

Insights: Alerts

Department of Labor Puts Forth New Rule to Expand Overtime Eligibility to Millions of U.S. Workers

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Written by

On Wednesday, August 30, 2023, the Department of Labor fulfilled its promise from its spring regulatory agenda and announced a Notice of Proposed Rulemaking (NPRM) regarding overtime eligibility. Prior to issuing this NPRM, the DOL has spent months talking with workers, companies, unions, etc., including hosting 27 listening sessions with more than 2,000 participants. DOL Acting Secretary Julie Su stated that from DOL's viewpoint this rule “would help restore workers' economic security by giving millions more salaried workers the right to overtime protections if they earn less than \$55,000 a year.”

As drafted, the NPRM would make a significant impact on the state of labor law.

First, the NPRM states that this new rule would increase the salary threshold for the overtime exemption for bona fide executive, administrative, and professional employees. Currently the salary threshold to qualify for these exemptions is \$684 a week, which equates to about \$35,568 per year. The NPRM increases the threshold to \$1,059 week, which equates to about \$55,000 per year. This change would make approximately **3.6 million U.S. workers** eligible for overtime pay. DOL states that this revised threshold is tied to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, which is currently the South.

Qualifying for the executive, administrative, and professional employee exemption requires two elements: (1) meeting the salary threshold and (2) satisfying certain, specific requirements for each type of exemption as outlined below.

To qualify for the executive employee exemption, the following must be met:

- The employee must meet the salary threshold;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

To qualify for the administrative employee exemption, the following must be met:

- The employee must meet the salary threshold;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

To qualify for the professional employee exemption, the following must be met:

- The employee must meet the salary threshold;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The NPRM also includes three other important components. First, the rule proposes automatically updating the salary threshold for the exemption for bona fide executive, administrative, and professional employees every three years to reflect current earnings data. Second, the proposed rule would return to previous practice and ensure that workers in U.S. Territories subject to the federal minimum wage have the same overtime protections as U.S. workers. Third, the salary threshold for highly compensated employees would be increased to \$143,988, tied to the 85th percentile of salaried workers nationally. This salary threshold would also update every three years to reflect current earnings data.

Important Takeaways for Employers

This rule is not final yet and employers still have time to respond to DOL and prepare internally. Employers (or anyone else) can choose to comment on the NPRM. Once published, the comment period is open for 60 days and comments can be made at [Regulations.gov](https://www.regulations.gov). It is likely that the comment period could be extended due to the significance of the proposed rule. The NPRM states that the rule would become effective 60 days after publication of a final rule.

In the meantime, employers should begin to prepare internally and consider questions like:

- Are our timekeeping systems up-to-date and accurate?
- Are we going to want to increase employee salaries to meet an increased threshold?
- Will employee morale be impacted by a change in classification?
- How do we communicate these new rules to our employees?
- Do we need to train our employees and managers in light of the new rule?
- Should we engage in an FLSA exemption audit to prepare for the new rule?

Kilpatrick Townsend's Labor & Employment team are here to assist with these, as well as any other questions or needs. Our team will continue to monitor any additional updates or material put out by the DOL and update this

Legal Alert accordingly.