

The End of the Saga of DOL's Proposed Changes to FLSA Overtime Rules?

3 min read

Mar 11, 2019

For nearly four years, proposed Department of Labor (DOL) rule changes that would expand the number of workers eligible for overtime wages have remained in limbo. The latest twist in this [long-standing saga](#) came last week, when the DOL published a new “Notice of Proposed Rule Making” (NPRM), which sets a new salary threshold for overtime pay at \$679 per week (\$35,308 per year). Under these proposed rules, any salaried employee earning less than that amount, will be entitled to overtime for the hours the employee works beyond forty (40) in a week.

Although this NPRM isn't finalized yet, it seems likely to be the final chapter in this update to the overtime rules, once the appropriate regulatory steps are taken. Accordingly, employers should begin evaluating their response to the likely rule change. Several actions employers can take into account for this new eligibility for salaried workers include:

- paying the employee a wage instead;
- always paying overtime when it occurs;
- better controlling the use of overtime; and/or
- increasing pay so that the employee earns above the new threshold



Refresher on the FLSA Overtime Regulations

Overtime wages consist of paying an employee one and one-half times the employee's regular rate for hours the employee works over 40 hours in a workweek. The Fair Labor Standards Act (FLSA) provides a number of exemptions to this general rule. The most commonly used exemption is the “white collar exemption.” In order to qualify, an employee must be paid a minimum amount per week on a salary basis and must meet a duties test.

The duties are generally categorized as executive, administrative, professional, outside sales, and computer employees. However, employees cannot be exempt from overtime wages if they are not paid above the salary threshold—even if they perform those specified duties.

In 2016, the DOL [published a rule](#) that would have more than doubled the 2004-era existing salary threshold from \$23,660 annually to over \$47,000 and tied future increases to inflation. In November 2016, following the election of President Donald Trump, a federal district court prevented this change from coming into effect, and the subsequent change of presidential administrations left doubt about whether the threshold would be changed at all. In August 2017, the DOL published a [Request for Information](#), asking several questions about whether the threshold should be changed, and if so, how that change should look.

2019's NPRM

As noted above, the most recent proposed rule would raise the salary threshold to \$35,308 per year; this change is not indexed to inflation or otherwise automatically adjusted.

This number was developed using the methodology developed the last time the threshold was increased in 2004. This sets the salary level at approximately the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region and in the retail sector. In contrast, the now-defunct 2016 rule change would have set the salary threshold by evaluating the same earnings at the 40th percentile—this methodology was a substantial reason for that rule's [failure in court](#) because it excluded too many employees and made “salary rather than an employee’s duties determinative.”

The NPRM will also allow employers to count annual (or more frequent) nondiscretionary bonuses, incentive payments, and commissions to satisfy up to 10% of the threshold.

Moving Forward

While this NPRM is not a final rule,, it seems very likely the rule will be finalized following the appropriate regulatory steps, and so employers should begin to evaluate their response to the likely change.

The DOL estimates that once finalized in approximately 2020, the NPRM’s revised rule would result in approximately 1.1 million currently-exempt employees (who earn at least \$455 per week but less than the proposed standard salary level of \$679 per week) gaining overtime eligibility.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm’s national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution,

and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

Wage And Hour, Overtime, NPRM, Notice Of Proposed Rule Making, Salaried Employees

Related Capabilities

Labor & Employment