

CLIENT ALERT

Proposed DOL Regulations Would Increase Salary Threshold for Exempt Employees

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Employees earning less than \$35,308 per year will be automatically eligible for overtime, if the Department of Labor's (DOL's) new Fair Labor Standards Act (FLSA) regulations, which were announced March 7, 2019, take effect. The mandatory salary level would increase from \$455 to \$679 per week.

The proposed rule follows previous DOL regulations issued in 2016 under the Obama Administration, which would have more than doubled the salary level. The previous regulations were struck down by a federal court in 2016 before they went into effect.

Some form of proposed increase to the minimum salary under the Trump Administration has been expected by DOL watchers, as the DOL issued a Request for Information in 2017 seeking comments about the salary level test. The new proposal is consistent with the expectations that a new minimum salary would fall in between the current minimum of \$455 per week and the salary level set forth in the 2016 rule -- which would have required a minimum salary of \$913 per week to start and would have increased automatically based on a set formula.

In this most recent proposal, the DOL has returned to the formula used to calculate the minimum salary level in the 2004 regulations, which was the last time the salary level increased. The DOL views the 2004 methodology as "reasonable and appropriate." The methodology for setting the salary level looks at the 20th percentile of all earnings for full-time salaried workers in the lowest-wage Census region. Unlike the 2016 rule, the current proposal sets a minimum salary, but does not include any automatic increases. The DOL has stated that it intends to seek increases to the salary levels every four years going forward, but will do so through a formal rulemaking process instead of applying an automatic increase by formula.

The DOL estimates that 1.1 million employees will gain overtime eligibility by 2020 if the DOL implements the current proposal.

Nondiscretionary Bonuses and Incentive Payments Can Be Counted Toward the Salary Level Requirement (in a Limited Way).

The DOL's proposal will allow employers, for the first time, to satisfy up to 10 percent of the minimum salary level through the payment of nondiscretionary bonuses or incentive payments. The 10 percent amount can be used to make a "catch-up" payment to the employee at the end of the year if the total amount paid in the 52-week period did not rise to \$35,308. This means that employers could potentially count on paying up to \$3,530 at the end of the year to an employee to whom they have not paid overtime but also have not paid a regular salary of \$679 per week in order to ensure that they meet the minimum annual salary and maintain the exemption from overtime requirements. The 10 percent/90 percent model mirrors similar language from the 2016 rule, except that such bonuses must be paid at least annually or more frequently, rather than at least quarterly under the 2016 rule.

Highly Compensated Employee Threshold Rises from \$100,000 to \$147,414 Annually. The DOL also proposes to raise the "highly compensated employee" exemption threshold to approximately \$147,414. This figure is tied to the expected 90th percentile of full-time salaried workers in 2020, which is essentially the same methodology the DOL used in calculating the

threshold in the 2016 rules, except that the new proposal will not include annual fluctuations. The DOL estimates that the new threshold would impact approximately 200,000 workers.

No Changes to the “Duties Test” for White Collar Exemptions. The new proposal does not suggest any changes to the "primary duty" analysis, which, since 2004, has defined the FLSA's "duties" test for most white collar exemptions. This is consistent with the 2016 rule.

Next Steps. The DOL’s announcement on March 7, 2019 came in advance of publication of the proposed rulemaking in the Federal Register, which is expected to occur next week. Once published, there will be a 60-day period of notice and comment. When it issued its last notice of proposed rulemaking on the salary level prior to the 2016 regulations, the DOL received more than 300,000 comments, and it received more than 200,000 comments in response to its 2017 Request for Information.

The current proposal is likely to be welcomed by many in the business community. Some commentators have already argued that the salary increase will impede job growth. Employee advocates contend that, because the new proposal does not change the duties test, it does not go far enough to ensure that an appropriate number of employees are overtime eligible.

Takeaways for Employers. Employers should expect these proposed regulations to be implemented in final form, largely in the substance summarized here. This is because many of the comments and arguments that will be submitted to the DOL in the weeks ahead are already known to the DOL and have already been taken into account through the comment processes in 2016 and 2017. There may be legal challenges to the regulations, likely from employee advocates. But, because the DOL has already attempted to take into account the reasons why the 2016 regulations were struck down by the court, we expect that any arguments challenging the proposed regulations as arbitrary and capricious or otherwise inappropriate under the Administrative Procedure Act will face an uphill battle to prevail.

The proposed regulations confirm that employers should review their employee classifications and prepare to adapt to the coming rules. Preparations should include the reclassification of employees who do not meet the salary threshold requirements to non-exempt and training of formerly-exempt employees on the requirements of timekeeping systems and FLSA overtime compliance policies.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies

Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Trina Fairley Barlow

Partner – Washington, D.C.
Phone: +1 202.624.2830
Email: tbarlow@crowell.com

Andrew W. Bagley

Senior Counsel – Washington, D.C.
Phone: +1 202.624.2672

Email: abagley@crowell.com

Christine B. Hawes

Counsel – Washington, D.C.

Phone: +1 202.624.2968

Email: chawes@crowell.com