



DOL OVERTIME RULEMAKING, REDUX

On March 7, 2019, the U.S. Department of Labor (DOL) issued a Notice of Proposed Rulemaking regarding changes to the “white collar” overtime exemptions under the Fair Labor Standards Act (FLSA). The new proposed rules are not the first crack at amending the exemption—a similar effort under the Obama administration met a slow and painful death by litigation and politics.

The renewed effort reflects lessons learned in the earlier court challenge and, in most respects, a more employer-friendly approach. The DOL estimates that the proposed changes would make more than a million additional workers eligible for overtime.

Obama-Era Overhaul Failure

In 2017, the United States District Court for the Eastern District of Texas ruled that the DOL exceeded its authority by increasing the salary basis requirement from \$455 to \$913 per week. The salary increase was former President Barack Obama’s last effort to impact wages under the FLSA.

In striking down the DOL’s salary increase, the court stated that the FLSA defined the so-called “white collar” exemptions for administrative, executive and professional employees based on the duties those employees perform. According to the court, the DOL “does not have the authority to use a salary-level test that will effectively eliminate the duties test” required by the FLSA. The court distinguished the DOL’s use of the \$455 per week salary threshold from the proposed increase to \$913 by stating that the former “sets the minimum salary level as a floor” that effectively “screens out” employees who are “obviously nonexempt”—but the court did not explain how the proposed \$913 per week level did not set a similar floor or screen out obviously exempt employees. The court commented that, had the \$455 weekly

threshold simply been adjusted for inflation, such an increase would have been lawful.

The Texas court’s ruling invalidated the DOL’s salary increase nationwide, and the DOL appealed. However, to avoid negative precedent and, of course, due to the results of the 2016 presidential election, the DOL abandoned the appeal and undertook new rulemaking.

Trump-Era DOL Efforts

With an eye toward avoiding judicial invalidation of new rules, the DOL’s latest proposed rules affecting overtime exemptions include the following key components:

The salary basis threshold would increase to \$679 per week (\$35,308 per year). The DOL set this threshold by using the same methodology from the 2004 revisions, which set the salary level at \$455 per week. In 2004, \$455 per week represented the 20th percentile of earnings for full-time salaried workers in the lowest-wage census region and in the retail sector. The new annual salary of \$35,308 represents the DOL’s estimate for the 20th percentile standard in January 2020, when it anticipates the rule to become final. The proposed rule would also permit employers to count nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more-frequent basis to satisfy up to 10 percent of the standard salary level.

The salary basis threshold for highly compensated employees would increase from \$100,000 to \$147,414 per year. The proposed salary basis threshold represents the 90th percentile of full-time salaried workers nationally, as projected by the DOL for 2020. This was the same methodology used by the DOL for the Obama-era rule. Regardless, this proposed change has drawn attention, not only because it is a \$47,000 increase, but also because it is a larger increase (by \$13,000) than the proposed change under the Obama administration. Many employers rely on the highly compensated threshold for exemptions, so comments on the proposed rule are expected to be heated.

The duties tests for executive, administrative and professional employees remain unchanged. Assuming an employer has properly classified its exempt employees, the proposed rule will not change that classification, unless the employee no longer satisfies the salary basis threshold.

The comment period for the proposed rules runs until May 21, 2019. With stakeholders on both the employer and employee-side of these issues highly motivated and a presidential election next year, these proposed rules will likely face myriad court and political challenges before taking effect.

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