Congress Mulls Bill to Raise Exempt Salary Threshold as DOL Finalizes New Overtime Rule Proposal: What Do Employers Need to Know?

Insights
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Lawmakers recently introduced a bill that would immediately raise the exempt salary threshold for so-called "white-collar" workers to $45,000 a year. The proposed legislation would then apply a series of annual hikes through 2026 followed by automatic increases based on estimated Bureau of Labor Statistics data — which could exceed $80,000 by 2027. The news comes as employers prepare for a long-awaited proposal from the U.S. Department of Labor (DOL) that would also raise the salary threshold – but the details of that proposal have not yet been made public. What are the chances of either proposal being approved? Given the polarized political climate in Congress, we don't expect lawmakers to pass the Restoring Overtime Pay Act. We do, however, expect the DOL to issue its proposed rule as soon as next month, according to its current regulatory agenda, and move swiftly to finalize the rule. What do you need to know about the pending proposals and how might they impact your workforce?

What New Threshold Do We Expect?

The proposal pending in Congress – the Restoring Overtime Pay Act – would drastically increase the exempt salary threshold over the next few years and allow for automatic increases in future years. But it's not likely to gain traction in Congress, where Republicans control the House and the margin in the Senate remains razor thin. Instead, we're more likely to see the DOL propose and finalize a new rule, as discussed below.

But first, let's take a step back and review the current requirements under the federal Fair Labor Standards Act (FLSA). As you likely know, the FLSA generally requires businesses to pay employees an overtime premium of 1.5 times their regular rate of pay for all hours worked beyond 40 in a workweek. The following three criteria must be met for employees to be exempt from the overtime pay requirement under the administrative, executive, and professional exemptions (which are collectively known as the white-collar exemptions). They must:

- Be paid on a salary basis;
- Be paid at least the designated minimum weekly salary; and
- 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. Moreover, the proposal could include automatic, periodic increases to the salary threshold based on market data, which would cause the rate to go up even more substantially in future years.

The Heated Debate Continues

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, making approximately 1.3 million workers eligible for overtime pay.

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.

Beyond the Salary Threshold

But wait! There's more. Although the DOL's Statement of Regulatory Priorities only mentions the salary level test, the agency might push for additional changes, such as:

- Adjustments to the exempt duties tests; 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.

These potential changes would create additional steps for employers when it comes to reviewing their employees' job duties and making determinations on whether they are still exempt from overtime pay. We'll have to wait and see the details when the proposed rule is published.

When exactly will the DOL announce its proposal? According to the latest regulatory agenda, the department expects to issue the proposed rule in May – but you should note that the proposal has already been delayed several times.

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 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.

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?

These are just some of the issues you'll need to consider. After the last increase to the salary threshold, many employers found they needed to re-think their entire compensation program as a result of the changes.

In short, you need to plan ahead. Even if the final rule faces legal challenges — which is very likely based on the opposition we've seen to prior rules — you'll need to be prepared to comply in case the rule is ultimately upheld.

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, including pay on a salary basis, 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. And you should keep in mind that the DOL might seek to adjust those duties in its proposal.

Conclusion

We will monitor developments from Congress and 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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