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SSG COMPLIANCE ADVISOR

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Preparing for the DOL's New Overtime Rule

In early March 2024, the U.S. Department of Labor's (DOL) proposed overtime rule, announced in August 2023, entered its last stage of review. Publication of the final rule is expected soon. The rule would amend the requirements that employees in certain 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, and some outside sales personnel and computer-related occupations. Some highly compensated employees (HCEs) may also qualify for a FLSA white-collar exemption.

To qualify for most white-collar exemptions, employees must meet the specified salary threshold, among other criteria. 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 (HCEs).

The rule would also enable the DOL to update the salary levels automatically every three years without having to rely on the rulemaking process.

ACTION STEPS

Employers can expect the final rule to be published soon, and the DOL has indicated that the final rule will likely take effect only 60 days after its publication. Therefore, employers should begin to familiarize themselves with the proposed rule and evaluate what actions they may need to take before the effective date. This Compliance Bulletin summarizes the proposed changes and describes steps employers may take in anticipation of the final overtime rule.

HIGHLIGHTS

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

IMPORTANT DATES

August 30, 2023

The DOL proposed higher salary levels for white-collar exemptions from overtime.

March 01, 2024

The DOL's proposed overtime rule entered its final stage of review.

Background on the Overtime Rule

The FLSA requires employers to pay employees overtime pay at a rate of 1.5 times their **regular rate of pay** for all hours worked over 40 in a workweek unless the employees qualify for an exemption under the FLSA. The FLSA provides several exemptions from the overtime pay requirements, the most common of which are the “white-collar” exemptions. These exemptions primarily apply to executive, administrative and professional employees (EAPs) but also apply to some individuals in outside sales and computer-related occupations and certain HCEs.

To qualify for most white-collar exemptions, an employee must satisfy the following tests:

- The **salary basis test** requires that the employee is paid a predetermined and fixed salary that does not fluctuate based on the quality or quantity of work;
- The **salary level test** requires that the employee meets a minimum specified amount to qualify for the exemption. The current salary threshold is \$684 per week (\$35,568 per year). The current compensation threshold for HCEs is \$107,432 per year (\$35,568 of which must be earned on a salary basis). However, outside sales personnel and certain other professions, including doctors, lawyers and teachers, are not subject to the salary level test; and
- The **duties test** requires that an employee’s actual work responsibilities match the description the FLSA assigns to the exemption. HCEs are subject to a less restrictive duties test.

The proposed rule would increase the salary threshold from \$684 to \$1,059 per week (\$55,068 per year) and raise the compensation threshold for HCEs from \$107,432 to \$143,988 per year (\$55,068 of which must be earned on a salary basis). These amounts may be different in the final rule, so employers should carefully review the final rule once published. The proposed rule also enables the DOL to automatically increase these thresholds every three years without having to rely on the rulemaking process.

Preparing for the New Overtime Rule

Identify Affected Employees

Employers should review payroll data to identify which employees will be affected by the new overtime rule. Specifically, the proposed rule will affect employees who are classified as exempt and earn an annual salary of less than \$55,068, and HCEs who are classified as exempt and earn annual compensation of less than \$143,988. In determining total compensation for purposes of the HCE exemption, only \$55,068 of such compensation must be paid on a salary basis, and the remaining compensation may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation.

Employees who are already classified as nonexempt from overtime under the FLSA will **not** be affected by the new overtime rule, regardless of their compensation.

Determine Treatment of Affected Employees

Highly Compensated Employees

To qualify for a white-collar exemption, HCEs are subject to a more relaxed duties test, which requires only that the employee’s primary duty must be office or nonmanual work and the employee must customarily and regularly perform at least **one** of the bona fide exempt duties of an EAP employee. For HCEs who are currently classified as exempt but earn less than the annual compensation threshold under the proposed rule (\$143,988), employers should assess whether they may still qualify for an exemption under the more stringent duties test applied to other white-collar exemptions. If they cannot satisfy that duties test, then employers must decide whether to raise their salaries to meet the new HCE compensation threshold or reclassify them as nonexempt employees once the new rule becomes effective, as described below.



All Other Affected Employees

After identifying any affected employees, employers will need to take one of the following actions with respect to such employees as of the rule's effective date:

- Raise their salaries so as to satisfy the salary level test for an exempt classification; or
- Reclassify the employees as nonexempt from overtime.

Employers are not required to take the same approach for all affected employees. However, it is generally considered best practice to assign the same classification to employees with the same job title and duties. Thus, employers may wish to make such determinations on a position-by-position basis rather than individually.

Further, to the extent employers choose to reclassify affected employees as nonexempt, employers will need to decide whether to pay newly nonexempt employees on an hourly rather than salary basis. Nonexempt employees are typically, but not required to be, paid on an hourly basis. Paying nonexempt employees hourly generally simplifies the process of determining overtime pay and ensures employees are paid only for hours worked. However, some employees view salaried positions as more prestigious and appreciate the predictability of a salary that does not fluctuate between paychecks. Therefore, employers may also need to consider the potential impacts on employee morale.

Track and Analyze Hours Worked

Under the FLSA, employers are required to track hours worked by nonexempt employees for purposes of calculating overtime (i.e., payment for hours worked in excess of 40 in a workweek). Employers may better prepare for the new rule by tracking and analyzing the hours worked by affected employees. This tracking and analysis can help employers determine the potential cost of reclassification and influence an employer's decision to either reclassify affected employees as nonexempt or increase their salaries. For example, if affected employees rarely work more than 40 hours per week, it may be more cost-effective to reclassify them as nonexempt. Conversely, if the affected employees regularly work more than 40 hours per week, it may be more cost-effective to avoid paying substantial overtime by increasing their salaries to retain their exempt status.

Review and Update Employer Policies

Overtime

Employers who want to limit the amount of overtime worked by reclassified employees should consider a policy of requiring overtime hours to be approved in advance and disciplining employees who violate such policy (employers are still required to pay for all overtime work even if not preapproved). However, employees who regularly work more than 40 hours per week as exempt employees may not be able to accomplish as much work if they are limited to working a maximum of 40 hours per week after reclassification. Therefore, employers that choose to restrict overtime may also consider whether to modify performance expectations, shift duties or responsibilities, or hire additional workers.

Timekeeping

Under the new overtime rule, employers may consider how existing timekeeping practices will apply to any affected employees the employer reclassifies as exempt and whether any modifications are required. For example, if employers reclassify remote or hybrid workers as nonexempt, employers will need to ensure that such workers will be able to record time remotely. Moreover, employers may need to establish additional guardrails for work performed at irregular times or off-site. For example, if affected employees conduct work remotely outside of business hours (e.g., answering emails during evenings or weekends), employers may need to modify their policies to ensure that such time is properly recorded or require all work to be conducted during business hours.

Other Employee Policies

Employers may also consider reviewing existing policies that differentiate between exempt and nonexempt workers and consider potential implications for reclassified employees. For example, employers may offer different vacation policies or bonus opportunities depending on an employee's exempt status.



Develop Internal Communications

Employers that choose to reclassify affected employees should communicate the change with employees in advance of the date such reclassification takes effect. The communications should generally include an explanation of the change in employee classification, the date such change goes into effect, a description of the organization's timekeeping policies (and meal and rest break policies, if applicable), the employees' obligations under such policies, and a description of any changes under employer policies that differentiate between exempt and nonexempt employees (e.g., vacation policies). Some employees could view the reclassification to nonexempt as a demotion, so employers may want to reassure employees that the change has no effect on their status and emphasize the positive aspects of reclassification, such as overtime eligibility.

Employers should also notify managers of the new requirements so that they understand their obligations with respect to newly nonexempt employees, such as reviewing and authorizing overtime. Employers may also consider notifying payroll personnel of any potential changes to employee paychecks, such as paying and calculating overtime and converting salaried employees to hourly employees.

Employers may begin preparing these communications now; however, because the final rule may include different salary thresholds and other changes, employers should wait to issue communications to employees until after the final rule is published.

Prepare Employee and Manager Trainings

Employees who are reclassified may be unfamiliar with timekeeping and other practices applicable to only nonexempt employees. Therefore, in addition to communicating the change, employers may consider training reclassified employees on timekeeping, hours scheduling, overtime approval, meal and rest breaks, and any other policies applicable only to nonexempt employees prior to the effective date of their reclassification. Managers of the reclassified employees may also need additional training to understand their obligations with respect to such employees, such as approving or denying overtime and ensuring hours are accurately tracked and reported.

As with communications to affected employees, employers may begin preparing training programs now but should wait to conduct training until after the final rule is published.

Audit Exempt Employees' Job Duties

Although the proposed overtime rule does not make any changes to the duties requirements for exempt classification, employers may also consider a broader audit on whether their exempt employees' job duties and responsibilities satisfy the FLSA's duties tests for white-collar exemptions. Employers may also wish to review existing job descriptions for exempt positions to ensure that they accurately reflect the work performed.

Review Applicable State and Local Overtime Laws

Some employers may already be subject to state or local laws that impose a higher salary threshold to qualify for an overtime exemption. Therefore, employers should continue to evaluate proper employee classifications using applicable state and local criteria as well as federal criteria.

Additionally, certain state and local laws, including those regarding meal and rest breaks, may only apply to nonexempt employees. Employers who reclassify employees as nonexempt should determine whether any such state or local wage and hour laws may apply to the reclassified employees and, if so, should inform the employees of these additional rights and benefits.

Monitor for Updates and Legal Challenges

While employers may take steps now to prepare for the final rule, they may want to wait to implement any concrete changes before the final rule takes effect. The final rule is likely to differ somewhat from the proposed rule, so employers should carefully review the final rule once published to identify any substantive changes. Moreover, the final rule is expected to face legal challenges similar to those with respect to the 2016 overtime rule, which resulted in substantial delays and was ultimately blocked and abandoned by a new administration. Therefore, employers should watch for updates and prepare for potential uncertainty following the final rule's publication.

