# OVERTIME RULES?

## A NEW DOL PROPOSAL HAS BEEN RELEASED

Earlier in March, the Department of Labor (DOL) released a new proposal on overtime for employees who are classified as "exempt." Much debate has occurred on this issue dating back to a proposal by the Obama administration in 2016, which was blocked by a US District Court in Texas just 9 days before the rule came into effect. While this new rule may face similar legal challenges, it's important for employers to develop a plan of action so they are ready if the new rule takes effect in January of 2020, as scheduled. Please read on to learn more about the new rule.

### What is in the New Rule?

The DOL's new proposed overtime rule would raise the minimum salary that an employee must be paid in order to be considered exempt from $23,660 to $35,308. "Exempt" refers to a category of employees defined by the Fair Labor Standards Act. Exempt employees do not need to be paid overtime wages, whereas non-exempt employees must be paid 1.5 times their regular rate for any hours worked over 40 per week.

The exempt employee's job duties must also meet certain other criteria, such as the Salary Test and Duties Test. The Salary Test dictates that the employee must receive a salary and not be paid an hourly wage, meaning their rate of pay does not vary based on the quantity of work hours. The Duties Test states that the employee must primarily perform executive duties, administrative duties, professional duties, certain computer-related duties, outside sales duties, as well as a few others defined by the regulations. While this may sound simple, **misclassifying employees as exempt is one of the most violated provisions of the law.**

- Employees under the "executive exemption" must regularly direct the work of at least 2 employees and have the ability to hire and fire employees.
- Employees under the "administrative exemption" must perform non-manual work directly related to management or general business operations and "exercise discretion and independent judgment with respect to matters of significance."
- Employees under the "computer exemption" must be systems analysts, computer programmers, software engineers, or require similar skills while working in the computer field.
- Other exemptions are explained in this DOL Fact Sheet: <https://www.dol.gov/whd/overtime/fs17a_overview.pdf>

The 2016 rule was blocked in court because the judge agreed with plaintiffs that the DOL had raised the salary threshold so high that the Duties Test became irrelevant; however, the judge did state that the DOL can set the minimum salary level and adjust that level based on inflation.

The 2019 proposal would raise the minimum annual salary to $35,308 from the current salary of $23,660, which was established in 2004. The new proposed salary was generated based on the 20th percentile of wages for full-time salaried employees in the lowest-wage Census Region. While based on 2017 data, the number was projected forward to January 2020, when the rule is expected to take effect. The 2016 proposal used the 40th percentile. An illustration is below, along with a breakdown of these numbers by week.

| | Current Rule (Established 2004) | 2016 Proposal (Blocked) | 2019 Proposal (New) |
|---|---|---|---|
| Annual Salary | $23,660 | $47,476 | $35,308 |
| Weekly Salary | $455 | $913 | $679 |

In addition, the new rule increases the "highly compensated employee" salary level from $100,000 to $147,414. This number was calculated based on the 90th percentile of wages for full-time salaried employees nationally, again using 2017 numbers projected forward to January 2020.

The new rule also sets up for additional minimum salary increases every 4 years to adjust for inflation. Changes will be made through notice-and-comment rulemaking.

## Submitting Comments

Employers who would like to make comments about the new rule may do so by visiting <www.regulations.gov>. The period for comments will end on May 6, 2019.

## Strategic Thoughts

While the rule has not been finalized yet, employers should begin preparing for its implementation but wait to make changes. Employers will have three options to choose from and will want to use the time period available prior to the rule taking effect to evaluate which option is best:

1. Raise affected employee pay to $35,308.
2. Convert affected employees to non-exempt employees and pay them on an hourly basis. Employers will need to have a system to track employee time and pay overtime when it occurs.
3. Continue paying employees the same salary but pay additional overtime when it occurs.

There are a number of reasons to take your time and plan accordingly because these changes will impact one of the most sensitive elements of the employee-employer relationship: employee pay. Take time to analyze and map out a coordinated strategy together with a communication plan. Doing so may also help you to avoid taking early steps only to find you have to make adjustments, thereby compounding any negative perceptions.

## What To Do Now

1. **Review the job duties of each employee that you currently have classified as exempt** to ensure they fit within one of the exemptions.

2. **Start tracking hours worked for the employees who will be affected by this new rule** if you are not already doing so. In addition to the hours worked at the office, you need to consider time spent working after hours on smart phones checking and sending emails, receiving or returning work-related phone calls, working lunches, and travel time during the normal workday.

3. **Analyze the financial impact of the new rule for affected employees.** Once you have a good feel for the hours worked, you can back into an hourly pay rate. Don't forget to factor each overtime hour as 1 ½ hours. Another option is to divide their annual salary by 2080, but you will need to manage overtime in order to stay budget neutral. You may also choose to continue to pay their current salary; however, you will still need to track their hours and pay overtime when it occurs.

4. **Review your current policies and procedures** and determine what will need to be modified and implemented. Managing overtime for newly reclassified employees will be a challenge. Company-provided smart phones, laptops, and other mobile communication devices, as well as telecommuting and traveling will all add to that challenge. Taking away these items will most certainly be seen as a negative. Additionally, review your current time tracking system to make sure it will be able to handle the process going forward. This may be an opportunity to look at more efficient time-keeping systems that track and report time more simply along with other conveniences such as automated approaching overtime alerts, off-schedule punches, PTO requests, and so on.

5. **Develop a communication strategy.** Communication is going to be the key to a smooth transition. Not having to punch a time clock is perceived as a benefit for many salaried employees. So in addition to changing their pay structure, moving to an hourly paid position may also be seen as a negative. Start talking with affected employees before the change. An initial memo may be fine, but face-to-face conversations are far more effective. Use positive examples such as being paid more during the busy times of the year or working after hours on projects. Include discussions about your new policies regarding answering non-emergency emails or calls after work and recording their time if they do encounter these issues.

## We Can Help

**We can help** you identify a budget-neutral solution and develop individualized communication strategies for the affected employees of each organization. Our model identifies at-risk employees, tracks their hours worked and generates a variety of viable and compliant pay alternatives based on an extensive series of analyses.

## For More Information

For more information or assistance, please contact our Human Resources team at **210–775–6082**, toll-free at **1–888–757–2104**, or **HRManagement@BFGonline.com**.


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