

March 2019

## It's Déjà Vu All Over Again—DOL Proposes (New) Revisions to Salary Requirements for FLSA Overtime Exemptions

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The U.S. Department of Labor (DOL) recently released its long-awaited proposed revisions to the regulations governing the minimum salary requirements applicable to the overtime exemptions for executive, administrative, and professional (EAP) employees and highly compensated employees (HCE) under the federal Fair Labor Standards Act (FLSA). Employers may recall that the Obama-era DOL issued a final rule concerning the same FLSA exemptions (the “2016 final rule,” explained in our prior [Client Alert](#)), which has been on hold under a nationwide injunction issued in late 2016 by a Texas federal judge. The new proposed rule, if adopted, will supplant the 2016 final rule.

On March 22, the Federal Register published the DOL's proposed rule, formally opening the 60-day public comment period, which ends May 21, 2019. Employers or other stakeholders wishing to comment on the DOL's proposed rule may submit their comments electronically [here](#).

Outlined below are highlights of the DOL's proposal and the key distinctions from the prior 2016 final rule:

- **Increase of the Annual Minimum Salary for EAP Exemptions.** To qualify for the EAP overtime exemptions under the FLSA's current rule, employees must perform certain exempt duties and, on a salary basis, be paid at least \$455 per week, or the equivalent of \$23,660 annually. Employees who do not meet the salary threshold and are not covered by any other exemption (for example, outside sales employees or certain computer employees) must be paid overtime if they work more than 40 hours per week. The DOL now proposes to increase the minimum salary requirements for the EAP overtime exemption to \$679 per week, or the equivalent of \$35,308 annually. This is a significantly *smaller* increase than the 2016 final rule, which proposed to double the current salary threshold to \$47,476 annually. The proposed new minimum salary will not apply to learned professionals like bona fide teachers, lawyers, and doctors, whose exemptions under the FLSA still will not be subject to a salary test.
- **Increase of the Minimum Annual Compensation for the HCE Exemption.** The FLSA's HCE exemption from overtime currently applies to employees who are paid at least \$100,000 in total annual compensation and satisfy a less-stringent duties test than for the EAP exemptions. The proposed rule increases the minimum annual compensation requirements from \$100,000 to \$147,414. This is a *larger* increase than in the 2016 final rule, which proposed to increase the HCE threshold to \$134,004.
- **Certain Nonsalary Pay May Be Used to Meet Salary Thresholds.** Similar to the 2016 final rule, the new rule allows employers to include certain nondiscretionary bonuses, incentive pay, and commissions to meet the EAP and HCE salary thresholds. To qualify, the nondiscretionary compensation must be paid at least annually, and it may be paid more frequently. To satisfy the minimum salary for an EAP exemption under the proposed new rule, the nondiscretionary compensation may be applied to satisfy up to 10 percent of the new minimum salary level. Under the proposed revision to the HCE rule, the employee's total annual compensation must include at least the minimum salary required for the EAP exemptions (i.e., at least \$679 per week) and may also include commissions and other nondiscretionary compensation.
- **No Automatic Adjustments of the Salary Threshold.** Unlike in the 2016 final rule, the DOL is no longer proposing to include automatic adjustments to the minimum salary thresholds. Instead, the DOL will engage in reviews of the salary threshold every four years, a process that would require formal rulemaking.
- **No Changes to the Existing Duties Tests.** The DOL's new proposed rule, like the 2016 final rule, does not modify the existing duties tests under the EAP or HCE exemptions, which the DOL has summarized in general terms on its [website](#). This means that employees meeting the proposed new salary thresholds for the EAP or HCE exemption must still satisfy the relevant job duties tests.

The DOL projects that the new rule will become final in January 2020. To prepare for the anticipated changes to the EAP and HCE exemptions under the FLSA, employers are advised to work with counsel to review compliance with the current and proposed rules and prepare to make any necessary adjustments to employee classifications or pay practices. Of course, employers must also take into account state law overtime requirements, since jurisdictions such as New York and California already require salary levels that exceed those proposed by the DOL rule for the FLSA exemptions.

**If you would like additional information on this topic, please contact the authors, a member of the [Labor & Employment Practice Group](#), or your lawyer at McCarter & English, LLP.**



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