

## **Employers Should Prepare: The Labor Department Plans Major Salary Threshold Increase for Exempt Status**

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Employers should begin preparing now.

On August 30, 2023, the US Department of Labor published [a new proposed rule](#) to raise the annual salary level threshold for exempt workers to \$55,068 per year - that's \$1,059 per week. In addition to the exempt/nonexempt threshold increase, the proposed rule would automatically update the salary threshold every three years and raise the threshold for the "highly compensated employee" exemption to \$143,988 (from the current \$107,432). More employees will likely be eligible for overtime, and employers will not be able to go on autopilot after they figure it out the first year. The financial consequences for getting it wrong will vastly increase. This will require ongoing analysis of employee classifications and overtime eligibility.

### **How Should Employers Prepare?**

*First*, employers should review their pay practices. Ensure employees currently classified as exempt meet the requirements for exemption. Employees must:

1. Be paid on a salary basis (not on an hourly or daily rate);
2. Be paid at least the designated minimum weekly salary (currently at least \$684);  
and
3. Perform the types of duties the [DOL ascribes](#) to [administrative](#), [executive](#), or [professional workers](#). Remember, this isn't merely a "title" game. Actual job duties have to align.

Note that highly paid workers (currently over \$107,432) who perform at least one of the white-collar duties qualify as exempt, even if they do not meet all of the other requirements in the standard test for exemption as an executive.

*Second*, employers should determine which employees would automatically lose their exemption under the Department of Labor's new salary threshold increase (and highly paid exemption increase). Employers will want to estimate the financial impact of the new rule. How many hours are your exempt employees currently working? When estimating your exempt employees' hours, be careful to avoid the perception that you are treating them as nonexempt workers.

*Third*, employers should chart their options. Not every employer will be able to raise salaries to keep workers exempt. Whose salaries will be raised? Which employees will need to be

placed in nonexempt status? Will the employer need to cut back on newly reclassified employees' hours to avoid overtime? If so, does this mean the employer will need additional part-time employees to fill the gap? There are many things to consider at this stage:

- If an employer reclassifies employees to nonexempt, will the employer factor in estimated overtime and adjust the rate, or divide the current weekly salary by 40 hours?
- Employers are required to calculate the "regular rate of pay" based on "all remuneration" earned from employment (with eight specific exclusions outlined in regulations), including non-discretionary bonuses, commissions, and some non-cash payments, depending on the circumstances. A bonus calculated on a pre-determined formula is not discretionary.
- Is the employer equipped to track hours for its newly nonexempt workers?
- Many employers allow and even encourage exempt employees to use their smartphones and laptops for work. This often results in work during non-business hours. Will that continue if those employees are reclassified as nonexempt, with the potential for overtime? If so, how will that be tracked so the newly nonexempt employees can be paid correctly?
- How will this impact employee morale? Many exempt employees will see a reclassification to nonexempt status as a 'demotion.' This can affect engagement and retention.

*Fourth*, employers will need a communications and training plan. Managers and employees alike will need training on the new regime. Policies may need to be updated. Employers must consider training on overtime approval, break time rules, record-keeping, scheduled hours, personal device policies, and a prohibition on working during unrecorded time. Employers need to plan ahead to give themselves enough time to announce the changes and train managers and employees.

## **What Is The Timeline?**

This new rule could become law in 2024. We encourage employers to consult labor and employment counsel and begin preparing now. Hope is not a plan, including hoping the rule is stalled by litigation or dramatically scaled back.

With that said, litigation will almost certainly be filed in an attempt to block the new rule, which [happened in 2016](#) when a federal judge in Texas blocked the Obama administration proposed salary threshold increase. Those opposing this new rule have an additional arrow in the quiver: Justice Kavanaugh [recently opined](#) in a dissenting opinion that the Department of Labor does not have statutory authority to issue a salary test for exempt or nonexempt status.

Without regard to litigation that may or may not be filed, here is the potential timeline: The new rule will go through a notice and comment period, which is typically 60 days, but could be extended based on the volume of comments that are likely on this impactful rule. Once the comment period closes, the Department of Labor must consider each comment and determine whether to adjust the proposed rule before it becomes final. Once published as a final rule, with or without adjustments, the rule will take effect within weeks. The current

administration will likely seek to publish a final rule by May or early June 2024 to avoid the potential for disapproval under the Congressional Review Act.

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