

# HR COMPLIANCE BULLETIN



## Answers to Frequently Asked Questions on the DOL Proposed Overtime Rule

On Aug. 30, 2023, the U.S. Department of Labor (DOL) [announced](#) a proposed rule to amend current requirements employees in white collar occupations must satisfy to qualify for an overtime exemption under the Fair Labor Standards Act (FLSA).

The FLSA white collar exemptions apply to individuals in executive, administrative, professional, and some outside sales and computer-related occupations. Some highly compensated employees may also qualify for the FLSA white collar overtime exemption.

To qualify for this exemption, white collar employees must satisfy the standard salary level test, among other criteria. This salary level is a wage threshold that white collar employees must receive to qualify for the exemption.

The DOL is proposing to increase the standard salary level from:

- \$684 to \$1,059 per week (\$55,068 per year); and
- \$107,432 to \$143,988 per year for highly compensated employees.

### Action Steps

The proposal does not impose any new requirements on employers at this time. However, employers should become familiar with the proposed rule and evaluate what changes they may need to adopt if the rule is implemented as proposed.

### Highlights

- ✓ The salary level for the executive, administrative and professional exemptions will increase to \$1,059 per week (\$55,068 per year).
- ✓ The salary level for highly compensated employees will increase to \$143,988 annually.
- ✓ The proposed rule does not impact the duties test for the white collar FLSA exemptions.
- ✓ The rule would enable the DOL to update salary levels automatically every three years.

### Important Dates

#### Aug. 30, 2023

The DOL announced an FLSA overtime rule with higher salary levels for white collar employees.



## OVERVIEW

### ***1. What is the purpose of the Department's proposed rule?***

This rulemaking proposes to update and revise the regulations for determining whether certain white-collar salaried employees are exempt from minimum wage and overtime requirements under section 13(a)(1) of the Fair Labor Standards Act (FLSA). Employees are exempt if they are employed in a bona fide executive, administrative, or professional (EAP) capacity as those terms are defined in the Department of Labor's regulations at 29 CFR part 541. This exemption from the FLSA is sometimes referred to as the "white-collar" or "EAP" exemption.

### ***2. What is "overtime?"***

Unless specifically exempted, an employee covered by the FLSA must receive pay for hours worked in excess of 40 in a workweek at a rate not less than one and one-half their regular rate of pay. This is referred to as "overtime" pay.

### ***3. What determines if an employee falls within the EAP exemption?***

Currently, to fall within the EAP exemption, an employee generally must:

1. Be paid a salary, meaning that they are paid a predetermined and fixed amount that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
2. Be paid at least a specified weekly salary level, which is \$684 per week (the equivalent of \$35,568 annually for a full-year employee) in the current regulations (the "salary level test"); and
3. Primarily perform executive, administrative, or professional duties, as provided in the department's regulations (the "duties test").

Certain employees are not subject to either the salary basis or salary level tests (for example, doctors, teachers, and lawyers).

### ***4. When did the Department last revise the exemption regulations for EAP workers?***

The Department last updated the EAP exemption regulations in 2019. That update, which included setting the standard salary level test at its current amount of \$684 per week (equivalent to a \$35,568 annual salary), has been in effect since January 1, 2020.

### ***5. Why is the Department proposing to revise the exemption regulations for EAP workers?***

The Department is committed to keeping the earnings thresholds up to date for the benefit of both workers and employers. Four years have passed since the 2019 rule, during which time salaried workers in the U.S. economy have experienced a rapid growth in their nominal wages, which lessens the effectiveness of the current salary level threshold. Through this rulemaking, the Department seeks to update the salary level test to more effectively identify who is employed in a bona fide executive, administrative, or professional capacity and ensure that the FLSA's intended overtime protections are fully implemented.

In addition to updating the salary level to account for increased wages, the Department's proposal would ensure that the salary level effectively performs its historic function of screening nonexempt employees from the overtime exemption and would more effectively account for the switch from a two-test to a one-test system.



## **6. What is the Department proposing to change about its exemption regulations for EAP workers?**

In this rulemaking, the Department proposes to:

- Increase the standard salary level to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South), which would be \$1,059 per week (\$55,068 annually) based on current data;
- Apply the standard salary level to Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands, and increase the special salary levels for American Samoa and the motion picture industry;
- Increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally, which would be \$143,988 per year based on current data; and
- Automatically update these earnings thresholds every 3 years with current wage data to maintain their effectiveness.

## **7. Is the Department proposing any changes to the current duties test?**

The Department is not proposing changes to the standard duties test, consistent with its approach in both the 2016 and 2019 rules. At this time, the Department favors keeping the current standard duties test, which is well known to employers and employees. As long as it is paired with an appropriate salary level requirement, the standard duties test can appropriately distinguish bona fide EAP employees from nonexempt workers.

## **8. Where can I review, and how can I comment on, the Department's proposed changes to the exemption regulations for EAP workers?**

The Department's Notice for Proposed Rulemaking ("NPRM") is available at [www.regulations.gov](http://www.regulations.gov). The Department encourages all interested parties to participate in the rulemaking process by submitting written comments regarding the NPRM within 60 days from the publication date in the Federal Register.

## **FLSA Basics**

### **9. What does the FLSA do?**

The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards for employees in the private sector and in federal, state, and local governments. Covered nonexempt workers are entitled to a federal minimum wage of not less than \$7.25 per hour. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.

### **10. Who is covered by the FLSA?**

Generally, employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more are covered by the FLSA. In addition, employees of certain businesses are covered by the FLSA regardless of the amount of gross volume of sales or business done. These businesses include hospitals; establishments providing medical or nursing care for residents; schools (whether operated for profit or not for profit); and public agencies. Employees of



employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce.

## ***11. Does the FLSA and the Department’s proposed rule apply to state or local government workers?***

Yes, state and local government employers are subject to the FLSA and the Department’s proposed regulations concerning EAP employees.

## ***12. Is there a small business exemption from the FLSA or the Department’s proposed rule for EAP workers?***

The FLSA does not provide an exemption for small businesses. Generally, the FLSA and the proposed rule apply to employees of enterprises that have an annual gross volume of sales made or business done of \$500,000 or more, and certain other businesses. The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees.

## ***13. Is there an exemption for nonprofit organizations from the FLSA or the Department’s proposed rule?***

There is no exemption for nonprofit organizations under the FLSA or in the proposed rule. Thus, the proposed rule may impact nonprofit organizations that have an annual dollar volume of sales or business done of at least \$500,000. In determining coverage, only activities performed for a business purpose are considered. Charitable, religious, educational, or similar activities of organizations operated on a nonprofit basis where such activities are not in substantial competition with other businesses are not considered. Employees of employers that are not covered by the FLSA on an enterprise basis may still be entitled to its protections if they are individually engaged in interstate commerce.

## ***14. How is overtime pay determined?***

Unless exempt, an employee covered by the FLSA must receive overtime pay for all hours worked over 40 in a workweek at a rate not less than one and one-half times their regular rate of pay. For guidance in determining an employee’s “regular rate of pay” when calculating overtime pay, refer to WHD Fact Sheet #56A or the Department’s regulations at 29 CFR part 778.

## ***15. What is the FLSA’s EAP exemption?***

Section 13(a)(1) of the FLSA exempts individuals employed in a “bona fide executive, administrative, or professional capacity” from the Act’s minimum wage and overtime requirements. Certain computer professionals and outside sales employees are included in the exemption and therefore excluded from the minimum wage and overtime requirements. The FLSA instructs the Department to issue regulations that define and delimit the EAP exemption; those regulations are located at 29 CFR part 541.

## ***16. I’m paid a salary and my job title is manager. Am I exempt from overtime pay?***

Job titles do not determine exempt status, and the fact that a white-collar employee is paid on a salary basis is not alone sufficient to exempt that employee from the FLSA’s minimum wage and overtime requirements. For an exemption to apply, an employee’s specific job duties and salary must meet all of the applicable requirements provided in the Department’s regulations.



## ***17. What if a state has its own laws about who is entitled to overtime pay?***

The FLSA provides minimum standards and does not preempt a state from establishing more protective standards. If a state establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that state. This would include, for example, exemption criteria for EAP employees under state law with higher earnings thresholds than those provided in the Department's federal regulations.

## **Earnings Thresholds**

## ***18. What are the current earnings thresholds needed for the EAP exemption?***

Under the current regulations, an executive, administrative, or professional employee generally must be paid at least \$684 per week (equivalent to \$35,568 annually for a full-year employee) to be exempt from the FLSA overtime protections. This \$684 per week threshold is the standard salary level.

A computer professional may be exempt if they are paid at least \$684 per week or at least \$27.63 an hour, if paid on an hourly basis.

There is no salary level test required to qualify as an exempt outside sales employee. Certain professionals including doctors, lawyers, and teachers are also not subject to the salary tests.

Finally, the current regulations also contain a less restrictive duties test for certain highly compensated employees who receive total annual compensation of \$107,432 or more and are paid at least \$684 per week.

## ***19. What is the proposed standard salary level?***

The Department is proposing to set the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). Using 2022 data, the proposed salary amount would equal \$1,059 per week (which is \$55,068 annually for a full-year worker).

## ***20. Why is the Department proposing to set the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers?***

In updating the standard salary level, the Department seeks to more effectively identify who is employed in a bona fide executive, administrative, or professional capacity. The proposal updates the standard salary level to account for earnings growth since the 2019 rule and adjusts the salary level methodology based on the lessons learned in recent rulemakings.

## ***21. What salary levels have the Department proposed to apply in U.S. territories?***

This proposal would restore the Department's longstanding policy prior to 2019 of only setting special lower salary levels for employees in those U.S. territories that are not subject to the full federal minimum wage (currently \$7.25 per hour). Accordingly, the Department proposes to apply the standard salary level (\$1,059 per week) to employees in Puerto Rico, where the federal minimum wage has applied since 1996; Guam, where the federal minimum wage has applied since at least 1957; the U.S. Virgin Islands, where the federal minimum wage has applied since 1989; and the CNMI, where the federal minimum wage has applied since 2018.



The Department proposes to set a special salary level for employees in American Samoa equal to 84 percent of the standard salary level (\$890 per week, based on a proposed standard salary level of \$1,059 per month), since American Samoa remains subject to special minimum wage rates below the federal minimum wage. American Samoa is scheduled to increase its minimum wage rates until they equal the federal minimum wage. The Department proposes that 90 days after the highest industry minimum wage for American Samoa equals the federal minimum wage, the full standard salary level would apply for all EAP employees in all industries in American Samoa.

## ***22. Is the Department proposing to change the special base rate for employees in the motion picture industry?***

The current regulations permit employers to exempt employees in the motion picture industry who are paid a specified base rate per week (or a proportionate amount based on the number of days worked), so long as they meet the duties test for the EAP exemption. Consistent with its practice in recent rulemakings, the Department proposes to increase the required base rate in proportion to the proposed increase in the standard salary level test, resulting in a proposed base rate of \$1,617 per week (or a proportionate amount based on the number of days worked).

## ***23. Is the Department proposing to increase the salary level for highly compensated employees?***

The Department is proposing to set the Highly Compensated Employee (HCE) annual compensation level equal to the 85th percentile of earnings for full-time salaried workers nationwide. Based on current data, the proposed HCE threshold would be \$143,988 per year, of which at least \$1,059 per week (the proposed standard salary level) would have to be paid on a salary or fee basis. The Department believes that its proposed methodology results in an HCE level that is low enough to not restrict the use of the HCE test for employers in low-wage regions and industries, and high enough to guard against the unintended exemption of workers who are not bona fide executive, administrative, or professional employees in higher-income regions and industries.

## **Future Updates**

### ***24. Does the proposed rule address future updates to the earnings thresholds provided in the EAP exemption regulations?***

The Department is proposing a mechanism to automatically update the earnings thresholds every three years to ensure that they remain effective tests for exemption. If finalized, this proposal would ensure that the Department can timely and efficiently update the earnings thresholds in future years to reflect current wage data. Experience has shown that the salary level test is a strong measure of exempt status only when it is up to date. Left unchanged, the test becomes substantially less effective as wages for overtime-protected workers increase over time. Automatically updating the salary level and HCE total annual compensation requirement using the most recent data will ensure that these tests continue to accurately reflect current economic conditions.

### ***25. How is the Department proposing to automatically update the salary level and HCE total compensation levels?***

The Department is proposing to update the standard salary level and the HCE total compensation requirement every three years to reflect current earnings data. Specifically, the Department is proposing to update the standard salary level by adjusting it to remain at the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (currently the South). The Department is proposing to update the HCE total annual compensation requirement to



remain at the annualized weekly earnings of the 85th percentile of full-time nonhourly workers nationally. The Department proposes to update both of these thresholds using the most recent available four quarters of data, as published by BLS, preceding the publication of the Department's notice to automatically update the thresholds.

Because the proposed special salary level for American Samoa and the base rate for the motion picture industry are set in relation to the standard salary level, those earnings thresholds would also reset at the time the standard salary level is updated. At least 150 days before the date of the update of the standard salary level and the HCE total annual compensation requirement, the Department would publish in the Federal Register a notice with the new earnings levels described above.

## ***26. Does the proposed rule include any special exceptions where the earnings thresholds would not be automatically updated?***

The Department's proposal includes a provision allowing the Department to temporarily delay a scheduled automatic update where unforeseen economic or other conditions warrant. This feature would afford the Department added flexibility to adopt to unforeseen circumstances without sacrificing the benefits provided by automatic updating.

## **Impact**

### ***27. What are the estimated costs, benefits, and transfers of the proposed rule?***

The Department estimates that in Year 1, the proposed rule would impose \$1.2 billion of direct costs on employers, including \$427.2 million in regulatory familiarization costs, \$240.8 million in adjustment costs, and \$534.9 million in managerial costs. The Department estimates that the proposed rule would result in a Year 1 income transfer of \$1.2 billion from employers to employees, predominantly from new overtime premiums, or pay raises to maintain the exempt status of some affected employees. Beyond these wage transfers, the proposal could reduce the risk of misclassification, increase worker productivity, reduce employee turnover, and increase personal time for workers.

### ***28. How many employees would be impacted by the proposed salary level increase?***

In the first year, the Department estimates that 3.4 million workers exempt under the current regulations who earn at least the current weekly salary level of \$684 but less than the proposed salary level of \$1,059 would, without some intervening action by their employers, become newly entitled to overtime protection under the FLSA.

Similarly, the Department estimates that an additional 248,900 workers who earn at least \$107,432 per year (the current HCE total annual compensation level) and who meet the minimal HCE duties test but not the standard duties test, would, without some intervening action by employers, become eligible for overtime if the HCE total annual compensation level were increased to the proposed level of \$143,988 per year.

*Source: U.S. Department of Labor – [Frequently Asked Questions](#) for the Notice of Proposed Rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*