

LABOR RELATIONS

Expert Analysis

## New Salary Thresholds On the Horizon

The U.S. Department of Labor (DOL) again seeks to increase the salary required to maintain a so-called “white-collar” exemption under the Fair Labor Standards Act (FLSA). On March 7, 2019, it announced its Notice of Proposed Rulemaking (Proposed Rule) to update the regulations and requirements under the FLSA for such executive, administrative and professional employees to be exempt from overtime requirements.

The current salary minimum to qualify for one of these white-collar exemptions is only \$23,660, and there has been widespread support among both employers and employees for increasing that minimum. The Obama Administration previously published a regulation (the 2016 Final Rule) that would have more than doubled the minimum salary level for such employees to be classified as exempt under the FLSA.

DAVID E. SCHWARTZ is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom. RISA M. SALINS is a counsel at the firm. DANIEL R. RODRIGUEZ, an associate at the firm, assisted in the preparation of this article.



By  
David E.  
Schwartz



And  
Risa M.  
Salins

However, on Nov. 22, 2016, just nine days before that regulation would have become effective, a U.S. District Court in Texas issued a preliminary injunction against enforcement of the 2016 rule, followed by a permanent injunction on Aug. 31, 2017.

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The Proposed Rule seeks to formally rescind the 2016 Final Rule, and instead proposes increasing current minimum salary levels by about 50 percent. In addition, the Proposed Rule proposes increasing by about \$50,000 the salary threshold to be

deemed a “highly compensated employee” subject to a looser duties test for exempt status. The DOL estimates that the Proposed Rule, if finalized, will make more than one million additional American workers eligible for overtime pay. In reality, the Proposed Rule will likely cause many employers to increase salaries or limit the number of hours employees are allowed to work.

### Proposed Rule

Employers must pay their employees a minimum wage and overtime pursuant to the FLSA, unless an exemption applies. The white-collar exemption applies to employees in executive, administrative, and professional roles. 29 C.F.R. §541. Under the white-collar exemption, an employer is not required to pay an employee overtime if three conditions are met: (1) the employee is paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of the work performed; (2) the amount of salary paid meets a minimum specified amount; and (3) the employee’s job duties

primarily involve executive, administrative or professional duties as defined by the regulations. 29 C.F.R. §§541.100, 541.200, 541.300. The current required salary level—set by the DOL back in 2004—is \$455 per week, or \$23,660 per year. The Proposed Rule would increase the salary threshold to be a white-collar exempt employee to \$679 per week, equivalent to \$35,308 per year. 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 Proposed Rule also updates the “highly compensated employee” (HCE) exemption contained within the white-collar employee exemption. Under the HCE exemption, an employee whose total compensation currently is at least \$100,000 per year is eligible for exempt status if the employee meets a reduced duties test as follows: (1) the employee’s primary duty is office or nonmanual work; and (2) the employee regularly performs at least *one* (as opposed to all) of the duties unique to their executive, administrative or professional position. 29 C.F.R. §541.601. Significantly, the Proposed Rule would increase the HCE salary threshold from \$100,000 to \$147,414 per year. The DOL calculated this salary by relying on the 90th percentile of earnings of all full-time salaried employees, and then adjusting for inflation. Although both the white-collar and HCE exemptions contain a duties test, the Proposed Rule does

not change the duties test that an employee must satisfy to be exempt.

The DOL historically has enforced compliance with FLSA exempt salary thresholds by looking solely at salaries and fee payments. The DOL has not considered bonus payments of any kind to satisfy the minimum salary thresholds. Notably, the Proposed Rule would allow employers to use nondiscretionary bonuses, commissions and incentive compensation to satisfy up to ten percent of the white-collar exemption salary threshold, as the DOL has recognized they are an important part of many employers’ compensation systems. For employers who use nondiscretionary bonuses and incentive compensation, the employer has until the first pay period after the end of the 52-week period to meet the applicable salary threshold. For example, under the new proposed salary threshold, an employer could pay a white-collar exempt employee a weekly salary of \$611.10 (90 percent of \$679) for 52 weeks and not run afoul of the salary threshold if the employer met the \$35,308 salary threshold with no more than \$3,530.08 in nondiscretionary bonuses, commissions and incentive compensation paid within one pay period of the end of a 52-week period. For the HCE exemption, employees must be paid a salary at or above the minimum threshold to meet the white-collar exemption (\$35,308), although nondiscretionary pay can be included in meeting the annual compensation requirement of \$147,414.

The DOL also announced through a March 7, 2019 press release that the Proposed Rule is maintaining

overtime protections for police officers, fire fighters, paramedics, nurses, and laborers including non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, and construction workers. Additionally, the Proposed Rule establishes the DOL’s commitment to review white-collar and HCE exempt salary thresholds every four years through a notice of proposed rulemaking after publication in the Federal Register, followed by an opportunity for public notice and comment.

### 2016 Rule

The DOL’s 2016 Final Rule went through the notice and comment period and was less than two weeks away from its enforcement date before the United States District Court for the Eastern District of Texas, in *Nevada v. U.S. Dep’t. of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016), preliminarily enjoined its enforcement, finding the DOL exceeded its authority by raising the exempt salary threshold so high that the salary test effectively eliminated the duties test. While the preliminary injunction ruling was on appeal before the Fifth Circuit, the District Court in *Nevada v. U.S. Dep’t. of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017), invalidated the 2016 Final Rule on summary judgment on the same grounds.

There are several key differences between the 2016 Final Rule and the Proposed Rule. Under the 2016

Final Rule, the white-collar exempt employee salary threshold would have more than doubled to \$913 per week, or \$47,476 per year. 81 FR 32391. Under the Proposed Rule, the salary threshold will increase only by roughly 50 percent from the current amount. On the other hand, the 2016 Final Rule increased the HCE salary from \$100,000 to \$134,004 per year, which is roughly \$13,000 less than the Proposed Rule threshold of \$147,414 per year. In addition, the 2016 Final Rule provided for automatic updates every three years to the white-collar and HCE exempt salary thresholds based on inflation and pay data. The Proposed Rule, however, only establishes the DOL's commitment to review the exempt salary thresholds every four years through the notice and rulemaking process.

### State Exemptions

In addition to the Proposed Rule's updates to the FLSA white-collar and HCE exemptions, employers should stay up-to-date on applicable state laws that apply higher salary thresholds to meet a white-collar exemption under state wage and hour laws. Employers are required to satisfy the strictest standard in each jurisdiction in which they have employees. For example, under New York's white-collar employee exemption, the salary thresholds for 2019 are significantly higher, at: (1) \$1,125 per week for New York City employers with 11 or more employees; (2) \$1,012.50 per week for New York City employers with ten or few employees; (3) \$900 per week for employers in Nassau,

Suffolk and Westchester counties; and (4) \$832 per week for employers in the remaining counties. To qualify for California's white-collar employee exemption, the salary thresholds for 2019 are: (1) \$960 per week for employers with 26 or more employees; and (2) \$880 per week for employers with 25 or fewer employees. Likewise, a number of other states currently have salary thresholds for white-collar exemptions that are higher than those set forth in the FLSA, including Alaska (\$791.20 per week), Maine (\$33,000

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per year) and Oregon (\$1,863 per month, but \$2,080 per month if the employee lives in the Portland metropolitan area). In addition to these salary thresholds, employers need to confirm employees meet any additional duties test that applies under applicable state law.

Importantly, some states—such as California, New York and Pennsylvania—do not recognize the exemption for HCEs. Employers in those states must structure exempt jobs in a way that fully satisfies all (not just one) of a white-collar exemption's duties. Thus, the Proposed Rule's new salary threshold for HCEs should not impact employers with respect to employees in those states.

### Conclusion

The Proposed Rule is now open to public comment until May 21, 2019,

and is anticipated to take effect in January 2020.

The DOL has encouraged public comment, particularly with respect to whether the proposed ten percent cap on using non-discretionary bonuses and incentive payments towards the salary threshold is sufficient, and how to approach periodic review of the salary threshold in the future.

In the meantime, employers are advised to be prepared to comply with the Proposed Rule by January 2020. Although the increase in the salary threshold to \$35,308 will not have the extensive impact that the Final 2016 Rule would have had, employers still may have managers and administrative employees currently classified as exempt who fall below that threshold. For those employees, employers may choose to either increase the employee's salary to meet the new threshold, or reclassify the employee to non-exempt and pay overtime premiums.