CLIENT ALERTS & INSIGHTS

# An Estimated 3.4 Million More Workers to be Eligible for Overtime Under DOL Proposed Rule

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Authors: Johanna Fabrizio Parker, Adam Primm

The Department of Labor (DOL) has issued a proposed rule to increase the salary required to be "exempt" under the Fair Labor Standards Act (FLSA). As a brief refresher:

- Non-exempt workers are eligible for overtime under the FLSA at a rate of time and a half for each hour over 40 that they work in any workweek.
- Exempt employees are not eligible for overtime.
- Each job has one designation to be set by the employer. In other words, the employee is either exempt or non-exempt.
  - To be exempt, an employee has to meet both the salary test and the duties test.
  - The current salary required is $684/week (or $35,568/year).
  - The duties test depends on the particular exemption, e.g., executive, professional, administrative, but generally requires that the employee's primary duty be non-manual work related to management or other business operations where the employee exercises judgment and/or discretion, or for a professional, performs work requiring advanced knowledge and instruction.

The DOL is not changing the duties test, but instead proposes to change the salary test in two significant ways:

- The new minimum salary would be: $1,059/week (or $55,068/year), which is approximately a 55% increase; and
- Establish that the salary rate would be automatically adjusted every three years. (The adjustment would be tied to the 35th percentile of weekly earnings for full-time employees in the South region, a lower wage region.)

The DOL also proposes increasing the salary threshold for the "highly compensated employee" from $107,432/year to $143,988/year (a nearly 34% increase), also with automatic updates every three years.

So, what does this mean? At this time, the rule is not effective and not binding. We expect both comments to the rule, and general challenges to the agency's authority even to make such a rule. You may recall 2016 when, just upon the date when a similar salary increase was to take effect, a nationwide injunction was issued ultimately leading to the revised rule we have today. But both the salary numbers and the commentary inform us as to the DOL's goals. The DOL estimates that 3.4 million employees who are currently exempt (and therefore not overtime eligible) will become overtime eligible with this increase. And the DOL clearly believes this is the "right" result, characterizing these individuals as those "who perform significant amounts of nonexempt work," Which seems to altogether ignore the existence of duties test that arguably qualifies such employees as exempt. As to the need for automatic updates, the DOL speaks of how they are needed to avoid basing the test on "outdated earnings data" which are "ill-equipped" to identify who should (or should not) be included as exempt.

Of course, we will provide updates as to the status of the proposed rule. In the interim, as we expect some change to happen - even if not this change -- a first step would be to review your exempt staff and salary levels to understand how significant (or not) these changes may be for your organization. Also, to the extent companies are at a point where some overall review and adjustment is needed more generally, the likely rule change would provide a good opportunity to do so.

**For more information on this ruling or to learn how it can affect your business, contact a member of Benesch's Labor & Employment Practice Group.**

**Johanna Fabrizio Parker at jparker@beneschlaw.com or 216.363.4585.**

**Adam Primm at aprimm@beneschlaw.com or 216.363.4451.**