rate was too high and the DOL exceeded its authority. Thereafter, the Trump administration raised the rate less substantially from $455 to the current $684 a week.

Notably, DOL officials under the Biden administration have made clear that they don't think the current threshold is high enough. Additionally, worker advocacy groups have called on the DOL to raise the threshold "substantially higher than what was proposed during the Obama administration." Again, they want more people to be eligible for overtime.

Many business groups, however, oppose another increase to the salary threshold. For example, the U.S. Chamber of Commerce has said that many exempt employees did not want to be reclassified to non-exempt under the Obama administration's rule. "Surveys showed that many previously exempt employees valued the flexible hours and work schedules that exempt status provided," the Chamber told Congress. "Furthermore, because the rule applied to all employers, some charitable non-profits could not afford to keep employees working the same hours and would have been forced to reduce the services they provide," it said.

But there's more. The DOL's pending proposal might include additional changes, such as:

- Adjustments to the exempt duties tests;
- Automatic, periodic increases to the salary threshold based on market data; and/or
- An additional rate increase for highly compensated employees. Currently, "highly compensated employees" who earn at least $107,432 are subject to a reduced duties test.

Although we don't know the details of the proposal just yet, we expect officials to move quickly through the notice and comment period once the proposed rule is published — making it essential for you to plan for possible changes in 2023.

"The Wage and Hour Division is still developing a proposal updating overtime regulations under the Fair Labor Standards Act," a DOL spokesperson recently told HR Dive. "The division held multiple stakeholder listening sessions in 2022, and DOL continues working toward this proposal."

**How Can You Prepare?**

Now is a good time to review your employee compensation data to determine which exempt employees earn between $684 and $1,000 a week and may be impacted. Once the rate is announced, you will need to decide whether to increase affected employees' salary to the new level or convert them from exempt to non-exempt.

Many employers learned when the salary threshold was increased last time that making these changes is not as simple as it may appear. For example, if you convert employees from salaried exempt to hourly, what rate will you use? Do you divide by 2080 hours? If so, and the employee works overtime, you may now be paying the employee more for the same work. But if you use a lower rate because you assume overtime will get them up to their previous salary level, the employee may feel like the lower rate equates to a demotion.

And don't forget about bonus and incentive plans. If you raise an employee's pay to maintain the exempt status, are you willing to keep them in the same bonus program? Many employers found they needed to re-think their entire compensation program as a result of these changes. In short, you need to plan ahead.

You should also keep the following compliance tips in mind when reviewing exempt and non-exempt status under the FLSA:

- **Non-Exempt employees aren't necessarily paid hourly.** You might assume that "salaried" means "exempt" and "hourly" means "non-exempt," but that's not necessarily the case. Although exempt employees under the white-collar exemptions must be paid on a "salary basis," there are many ways to compensate non-exempt employees and remain in compliance with the FLSA, as long as the employee receives (1) the minimum wage for all hours worked and (2) the overtime premium, which is due on almost all wages.
- **State laws may have different requirements.** It is important to remember that the FLSA sets the floor and other jurisdictions can have higher, stricter, or different wage-hour requirements. For example, some states have a higher salary threshold for exempt status than the FLSA. Others might have different duties tests and other exemptions or exceptions.
- **Job duties matter.** Simply paying employees the salary threshold isn't enough to determine whether they are properly classified as exempt, nor is having the word "manager" in their job title. They also must perform certain duties, and the tests under the executive, and administrative, and professional exemptions slightly differ from each other. So, as you evaluate your employees' salary data, you should also use this as an opportunity to do a self-audit reviewing and updating job descriptions to ensure they accurately reflect the duties employees perform and that they are still properly classified as exempt.

**Conclusion**

We will monitor developments from the DOL's Wage and Hour Division, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Wage and Hour Practice Group.

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