

# FYI<sup>®</sup> Alert

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### **DOL proposes overtime pay for millions of workers**

On September 8, the DOL officially released its long-awaited proposal to revise the FLSA's so-called "white collar" overtime exemptions, raising the minimum weekly salary threshold to qualify for these exemptions by more than 50% from \$684 to at least \$1,059. Under the proposed rule, more than 3.5 million workers who are currently classified as exempt would become overtime eligible.

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#### **Background**

Employees covered by the Fair Labor Standards Act (FLSA) must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half times their regular rate of pay ("overtime" pay) unless they qualify for an exemption. Under current regulations, employees who qualify for one of the three main white-collar overtime exemptions — executive, administrative, or professional (EAP) — are not entitled to overtime pay if they (1) are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"), (2) earn a minimum weekly salary of \$684 (or \$35,568 per year) (the "salary level test"), and (3) primarily perform certain EAP duties as defined by DOL regulations (the "duties test").

The current regulations also contain an exemption from the FLSA's overtime pay requirements for certain highly compensated employees (HCEs) if they receive total annual compensation of at least \$107,432, which includes at least \$684 per week paid on a salary or fee basis, and they satisfy a less restrictive EAP duties test.

The DOL last updated the EAP exemption regulations in 2019. The current salary thresholds have been in effect since January 1, 2020.

## Proposed rule

The DOL's proposed rule, published in the September 8, 2023 Federal Register, would:

1. Increase the minimum weekly salary level for an EAP exemption from \$684 per week to \$1,059 per week (\$55,068 annually for a full-year worker) — the 35<sup>th</sup> percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).
2. Increase the HCE exemption total annual compensation threshold from \$107,432 to \$143,988 — the annualized weekly earnings of the 85<sup>th</sup> percentile of full-time salaried workers nationally.
3. Automatically update the earnings thresholds every three years.
4. Apply the standard salary level for EAP exemptions to Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, and increase the special salary levels for American Samoa and the motion picture industry.

Even though the DOL is proposing increased salary and total annual compensation requirements for the EAP and HCE exemptions, it is not proposing any changes to the FLSA's duties tests for these exemptions.

While the proposed rule would not impact employers in states such as New York and California that already have overtime laws with higher exemption thresholds than the DOL is proposing, employers in other states will have to assess the potential impact on their operations, pay practices and job classifications.

## In closing

The DOL will accept comments on the proposal until November 7, and has said that it will consider all comments it receives before publishing a final rule. Given the volume of comments anticipated, release of a final rule this year seems unlikely. Substantial legal challenges to the final rule are expected.

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