

BREAKING: USDOL RELEASES OVERTIME RULE 2.0 FOR 2020

Insights

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The suspense is over – the Department of Labor **just this morning announced** the revised Overtime Rule, which will set the minimum salary threshold for the Fair Labor Standard Act’s white-collar exemptions at \$684 per week, or \$35,568 per year. The rule, which will expand overtime pay obligations to an estimated 1.3 million additional workers, will take effect on January 1, 2020. What do you need to know about this breaking news?

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EXECUTIVE SUMMARY: PROPOSED RULE IN A NUTSHELL

- The minimum salary threshold will be \$684 per week, annualized to \$35,568 per year.
- The rule provides for one threshold regardless of exemption, industry, or locality, subject to a few exceptions that already existed.
- Employers will be able to credit certain non-discretionary payments in limited ways.
- The highly compensated employee exemption’s additional total annual compensation requirement will be set at \$107,432 per year.
- No changes will be made to the duties tests – the crux of the relevant exemptions.

- The changes are limited to the executive, administrative, professional, and highly compensated employee exemptions.
- No change has been made to the various other exemptions (for example, outside sales) that do not specifically include a salary requirement even if the employee happens to earn a salary.
- There will be no “automatic” updates, or even a formal schedule of future adjustments to these figures.
- However, you can expect that the salary threshold will be assessed more frequently than it has been in the past, but hopefully not so often that it essentially drives the market.

A BRIEF HISTORY OF THE OVERTIME RULE SAGA

It seems an eternity ago when President Obama directed the U.S. Department of Labor (USDOL) to revise the regulations governing the outdated white-collar exemptions of the Fair Labor Standards Act (FLSA). The proposal eventually released by the USDOL would have radically altered the federal compensation rules. Most notably, the agency would have more than doubled the salary threshold and applied, essentially, a formula to update the amount every three years. This minimum threshold was set to become effective on December 1, 2016, and the “updating” would begin, ironically, on January 1, 2020.

But concerned states and business groups sought to block the rule from taking effect, and, at the last minute, a federal court issued a preliminary injunction preventing the rule from being implemented on a nationwide basis. Since the Texas court put the final nail in Overtime Rule 1.0’s coffin by striking down the rule once and for all in August 2017, employers have been patiently awaiting a revised rule.

Under the current administration, 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. In what seemed like a painstakingly long process, the agency held public forums, issued a request for information, and **sought comments on a proposed rule** that, like Overtime Rule 1.0, focused solely on the pay component but without completely overshadowing the duties tests. After all, the FLSA authorizes the agency to define and delimit the executive, administrative, and professional exemptions – not supplant them. Today, finally, all of the work culminated in the release of Overtime Rule 2.0.

WILL THIS RULE SURVIVE?

After the drama surrounding the last-minute injunction blocking the 2016 proposal, it would be natural for employers to feel gun-shy about adjusting to these changes. After all, isn't there a chance that another court will once again block these changes and put us in yet another state of limbo? While there is always a chance for litigation to unfold in such a way that it would impact the implementation of this rule, there are several reasons why you should be preparing as if this rule will go into effect as planned on January 1, 2020.

First, while there is no magic number for setting the salary threshold (that's the whole point), there is something to be said for certainty. The new rule skirts some of the more problematic areas that existed with the first attempt at revisions. The \$684 per week threshold will require the reclassification (or pay increases) of some employees, but a far less significant portion than would have seen increases had the \$913-per-week proposal of three years ago was adopted.

Second, while the rule contains some of the **same flaws** as Overtime Rule 1.0, they generally are not the kinds of concerns that were previously raised in lawsuits. Employer advocates will have more difficulty taking the position that this particular threshold eclipses the duties tests. Likewise, while employee

advocates might feel that the threshold is set at too low a level, meeting the pay component does not make someone exempt in and of itself, so this argument is more philosophic in nature and may not warrant the rule being blocked.

Finally, the USDOL must be well prepared at this point to defend the rule. Even aside from the litigation, it has received voluminous public feedback on an increase from \$455 per week numerous times, including those shared in [2015](#), [2017](#), and [2018](#). So, while litigation seems inevitable, employers should not be idle in preparing for this rule to take effect.

AVOIDING THE LAST-MINUTE PANIC

As recounted above, the drama surrounding Overtime Rule 1.0 was a painfully long process for employers as they waited to see what might happen. The best practice, though, is to assume Overtime Rule 2.0 is the real thing. That said, you should not run out tomorrow and make immediate changes to your compensation structure. Instead, you should use this time to start evaluating not just whether changes will be necessary, but how best to make those changes (timing, communications, etc.).

If you made changes in 2016 in anticipation of the \$913 per week threshold, you are certainly ahead of the curve. If you did some of the work but decided to wait to implement once the preliminary injunction was put in place, you also have a great head start. Nonetheless, in both cases, you must keep in mind that three years have passed and it is possible that an employee's *work* has changed in the interim.

It is imperative to confirm your prior findings at least for any employee that might receive a salary increase to qualify for exempt status under Overtime Rule 2.0. No employee is automatically entitled to be treated as exempt; in contrast, increasing the salary for an employee that does not meet the duties tests can only make matters worse.

Right now, you should be:

- Analyzing whether those exemptions you have been relying upon will still apply;
- Considering the possible application of alternative FLSA exemptions; and
- Developing FLSA-compliant pay plans for employees who have been treated as exempt but who no longer will be.

The USDOL released extensive commentary explaining its rationales for the revised provisions. We are continuing to study the final regulations and accompanying discussion carefully and will offer further considered views, 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.

Contact your Fisher Phillips attorney, or any member of our [Wage and Hour Practice Group](#), for materials and other guidance as you consider what steps to take.

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

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