

Blog Post

Pain and a Half: How DOL's New Overtime Proposal Could Drastically Change Your Business

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The U.S. Department of Labor (DOL) recently rocked the business world when it announced a Proposed Rule that, if implemented in its current form, would force employers around the country to increase salaries for millions of currently exempt workers or convert them to non-exempt employees eligible for overtime. The Proposed Rule would dramatically increase the existing salary thresholds for the Fair Labor Standards Act (FLSA) overtime exemptions by changing the underlying methodology and featuring automatic future increases on a three-year cycle. If the Proposed Rule takes effect, it will impact nearly all employers nationwide.

60 Seconds of Background

The FLSA requires employers to pay employees overtime for all hours worked over 40 in a single workweek. For non-exempt hourly workers, overtime pay is typically determined by multiplying the employee's regular rate of pay (including "all remuneration" such as bonuses, incentive pay, and commissions) by 1.5 to compute the overtime rate.

Employees who perform certain "exempt" duties and receive a minimum salary are not entitled to overtime pay. For those employees in positions that meet the Executive, Administrative, or Professional

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(EAP) exemption, the salary minimum is \$684 per week (or \$35,568 annually). There is also a Highly Compensated Employee (HCE) exemption, under which higher-salaried employees who customarily and regularly perform at least one of the EAP duties are also exempt from federal overtime requirements. The current HCE salary minimum is \$107,472 per year. DOL last raised these thresholds in 2019.

What Is The DOL Proposing?

The Proposed Rule would increase the EAP salary threshold by 50 percent to approximately \$1,059 per week (or \$55,068 annually). Additionally, the Proposed Rule would increase the HCE salary exemption threshold by 30 percent to approximately \$143,988 per year. DOL selected these numbers based on a change to the underlying methodology it uses to calculate the minimums based on workforce data. Because DOL intends to set the numbers based on the current workforce data at the time the Rule becomes final, these minimums *may be even higher when the Rule takes effect*. Put simply, DOL wants to expand overtime eligibility to millions of workers by making exempt status more expensive. Employers would bear the brunt of the logistical, fiscal, and intangible impacts of such a change, as they have every other time a new Overtime Rule takes effect.

Arguably the biggest change in the Proposed Rule is DOL's proposal to implement automatic updates to the salary minimums every three years. This has never been done before. DOL has only changed the Overtime Rule through formal rulemaking. While DOL has argued that automatic updates are needed to ensure that the salary minimums keep up with increasing costs of living, the automatic procedure avoids public comment and includes only a short-term pause mechanism for DOL to delay updates during unfavorable economic conditions. It also leads to unpredictable results because the updated salary thresholds will be determined based on then-current workforce data. That does not leave much time for employers to prepare or adjust. Employers

would not know what those salary levels will be until shortly before they become effective.

If Implemented, the Proposed Rule Would Come at a Cost

In addition to the DOL-estimated \$1.2 billion in direct costs in the first year alone, comprising of \$240.8 million in adjustment costs (to adjust workers to new requirements), \$534.9 million in managerial costs, and \$427.2 million in regulatory familiarization costs, employers may also incur equally consequential nonquantifiable costs. If the Rule becomes final in substantially its current form, employers will need to immediately consider whether to reclassify certain positions, raise salaries, or a combination of both.

In considering reclassification, employers should determine how they would start paying current employees. For example, should you convert an employee's salary into an hourly wage, or would raising that employee's salary to the new minimum threshold cost less than the potential overtime the employee would incur? With reclassification also comes a host of logistical considerations, such as implementing new policies and trainings around timekeeping, adjusting benefits, reshuffling responsibilities, revising tech policies so previously-exempt employees don't work off the clock, and thinking about how to start tracking time and breaks for previously exempt employees.

Employers would also need to consider intangible factors like adverse effects on employee retention. Formerly exempt workers may experience decreased morale and feel restrained by the lack of flexibility that would come with an hourly position, which may affect retention. There may also be adverse effects on the management population, as managers would have to shoulder new burdens in tracking and policing employees' time. The effects will vary by industry and business, but employers

should expect dissatisfaction and job movement as a result.

Employers must also remember that some states have their own exemption requirements providing for higher salary thresholds than federal requirements. In most of these states, the Proposed Rule would increase the federal threshold beyond the state threshold, requiring employers to comply with the federal rule. In others, particularly California, where the threshold is \$64,480 annually, and Washington, where certain employers have to meet a threshold of \$65,478 annually, the state thresholds will be unaffected by the Proposed Rule. Employers should stay on top of state level changes in these states, which also include Alaska, Colorado, New York, and Maine, to see whether state regulators in these jurisdictions change their salary minimums in response to DOL's rulemaking.

When Will the Rule Become Law of the Land?

The public comment period for the Proposed Rule just ended on November 7, 2023. During the public comment period, businesses, organizations, and other stakeholders had the opportunity to contact the DOL to express their concerns with (or support for) the Proposed Rule. The DOL is slated to consider these submissions in deciding how to move forward — whether to enact the Proposed Rule in its entirety or make changes.

If history is any indicator, the DOL will more than likely face lawsuits before any final iteration of the Proposed Rule is implemented. Employers should particularly anticipate legal challenges to the part of the Proposed Rule that would implement automatic updates to the salary thresholds, since the only other time the DOL proposed such an idea, the Rule as a whole was invalidated in court. Although the Supreme Court declined to weigh in on the validity of an automatic update in that decision, we can expect it to play a key role in potential litigation stemming from this Proposed Rule.

Moving Forward

With the comment period for the Proposed Rule officially closed, this is an ideal time for employers to try to quantify the Rule's potential impact on their workforces to determine best courses of action as we wait for it to either go into effect or face legal challenges. The attorneys in Akerman's Labor and Employment Practice Group are available to assist and answer any questions.

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