



USDOL Releases Proposed Overtime Rule 2.0

Insights

3.08.19

We have waited years to see where the U.S. Department of Labor would land with its much anticipated revised “overtime rule”—late yesterday, the agency delivered. The USDOL released its long-awaited proposed rule which, if adopted, would set the minimum salary threshold at \$679 per week, annualizing to \$35,308 per year. For now, the proposed rule does not include an automatic update provision (which many were concerned would simply serve to periodically inflate the threshold level), nor does it revise the duties test that accompanies the rule.

Once published in the Federal Register, the public will have 60 days to submit comments regarding, among other things, the proposed minimum salary threshold. What do you need to know about this breaking news?

[Ed. Note: The USDOL published the proposed rule on March 22, which means that the public comment period will run through May 21, 2019. Read more [here](#).]

Executive Summary: Proposed Rule In A Nutshell

- The proposed minimum salary threshold would be raised from \$455 to \$679 per week (\$35,308 per year, annualized).
- The proposed rule provides for one threshold regardless of exemption, industry, or locality, subject to a few exceptions that already exist.
- The additional total annual compensation requirement for the highly compensated employee exemption has a proposed entry level of \$147,414 per year.
- No changes were proposed to the duties tests for the exemptions.
- No “automatic” updates were proposed.
- The unnecessary 90/10 approach with respect to certain non-discretionary pay has been teed up again.

Brief History Of Overtime Rule Saga

It seems like an eternity ago, but in May 2016, the USDOL (then a part of the Obama administration) released finalized rules that were designed to radically alter the federal compensation rules. The biggest changes in store for employers: the minimum salary threshold would be increasing to \$913 per week (which would have annualized to \$47,476, more than double the existing \$23,660 annual threshold), and the amount would be “updated” every three years (meaning that it will likely

increase with each “update”). The new minimum threshold was set to become effective on December 1, 2016, and the “updating” would begin on January 1, 2020.

But in a dramatic last-minute development, a federal judge in Texas blocked the overtime rule from taking effect just days before the December 1, 2016 implementation date, handing an eleventh-hour victory to employers across the country. Agreeing with arguments posed by concerned states and business groups, the judge issued a preliminary injunction preventing the rules from being implemented on a nationwide basis.

After Donald Trump was inaugurated and Alexander Acosta installed as head of the USDOL, the new USDOL leadership indicated that it would no longer advocate for the \$913 per week proposal but would instead undertake further rulemaking to determine what the salary level should be. After the Texas court put the final nail in Overtime Rule 1.0’s coffin in August 2017 by striking down the rule once and for all, employers have been patiently awaiting a revised rule.

Will This Proposal Be The End Of The Story?

It depends. The new proposal skirts some of the more problematic areas. The \$679 per week threshold is in the ballpark of what everyone has been expected—and sounds a lot better to employers than \$913. And while the proposal contains some of the same flaws as Overtime Rule 1.0, they generally are not the same kinds of concerns raised in lawsuits attacking the first proposal (at least with respect to private employers). And although several legal analysts have stated they expect litigation based on the lower figure, the basis for such anticipated litigation is unclear given that (1) the salary alone does not make someone exempt and (2) if a salary-basis requirement exists, it should be low enough (possibly lower) to prevent its overshadowing the duties tests.

Keeping Things In Perspective: This Is A Notice Of *Proposed* Rulemaking

If we’ve learned anything from the saga that accompanied the release and subsequent controversy over Overtime Rule 1.0, it’s that this is a process. Many twists and turns might occur before this proposed rule is finalized. Do not run out tomorrow and make changes to your compensation structure based on what is simply a *proposal*. Instead, use this time to start evaluating what 2020 might look like for your compensation system if the USDOL’s proposal comes to fruition in its current form.

You’ve Been Through This Before

Some employers conservatively made changes in 2016 in anticipation of the \$913 per week threshold. If you fall in this camp, you are certainly ahead of the curve—especially because the final rule could set a minimum threshold higher than \$679 per week. Many other employers still have a leg up in that they undertook detailed analyses of their exempt-classified employees in 2016. If you did so, not only can you just tweak their review strategy, in many cases you will simply be confirming your prior findings when adopting the finalized changes.

Assume The Final Rule Will Come Sooner Rather Than Later

As recounted above, Overtime Rule 1.0 was a painfully long process for employers as they waited to see whether the final rule would be significantly different from the proposal in some way. Thankfully, there appears to be no hint of duties-changes being on the table with Overtime Rule 2.0. Moreover, although the USDOL will likely analyze the salary threshold on a more frequent basis going forward, we do not expect some form of the troublesome automatic “updates” to pop up in the final rule.

These distinctions should narrow the scope of the comments submitted by the general public, which should make the review period easier than previous efforts. Moreover, the USDOL should not need as much time to review the comments because they should be fairly similar to those filed in [2015](#), [2017](#), and shared in [2018](#) by Fisher Phillips and numerous others. And while some employers and other concerned entities might want more time to react to this latest proposal, the sooner we get the final rule, the less muddled any opposing efforts (such as last-minute [legislative](#) attempts or [lawsuits](#)) should be—especially in today’s contentious political atmosphere.

The Bottom Line

While the proposed changes are just about what most have expected, thankfully the USDOL has had the sense to recognize that one threshold is sufficient to address its goals. The movement away from the improper “[automatic](#)” updates approach in Overtime Rule 2.0 is a welcome development. Nonetheless, employers in certain localities or industries might contemplate [submitting comments](#) regarding the proposal, and you should coordinate with your Fisher Phillips attorney if you want to take this path.

We will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips’ alert system](#) to gather the most up-to-date information, and follow our [Wage And Hour Blog](#) to see our latest commentary.

This Legal Alert provides an overview of a specific federal proposed rule. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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