

3 Employer Considerations In Light Of DOL Proposed OT Rule

By **Brodie Erwin and Sarah Spangenburg** (September 18, 2023)

As many employers are aware, on Aug. 30, the U.S. Department of Labor announced a notice of proposed rulemaking regarding overtime eligibility.

The proposed rule would increase the salary threshold for the overtime exemption for bona fide executive, administrative and professional employees.

The current salary threshold for these exemptions is \$35,568 per year. Under the proposed rule the threshold would increase to \$55,068 per year.

The salary threshold for highly compensated employees, which is currently \$107,432, would also be increased to \$143,988. As a result, the proposed rule would make approximately 3.6 million new U.S. workers eligible for overtime pay.

The proposed rule would also automatically update the salary threshold for the exemptions for bona fide executive, administrative and professional employees, and highly compensated employees every three years to reflect current earnings data.

Worth noting, the notice does not include any proposed changes to the duties tests for the various exemptions.

While these proposed changes are significant, they are not the law just yet. The notice of proposed rulemaking was published in the Federal Register on Sep. 8, and is open for public comment for 60 days until Nov. 7.

If past notices are any indication, the proposed rule will likely undergo revisions based on public comments and potential legal challenges before the DOL adopts its final rule. Affected employers should feel free to submit comments.

However, just because the proposed rule is not yet the law of the land, does not mean employers should not start thinking about the best ways to position their organizations for the future.

1. Consider Conducting an FLSA Classification Audit

Any revisions to the overtime rules will likely require employers to undertake costly and time-consuming reviews of the Fair Labor Standards Act classifications of their employees.

Employers might want to start evaluating how such an audit might work for their organization and what resources and personnel need to be in place to engage in that endeavor once a final rule is adopted.

Qualifying for the exemptions at issue generally requires two elements: meeting the salary threshold and satisfying certain, specific duties requirements for each exemption



Brodie Erwin



Sarah Spangenburg

classification.

While the salary threshold will change if a final rule is implemented, the certain, specific requirements for each type of exemption will not, based on the notice of proposed rulemaking as it currently stands.

Therefore, employers can proactively start thinking about what an organizational audit will entail. An affected company will need to review workforce roster and identify the specific employees who are currently above the salary threshold for exempt status, but who may lose their exempt status with the implementation of the new, increased threshold.

Understanding the scope of affected employees will influence other decisions the company will have to make in order to ensure compliance with the law.

Employers need to remember that exemptions are not just about an employee's salary level. An employee's salary level should be viewed as a floor for audit purposes.

What is most critical is whether a given employee is primarily performing duties contemplated by a given exemption. If they are, and they earn the salary threshold, then they are in fact exempt.

However, if there is a question regarding their primary duties that requires more analysis, further review and a consultation with the organization's legal counsel is likely necessary.

2. Consider The Cost Impact of a Newly Nonexempt Employee

If some version of the notice of proposed rulemaking is adopted, millions of employees who were previously exempt will potentially be entitled to overtime pay.

Employers of all size, but certainly small- and medium-sized businesses, should brace for the increased labor costs related to employees that are transitioning from exempt to nonexempt status. How an organization approaches this unique situation will need to be decided on a case-by-case basis given the financial needs of an individual company.

However, all employers can, and should, start planning now for how to handle any increased cost burdens imposed by the adoption of the notice of proposed rulemaking.

3. Consider Whether Your Company's Timekeeping Protocols and Systems Are Sufficient

Facing the prospect of additional nonexempt employees being added to their workforce overnight, now is as good time for employers to review the sufficiency of their timekeeping protocols and systems.

As most employers are all too aware, insufficient timekeeping systems and protocols lead to costly and unnecessary disputes with employees under a variety of federal and state statutes that provide for punitive penalties and awards of attorney fees.

Maintaining up-to-date and adequate timekeeping systems is an important way to avoid this legal quagmire.

With the notice of proposed rulemaking, not only is there a potential that significantly more employees will be tracking their time, but there is also the potential that new job positions

will be engaging in timekeeping for the first time.

Both of these situations will require advanced planning, evaluation of the current systems and timekeeping protocols, and potential implementation of new systems and procedures — the burden of which can be alleviated by reviewing now, and not when a final version of the notice of proposed rulemaking is adopted.

Employers should consider some of the following questions when undertaking a review of their timekeeping systems and protocols:

- Does your system allow for timekeeping of all positions that must now keep time?
- Do your protocols account for all positions that must now keep time?
- Do you need to edit any written timekeeping protocols or procedures, including our overtime policy?
- Do your protocols account for hybrid or remote workers?
- Is your system equipped to handle a significant influx of new timekeepers?
- Will an influx of timekeepers affect payroll and pay procedure?
- Should you consider other timekeeping vendors for your needs?
- Will there be a cost increase associated with your timekeeping system if a significant number of new timekeepers are added?

Regardless of the timing or wording of the rule the DOL ultimately adopts, employers will do well to consider the impact that new nonexempt workers will have on their operations and resources.

Further, employers must remain mindful that no matter what rule the DOL promulgates, there are still states with overtime laws that already require higher salary levels to qualify for certain exemptions.

State overtime salary thresholds are higher than the current federal level for exemptions in California, Colorado, Maine, New York and Washington.

Employers must remain ready to comply with these heightened state exemptions along with any new federal minimum threshold that is adopted.

Brodie D. Erwin is counsel and Sarah J. Spangenburg is an associate at Kilpatrick Townsend & Stockton LLP.

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