Labor Department's Proposed Overtime Rule Could Raise Salary Floor to $55k: Here Are 8 Ways Employers Can Prepare Now

Insights
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Employers may need to adjust their pay practices now that the Labor Department has issued its long-anticipated proposal to raise the salary threshold for exempt employees – a change that could make more of your employees eligible for overtime premiums. The U.S. Department of Labor (DOL) announced today that it intends to significantly raise the exempt salary threshold from $684 per week to $1,059, meaning employees would need to earn $55,068 or more per year to be exempt from OT pay – a change the agency says would impact 3.6 million workers. Although it's just a proposal at this point, we expect the DOL to prioritize this rule and move swiftly through the notice and comment period. In the meantime, you should start preparing for what could be big changes to your compensation plans. What are the top eight considerations you should make as you prepare for a final rule?

Overview of New Rule

Before we discuss the eight steps you should consider taking to prepare for the rule, it's important to understand the process at play. The proposal just released by the DOL isn't yet law, and it will face a few hurdles before it takes effect. When a regulation such as this is introduced by a federal agency, the next step is a notice-and-comment period during which interested parties can review the proposal and provide their input about suggested changes. In this case, the comment period will be open for 60 days upon publication in the Federal Register, but we wouldn't be surprised to see this extended once or twice given the expected volume of comments the agency should receive.

Once the comment period closes, the agency is required to take each comment into account and then determine whether to adjust the proposed rule before it becomes final. This course could take several months, although we expect the DOL to fast track the process given the importance of this rule. The agency will then issue a final rule taking the comments into account, and it will then take effect within a few weeks of the final proposal being issued. If all goes to plan, the new rule could become the law of the land in 2024.

However, we expect to see business groups or states opposing the proposal to file litigation in business-friendly jurisdictions like Texas or Florida in an attempt to sidetrack or derail the rule completely. This is exactly what happened in 2016 when the Obama administration attempted to raise the salary level to over $900 per week. A federal court judge in Texas blocked the rule from taking effect just days before the hike was set to take effect. The DOL stopped pursuing the rule at that time due to a change in presidential administration.

Those seeking to oppose the new rule will now be able to rely on Justice Kavanaugh's recent dissent in the *Helix Energy* case, which argued that the DOL does not have statutory authority to issue a salary-basis or salary-level test.

But you can't count on this happening again given the uncertain nature of litigation. ***Therefore, you need to prepare as if it the proposal will take effect in the near future.*** And speaking of preparations, here are the eight considerations you should take into account to get ready.

1. Review Your Pay Practices and Prepare for Compliance

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 — unless they fall under an exemption.

In recent years, the DOL's new rules that change the exempt salary threshold have become known as "federal overtime rules" — but you should note that they do not actually change current overtime laws or implement new ones. Rather, the DOL's objective is to increase the number of employees eligible for overtime. To accomplish this, the revised regulations primarily serve as an increase in the minimum salary that an employee must receive to be eligible for the administrative, executive, or professional exemptions — collectively known as the "white-collar" exemptions. To qualify for these exemptions, employees must meet three criteria:

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). The DOL's new proposal, if finalized in its current form, would raise the rate to $1,059 a week ($55,068 annualized). That's a pretty big jump that will require some planning if you have exempt employees who earn less than the proposed amount.

In addition to the new salary threshold, the proposed rule would make the following changes:

- Automatically update the salary threshold every three years.
- Raise the threshold for the "highly compensated employee" exemption to $143,988 (from the current threshold of $107,432).
- Apply salary thresholds in U.S. territories that are subject to federal minimum wage with some exceptions for American Samoa.

2. Work Through Your Decision Tree

How can you best prepare for the pending changes? It's a good idea to start by creating a list of your exempt employees who currently earn between $35,568 and $55,068 a year. When the rule is finalized, you will have to decide whether to raise their salary to meet the new threshold or convert them to non-exempt status. Additionally, you may want to start tracking their actual hours worked now to help you understand the potential impact of converting to non-exempt status and to make an informed decision when the time comes.

If you decide to reclassify your employees to non-exempt status, there are many considerations you'll have to work through, including the following:

- **How Much to Pay.** Will you divide the employee's weekly salary by 40 hours to determine their hourly rate, or will you factor in the employee's estimated overtime and adjust accordingly?
- **Regular Rate Calculations.** Overtime premiums are based on the employee's "regular rate of pay." Employers are sometimes surprised to learn the regular rate is not simply an employee's hourly rate of pay or their take-home pay. The regular rate is based on "all remuneration" earned from employment with the exception of eight specific exclusions contained in section 7(e) of the FLSA.
- **Incentive and Bonus Pay.** The regular rate includes all types of compensation – including things like non-discretionary bonuses, commissions, payments for undesirable shifts or duties, and some non-cash payments depending on the circumstances. Keep in mind that most bonuses are not discretionary and must be included in the regular rate. It is common for employers to pay out bonuses based on a formula announced ahead of time and designed to incentivize certain behavior. Such bonuses are not discretionary. You can read more about the regular rate here.
- **How to Track Those Employees' Work Time.** Employers are required to make and keep records of non-exempt employees' working time. Before converting employees to non-exempt status, it may require some planning, reconfiguration of workflow, and implementation of new processes or technology to ensure that you are accurately recording their work time. It is best practice to think about these questions in advance and explore multiple potential recordkeeping processes to determine which options meet your needs and are cost-effective.
- **How Benefits Will Be Affected:** Do you have different vacation, sick leave, and other policies for exempt and non-exempt employees? You will have to consider how to transition reclassified employees to new programs and train workers and their supervisors on new procedures.

Before converting an employee to non-exempt status, you may also want to see if they qualify for another exemption, such as the computer employee exemption or the outside sales exemption.

3. Consider the Impact on Employee Morale

For many employers, it may not be possible to simply raise every affected employee's salary to the new threshold. But reclassifying employees to non-exempt could have a negative impact on morale.

Many employees associate prestige with being classified as an exempt-salaried employee, especially since the white-collar exemptions require a certain level of supervisory responsibility or discretion and independent judgment. Oftentimes, exempt employees like the flexibility that comes with being salaried, and they don't want to track and record their hours worked. Managers who will now have to clock in and out with their direct reports may be particularly sensitive to this change.

Therefore, even if their pay remains the same, employees may view a switch to non-exempt status as a demotion. So, you will need to weigh the impact on morale when making the decision to convert employees. Proactively communicate and be prepared to answer questions about why you decided on this route rather than increasing pay. It may be helpful to review and summarize market studies on salary data so you have facts to back up your decision.

Remind employees that they are valued and let them know you are required to make changes in light of the federal government's new wage and hour rules. The DOL has made clear that the goal is to make more people eligible for overtime pay — which means more workers will likely need to be converted to non-exempt — and you can explain to employees that your decisions are meant to keep your business compliant with the latest regulations.

4. Plan to Provide Advance Notice of Changes

In addition to developing communications focused on employee relations and morale, you'll want to prove a written communication to each employee about the specific changes to their compensation and what new responsibilities come with the changes, such as timekeeping, meal and rest breaks, and other requirements.

Note that some states require advance notice of wage changes, so you should check your local requirements. Regardless of the state law, however, you should clearly communicate the new terms of employment before they take effect.

5. Review Your Policies on Company Equipment and Personal Devices

Do you have different policies for exempt and non-exempt employees when it comes to issuing company equipment and using personal devices? Exempt employees may have more leeway to use company laptops or their own personal devices – such as smartphones – to conduct business while traveling or outside of their regular office hours. Perhaps you limit such use for non-exempt employees so they aren't tempted to perform off-the-clock work. In that case, you'll need to apply your policies consistently and advise reclassified employees about their new responsibilities.

Regardless of whether you allow non-exempt employees to work remotely or use portable devices, be sure your policies are clear about acceptable work hours, proper timekeeping procedures, and capturing all hours worked.

6. Develop a Training Plan for Managers and Newly Non-Exempt Employees

We highly recommend that you provide detailed training to newly reclassified employees and their managers prior to the changes taking effect. There's a lot to learn. The specifics may vary from business to business, but here are a few examples of what you'll want to cover:

- scheduled hours;
- overtime approval policies;
- timekeeping procedures;
- recordkeeping requirements;
- rules about meal and rest breaks;
- policies on using personal devices for work; and
- prohibition on off-the-clock work.

7. Ensure Exempt Employees Meet the Duties Test

As with all exemptions, neither the job title nor the job description alone determines whether an employee qualifies for a white-collar (or any other) exemption. Instead, to be eligible for an exemption, the employee's primary job duties must meet both state and federal wage and hour law requirements.

You should note that the duties test varies depending on the exemption. Here is a summary of the basic requirements under federal law for the white-collar exemptions. Of course, the salary basis test must be met before any of these exemptions can be relied upon.

Executive Exemption:

- The employee's primary duty must be to manage the enterprise or customarily recognized department/subdivision;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire employees, or the employee's suggestions and recommendations as to hiring, firing, or any other change of status must be given particular weight.

Administrative Exemption:

- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers; and
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption:

- The employee’s primary duty must be the performance of work requiring advanced knowledge, predominantly intellectual in character and which requires the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science of learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

8. Review Applicable State Laws

It is important to remember that other jurisdictions can have higher, stricter, or different wage and hour requirements. For example, some states have a higher salary threshold for the white-collar exemptions than the FLSA’s $684 per week. Others might have different exemptions or exceptions, including that not all have the salary exception related to the practice of medicine.

Of course, some jurisdictions also have higher minimum wage rates and/or additional overtime-type requirements.

Finally, while the FLSA regulates little in the way of actual wage payments, deductions, and notification of pay terms, many states have detailed requirements and might even have different provisions for non-exempt versus exempt employees.

Conclusion

We will continue to 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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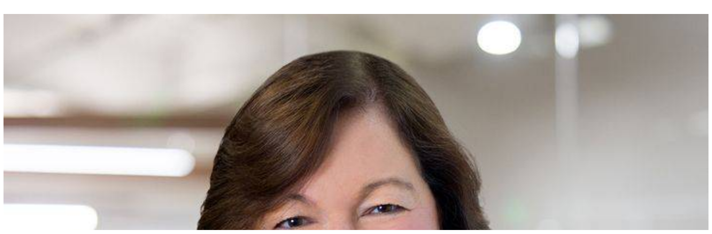

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