

NEW FEDERAL OVERTIME RULE IS HERE! 10 STEPS EMPLOYERS CAN TAKE NOW TO PREPARE FOR \$59K SALARY FLOOR

Insights
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Millions of additional workers will soon be eligible for overtime pay thanks to the Labor Department's new salary threshold for certain exempt employees – which raises the rate higher than initially anticipated. Employers will need to act quickly to ensure their pay practices align with this significant change. Specifically, the U.S. Department of Labor (DOL) announced today that the salary threshold for the so-called “white-collar” exemptions will rise from \$35K to about \$44K on July 1 and will jump to nearly \$59k at the start of 2025 – which means your workers will need to earn at least this new threshold to even be considered exempt from OT pay under the white-collar exemptions. The Department says this change will impact about 4 million workers, and it could prompt big changes to your compensation plans. While we expect to see legal challenges, you can't count on a court halting the rule before the effective dates, so you should start planning right away. What are your top 10 considerations ahead of the effective date?

First a Quick Refresher

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 changing the exempt salary threshold have become known as “federal overtime rules” — but you should note that they do not actually

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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 DOL has revised regulations to raise the minimum salary that an employee must receive to be eligible for a white-collar exemption.

Employers don't have much time to prepare for the new increases that will take effect in two phases – the first phase on July 1 and the second phase on January 1, 2025. While the first phase appears to help employers by temporarily using a lower salary threshold, this is likely to complicate your planning – so you'll want to start preparing immediately. Read on for the 10 key steps you can take now.

1. Get Ready for Big Changes

Currently, the salary threshold for exempt employees is \$684 a week (\$35,568 annualized) under the administrative, executive, and professional exemptions — which are collectively known as the “white-collar” exemptions. The DOL's new rule raises the rate first to \$844 a week (\$43,888 annualized), then to \$1,128 (or \$58,656 a year). These significant increases will require some planning if you have exempt employees who earn less than the finalized amounts.

In addition to raising the salary threshold, the rule makes the following key changes:

- The salary threshold will be **automatically updated** every three years starting on July 1, 2027.
- The threshold for the “**highly compensated employee**” (**HCE**) **exemption** will rise, first to \$132,964 on July 1, then to \$151,164 on January 1, 2025 – which is also a bigger increase than initially proposed and is a significant increase from the current \$107,432. The HCE threshold will also be updated every three years.

2. Review Your Pay Practices for Compliance

Don't forget that the white-collar exemptions have more requirements than just the salary threshold. To qualify for these exemptions, employees must meet three criteria:

- Be paid on a salary basis;

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- Be paid at least the designated minimum weekly salary;
and
- Perform certain duties.

Now is a good time to review your exempt jobs for compliance with all criteria – not just the salary threshold. We discuss the duties requirements more below.

3. 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 \$58,656 a year. You will have to quickly decide whether to raise their salary to meet the new threshold or convert them to non-exempt status. Additionally, you may want to track or otherwise evaluate their actual hours worked to help you understand the potential impact of converting to non-exempt status and to make an informed decision before the effective date.

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 Non-Exempt 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 outside sales exemption – that does not require a minimum salary threshold.

4. 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. 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 total 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.

5. Plan to Provide Advance Notice of Changes

In addition to developing communications focused on employee relations and morale, you'll want to provide 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.

6. 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.

7. 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.

8. 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.

9. 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 new \$844 per week (July 1, 2024) and \$1,128 per week (January 1, 2025). Others might have different exemptions or exceptions, including some that do not have salary thresholds. 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.

10. Stay Updated on Legal Challenges

We expect to see business groups or states opposing the final rule 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 likely argue that the DOL does not have statutory authority to issue a salary requirement at all – and to support their argument, they may point to Justice Kavanaugh’s dissent in last year’s [Helix Energy case](#), where he questioned whether the regulations requiring a salary basis and salary level were consistent with the FLSA.

But you can’t count on the rule being halted given the uncertain nature of litigation. Therefore, you need to prepare as if the final rule will take effect as planned.

[Ed. Note: A federal district court in Texas issued a ruling on June 28 that temporarily halts the new federal overtime rule only as it applies to the State of Texas as an employer. [Read more about that very limited ruling here.](#)]

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](#).