



## How Employers Should Prepare for the Department of Labor’s Proposed Expanded Overtime Rule

Labor & Employment  
09.07.2023

**The Department of Labor has issued its long-anticipated proposal to raise the salary threshold for “white-collar” overtime exemptions under the FLSA from \$35,568 to \$55,068 annually. Although a final rule is still months away, employers should review their current pay practices to prepare for possible changes.**

On August 30, 2023, the U.S. Department of Labor (DOL) unveiled a significant proposed increase to the salary threshold for exemptions to the Fair Labor Standards Act’s (FLSA) overtime pay requirements. The DOL estimates the proposed salary increase will extend overtime pay to an estimated 3.6 million workers.

Currently, workers must earn at least \$35,568 annually (\$684 per week) and meet the duties test to qualify for one of the FLSA’s “white-collar” overtime exemptions. DOL’s proposed rule raises the salary threshold to the 35th percentile of average weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Today, that constitutes a 55% raise to \$55,068 annually (\$1,059 per week), meaning all employees earning less than that amount will be entitled to overtime pay regardless of their job duties.

The proposed rule also raises the salary level for the “highly compensated employee” exemption from \$107,432 to the 85th percentile of full-time salaried workers nationally, which is currently a 37% increase to \$143,988. See here. DOL has stated it will use the most recent data available when it promulgates the final rule, which could result in even higher salary thresholds.

### RELATED PROFESSIONALS

Savannah D. McCabe

Amy Jordan Wilkes

### RELATED CAPABILITIES

Labor & Employment

Wage & Hour

# How Employers Should Prepare for the Department of Labor's Proposed Expanded Overtime Rule

Significantly, the proposed rule also includes a mechanism that will automatically update both of these salary thresholds every three years based on current wage data, meaning employers will need to remain constantly vigilant to ensure employee salaries do not drift too low. The proposed rule does not make any changes to the duties tests applied to determine whether an employee is properly classified as exempt under the FLSA.

Extending overtime pay to more workers is a central agenda item for the DOL and the Biden Administration, so the DOL is expected to move quickly to implement a final rule. The proposed rule is scheduled for publication in the Federal Register the week of September 4, 2023, after which the public will have 60 days to submit comments at <https://www.regulations.gov/>.

Just as with a similar overtime proposal from the Obama Administration, legal challenges to the DOL's proposed rule are expected. The Obama-era proposal, which sought to raise the annual salary threshold from \$23,660 to \$47,476, was blocked by a federal court in Texas because "[t]his significant increase would essentially make an employee's duties, functions or tasks irrelevant if the employee's salary falls below the new minimum salary level." See *Nevada v. United States Dept. of Labor*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017). More recently, Supreme Court Justice Brett Kavanaugh argued in a dissenting opinion that the DOL does not have statutory authority to make these rules absent Congressional approval, so the legal battle bears watching over the coming months.

While the proposed rule is not yet in effect, employers should be proactive in examining their current workforce and pay practices in preparation for any changes that may be required should the rule become final:

- **Know Your Workforce:** Review current position classifications and pay scales to determine how many exempt employees earn between \$35,568 and \$55,068 annually to estimate the potential cost of increasing the pay of those employees currently earning below the proposed threshold.
- **Gather Data:** For exempt positions currently earning below \$55,068 annually, track and analyze the number of hours worked per week to evaluate the potential cost of converting those employees to non-exempt hourly workers.
- **Be Mindful of Employee Morale:** Many employees view being paid on a salary basis as more prestigious than being paid by the hour and may view the change as a type of demotion. Formerly salaried exempt employees may also resent having to clock in and clock out and keep track of their hours worked.
- **Review Policies:** Ensure company policies related to proper timekeeping procedures, approval of overtime, use of company equipment or personal devices to conduct business during non-work hours, meal and rest breaks, and remote work, among others, are up to date.

**Burr & Forman will continue to monitor developments related to the FLSA overtime exemptions and will keep our clients up to date on all of the applicable legal requirements. For more information, please contact Amy Jordan Wilkes, Savannah McCabe, or the Burr & Forman attorney with whom you usually work.**