

Overtime Rules: US Labor Department Proposes Hiking Salary Threshold for Exempt Employees

Highly anticipated proposal raises the minimum base salary for exempt employees to US\$35,308, while formally rescinding the enjoined 2016 final rule that would have doubled the current minimum level.

Key Points:

- Increases the minimum base salary for exempt employees under the Fair Labor Standards Act (FLSA) from US\$455 to US\$679 per week
- Increases the minimum annual compensation required to qualify for the FLSA's "highly compensated employees" exemption from US\$100,000 to US\$147,414
- Allows up to 10% of the minimum base salary to be paid through nondiscretionary bonuses and incentive payments
- Does not provide for automatic periodic increases to the salary level

On March 7, 2019, the US Department of Labor (the Department) proposed a new rule that would raise the minimum base salary required to qualify for an exemption from the overtime requirements of the FLSA under the "executive," "administrative," and "professional" exemptions (the so-called "white collar" exemptions), among other updates summarized in the table below. Currently, employees who are classified as exempt under these FLSA exemptions must perform qualifying duties and be paid on a salaried basis in an amount that equals at least US\$455 per week (or US\$23,660 annually). The proposed new rule, which would take effect in 2020, does not modify the duties requirements.

Updates Under the Proposed New Rule

Recognizing that the current salary level, which was set in 2004, should be updated to reflect current wages, the Department has proposed increasing the minimum base salary to US\$679 per week, or US\$35,308 annually. This new salary minimum is far less than the US\$913 per week threshold the Department set in its 2016 final rule. The new rule would formally rescind the 2016 final rule, which a Texas federal court had ruled invalid shortly before it would have taken effect.

The new rule would also raise the annual compensation threshold required to qualify under the FLSA's "highly compensated employee" exemption to US\$147,414. This proposed new annual compensation level is almost 50% more than the current level and, surprisingly, higher than the level set by the enjoined 2016 final rule.

Similar to the 2016 final rule, the proposed new rule permits employers to provide up to 10% of the minimum base salary (*i.e.*, up to US\$67.90 per week, or US\$3,530.80 annually) through nondiscretionary bonuses and incentive payments, including commissions, provided such payments are paid at least annually. This means an employer could pay an exempt employee at least 90% of the minimum base salary each pay period (*i.e.*, at the rate of at least US\$611.10 per week) and pay the additional 10% (*i.e.*, at most \$3,530.80 annually) at the end of the 52-week period through such alternative payment options. The new rule expressly provides that employers may use any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year.

The Department also proposes to permit employers to make a final catch-up payment within one pay period after the end of each 52-week period to any exempt employee who does not receive enough nondiscretionary bonus or incentive pay to cover the withheld 10% of the minimum base salary. Any such final catch-up payment will count toward the prior year's salary amount, to meet the FLSA exemption salary test. Otherwise, if an employee does not receive the full minimum salary for the 52-week period needed to qualify for an FLSA exemption, the employee would lose his or her exemption and be entitled to overtime pay for hours worked above 40 in a workweek.

Unlike the 2016 final rule, the proposed rule does not include automatic periodic increases to the minimum base salary, though the Department affirmed its intention to propose updates every four years that would be subject to the standard rulemaking process.

The following table sets forth a summary of the key FLSA updates under the proposed new rule, excluding the new special salary levels applicable to US territories, as compared to both the current rule and the enjoined 2016 final rule:

	Current Rule	Enjoined 2016 Final Rule	Proposed New Rule
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Minimum base salary to maintain the “executive,” “administrative,” and “professional” FLSA exemptions	US\$455 per week (US\$23,660 annually)	US\$913 per week (US\$47,476 annually)	US\$679 per week (US\$35,308 annually)
Minimum total annual compensation required to maintain the “highly compensated employees” FLSA exemption	US\$100,000	US\$134,004	US\$147,414
Do nondiscretionary bonuses and incentive payments (including commissions) count	No	Yes, but only up to 10% of the minimum base salary, and provided such	Yes, but only up to 10% of the minimum base salary, and provided such

	Current Rule	Enjoined 2016 Final Rule	Proposed New Rule
toward the minimum base salary?		payments are paid at least quarterly	payments are paid at least annually
Special salary rules applicable to the motion picture producing industry, under which exempt employees need not be paid on a salaried basis, provided their base rate equals the rule's minimum level (based a workweek of not more than 6 days)	US\$695 per week (or a proportionate amount based on the number of days worked)	US\$1,397 per week (or a proportionate amount based on the number of days worked)	US\$1,036 per week (or a proportionate amount based on the number of days worked)
Is there a mechanism for increasing the salary and compensation thresholds in the years to come?	No	Yes, automatic updates every 3 years	No, but the Department intends to propose updates every 4 years

The Department has invited public comments over the next 60 days.

The Department is hopeful the new rule will survive challenges in court this time, given the less drastic minimum base salary increase. Further, unlike with the 2016 final rule, the Department used the same methodology to calculate the salary level it used in 2004, which has stood the test of time.

Preparing for the New Rule

When the proposed rule becomes final, employers should review the base salaries of their exempt workforce and consider increasing base salaries or reclassifying employees as non-exempt, if and as necessary. Employers may recall doing a similar drill in anticipation of the Department's 2016 final rule raising the minimum base salary to US\$913 per week. The rule provides a silver lining for employers who already increased base salaries in anticipation of the enjoined 2016 final rule, as those employers may have little to do to prepare for the new rule, given the proposed lower salary level.

As always, employers should ensure their exempt employees perform duties that satisfy the duties test of at least one FLSA exemption, which the proposed new rule leaves as-is. Further, employers should ensure their exempt employees are paid in accordance with applicable state laws that may impose stricter salary requirements, such as in California and New York, which the FLSA does not preempt.

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