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DOL Proposes New Salary Threshold for FLSA's Overtime Exemptions

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On Thursday, the Department of Labor released its long-awaited Notice of Proposed Rulemaking (Proposed Rule) that focuses on updating the minimum salary requirement for the Fair Labor Standards Act's white collar exemptions. To be excluded from the FLSA's overtime requirements, white collar employees (e.g., executive, administrative and professional employees) must meet three tests:

- **Salary basis test** (employee must be paid a predetermined and fixed salary)
- **Salary level test** (employee's salary must meet a minimum specified amount)
- **Duties test** (employee performs executive, administrative or professional duties, as defined by the regulations)

Key Notes:

- "White collar" exemptions' threshold to increase from \$455/week (\$23,660/year equivalent) to \$679/week (\$35,308/year equivalent).
- Expected effective date in January 2020.
- No changes to standard duties test.

The Proposed Rule changes *only* the straightforward **salary level test**.

Getting to this point has been a long road. In May 2016, the DOL under the Obama administration issued proposed regulations overhauling the 2004 FLSA white collar exemptions by raising the salary threshold from \$455 per week (\$23,660 annual equivalent) to \$913 per week (\$47,476 annual equivalent). The 2016 final rule also established an automatic update for the salary threshold every three years to track the 40th percentile of earnings for full-time salaried workers in the lowest-wage region. In November 2016, a federal court blocked the rule days before it took effect, maintaining the salary threshold at the 2004 level.

Despite initially challenging the ruling, the DOL announced that it would conduct further review and propose new rules. In July 2017, the DOL under the Trump administration issued a Request for Information soliciting public comments. The Proposed Rule is a result of that process.

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Salary Tests

Perhaps the most anticipated aspect of the new Proposed Rule is the increased threshold of the salary level test. Instead of more than doubling the salary threshold (as proposed in 2016), the current proposal raises the required salary level from \$455 per week (\$23,660 annual equivalent) to \$679 per week (\$35,308 annually). By January 2020, when the rule is anticipated to become effective, the new threshold is projected to equal the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (the South) and in the retail sector. The DOL also proposes to allow employers to count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test, provided the bonuses are paid at least annually.

Similarly, the DOL proposes increasing the salary level required to meet the FLSA's Highly Compensated Employee exemption. Currently, covered employees must earn at least \$100,000 in total annual compensation, perform office or non-manual work, and customarily and regularly perform at least one of the exempt duties of an exempt executive, administrative or professional employee. If the Proposed Rule takes effect, the HCE salary test will rise to the 90th percentile of full-time salaried workers nationally, or \$147,414, when projected to January 2020. Note, however, that many states with state-level FLSA equivalents do not incorporate, and even expressly exclude, the HCE exemption. The Proposed Rule will further narrow the exemption's utility.

The Proposed Rule also provides for updates to both salary levels every four years. Unlike the 2016 rule, however, which was going to provide for automatic updates, the Proposed Rule requires notice and comment periods for each update.

Duties Test

Although the DOL sought comments on the effectiveness of the duties test, the Proposed Rule makes no changes to the test.

What It Means

Many employees currently classified as exempt from overtime will likely become non-exempt because of the increased salary level test, though the effects will not be as far-reaching as the 2016 rule would have been. The DOL estimates that 1.1 million currently exempt workers earn more than \$455 but less than \$679 per week and would become entitled to overtime pay if the Proposed Rule takes effect. The 2016 rule would have impacted 4.2 million workers.

Employers can expect to incur significant costs if the Proposed Rule takes effect, including direct costs, such as regulatory familiarization, adjustment and managerial costs, as well as income transfer from the employer to employees in the form of higher earnings.

Before issuing its final rule, the DOL will accept written comments for 60 days once the notice is published in the Federal Register. The 219-page notice, fact sheet and additional resources can be found [here](#) or on the Wage and Hour Division's page on the DOL website.

For More Information

If you are a client and have questions about the Proposed Rule or about how to prepare for its likely implementation, please contact us at info@pbpohio.org.

If you are not a client but would like to apply, please contact us at info@pbpohio.org.