

ALERT

DOL Issues Notice of Proposed Rulemaking to Update Overtime Rules

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WHAT: The Department of Labor (DOL) has issued a Notice of Proposed Rulemaking (NPRM) to update the regulations issued under the Fair Labor Standards Act (FLSA) that govern the exemption to the minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees. The proposed rule would raise the current salary level for exemption, thus qualifying more workers for overtime protections. According to the NPRM, the minimum salary required to qualify for overtime would be raised from \$455/week (\$23,660 annually) for workers who work more than forty hours per week to \$679/week (\$35,508 annually). DOL has estimated that 1.3 million currently exempt employees would become eligible for overtime in Year 1 should this rule be adopted. The proposed rule also increases the total annual compensation requirement for “highly compensated employees” (HCE) from \$100,000 to \$147,414 per year. DOL is not considering any change to the “duties test,” one of the tests required to determine if a particular employee is qualified for the exemptions.

In addition to raising the minimum salary requirements, the proposed rule discusses DOL’s intention to propose updates to the earnings thresholds every four years, as opposed to automatic updating of this threshold. The proposed rule also allows employers to use nondiscretionary bonuses and incentive payments to satisfy up to ten percent of the standard salary level, although DOL is specifically seeking comment on whether the proposed ten percent cap is appropriate.

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Finally, this rulemaking is also intended to formally rescind the final rule issued by DOL on May 23, 2016, which was declared invalid and enjoined from enforcement by the United States District Court for the Eastern District of Texas.

WHEN: The Notice of Proposed Rulemaking was published on the Federal Register on March 22, 2019. Comments on the rulemaking are due by 11:59 p.m. on May 21, 2019.

WHAT DOES IT MEAN FOR INDUSTRY: DOL has estimated that the average annualized direct employer costs will be approximately \$120.5 million over the first ten years. This estimate is \$224 million less than the estimate for the 2016 rule, but this still has obvious implications for businesses who have employees that will no longer be exempt under the new rule.

This proposed rule has the potential for a unique impact on government contractors who have obligations under the Service Contract Labor Standards (SCLS), formerly known as the Service Contract Act (SCA). The definition of "service employee" in the SCLS is tied to the FLSA; executive, administrative, and professional employees who are exempt under the FLSA are not covered by the SCLS. By raising the salary requirement, the proposed rule has widened the number of employees who are non-exempt, and thus the number of employees covered by the SCLS. Should the proposed rule become final, contractors who have SCLS-exempt contracts will have to confirm whether any of these contracts may now be covered by the SCLS because the work is no longer going to be performed almost exclusively by FLSA-exempt personnel. Similarly, contractors will have to evaluate if employees that were exempt will no longer be exempt under the new rule. Contractors will also have to evaluate whether they are able to receive price adjustments due to an increase in worker wages, whether it be from increased salaries, overtime pay, or fringe benefits.

Comments on the proposed rulemaking may be submitted on www.regulations.gov under docket number RIN 1235-AA20 before May 21, 2019.