



Unpacking and Navigating the DOL's New Overtime Exemption Rule

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Introduction



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Overview for Today

- 01 Refresher on FLSA Overtime Exemptions**
- 02 Examining the Final Rule**
- 03 Challenges Ahead for the Final Rule**
- 04 Next Steps for Employers**

The EAP Overtime Exemptions

a look at status quo



*The provisions of sections 206...and 207...shall not apply with respect to...any employee employed in a bona fide **executive, administrative, or professional capacity... (as such terms are defined and delimited from time to time by regulations of the Secretary...)***

Section 13(a)(1) of the FLSA,
29 U.S.C. § 213(a)(1)



The DOL Defines EAP “Capacity” Through Duties and Pay

	Custodian	CEO
Hourly rate of \$5/hour	Not Exempt	Not Exempt
Hourly rate of \$150/hour	Not Exempt	Not Exempt
Salary of \$200,000/year	Not Exempt	Exempt



The EAP Exemption Rules

EAP (“white-collar”) exemptions as of *today*

1. Paid on a **salary basis**
2. At a **salary level of at least \$684/week** (except for practicing doctors and lawyers)
3. Performing **primary duty** of exempt executive, administrative, or professional (relaxed for HCE)

Highly-compensated employee (“HCE”) exemption as of *today*

1. **Total comp of \$107,432**, inclusive of min. salary
2. A **minimum duties test**

Some States Define Exemption More Narrowly

- Some states have their own overtime laws with their own exemptions
- **Salary level is higher in some states**, including (but not limited to):
 - ❑ California: \$66,560 annually
 - ❑ Colorado: \$55,000 annually
 - ❑ New York: \$58,458.40 to \$62,400 annually, depending on location
 - ❑ Washington: \$67,724.80 annually
- **Duties tests differ in some states**, including (but not limited to):
 - ❑ California: quantitative duties test (50%)
 - ❑ Colorado: quantitative duties test for executives
- And **plenty of states don't recognize all exemptions**, including HCE

Unpacking the New Rule

the DOL's push to
\$58,656

The New Rule Focuses on Salary Level

- No changes to the duties test

“While...the standard duties test is not universally popular, it is well known to employers, employees, and the courts, making it easier and more efficient for employers to implement and for workers to understand.”

- Focus is on **higher salary level**, as well as **new auto increases**
- DOL believes:
 - ❑ More than 4 million workers newly entitled to OT pay in year 1
 - ❑ \$1.5 billion in costs to employers and “income transfer” to employees
 - ❑ Increased worker productivity, reduced turnover, better balance

Changes to the EAP Salary Levels

	2004 (R)	2016 (D) (enjoined)	2019 (R) (current)	2024 (D) (July 2024)	2025 (?) (Jan. 2025)
Salary Level	\$455/week (\$23,660/year)	\$913/week (\$47,476/year)	\$684 per week (\$35,568/year)	\$844/week (\$43,099/year)	\$1,128/ week (\$58,656/ year)
Percentile	20 th in lowest-paid region and retail industry nationally	40 th in lowest-paid region	20 th in lowest-paid region	20 th in lowest-paid region	35 th in lowest-paid region
Auto-Increases	No	Yes, every 3 years	No	Auto increase in Jan. 2025	Yes, every 3 years, starting July 1, 2027

Potential Ratcheting Caused By Auto-Increases Tied to Wages Paid to Full-Time Salaried Workers



Note: The graphs and projected thresholds reflected on these graphics are neither precise nor to scale; they are intended for illustrative purposes.

Changes to the HCE Compensation Levels

	2004 (R)	2016 (D) (enjoined)	2019 (R) (current)	2024 (D) (July 2024)	2025 (?) (Jan. 2025)
Total Annual Comp	\$100,00	\$134,004	\$107,432	\$132,964	\$151,164
Percentile	-	90 th nationally	80 th nationally	80 th nationally	85 th nationally
Auto-Increases	No	Yes, every 3 years	No	Auto increase in Jan. 2025	Yes, every 3 years



Additional Points

- U.S. territories
 - Unlike the proposed rule, the DOL stated that the salary changes will not apply to Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.
- Motion picture industry
 - Unlike the proposed rule, the DOL did not carve out a special change for the motion picture industry.

Challenges Ahead

2016 all over again?



The Rule Will Face Challenges

- Challenge to salary rules as exceeding DOL's authorization to define EAP "**capacity**"
- Challenge to salary level as **too high**
- Challenge to **auto-increasing** as exceeding regulatory charge
- Challenge to **DOL's authority** to publish new rules with no confirmed secretary
- **Political uncertainty** around Nov. election

[T]he Act provides that employees who work in a “bona fide executive . . . capacity” are not entitled to overtime pay. **The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So it is questionable whether the [DOL]’s regulations—which look not only at an employee’s duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act...the statutory question remains open for future resolution in the lower courts and perhaps ultimately in this Court.**

Justice Kavanaugh Dissent in
Helix Energy Solutions Group v. Hewitt



Challenge to **Salary Amount** and **Auto-Increasing** Feature

- In 2016, a judge in Texas enjoined Obama DOL's rule, which increased salary level and added automatic updates
- The court's main concern: rule would exclude too many workers who perform exempt duties
- Similar challenges here:
 - Salary level: Obama DOL went to 40th, Biden DOL goes to 35th
 - Both rules include auto updates



Challenge Concerning Gaps in DOL Permanent Leadership

- DOL does not have Senate-confirmed Secretary in place (led by Acting Secretary Julie Su)
- Issuance of rule without a permanent Secretary in place has drawn heat from some industry groups



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Next Steps for Employers

**opportunities and
imperatives**



What Should Employers Be Doing?

- Waiting for legal challenges to start/finish means high risk of waiting too long
- Critical to partner with counsel to prepare for potential changes to impacted jobs
 - Any roles earning less than \$60,000?
 - For roles that straddle both sides of the line, what is tolerance for (a) raises; (b) split-classification roles; or (c) conversion of roles that exceed the minimum?
 - For roles being reclassified, need to assess budget impact, new comp approaches, and effects on impacted employees
- Also an opportunity to assess other exemption-related issues

How to Ready for Compliance

1

Get the Right People in the Room

Identify key stakeholders, i.e., individuals whose buy-in is key to effectively execute a classification review project and implement any changes

2

Develop an Accurate Picture of the Exempt Workforce

Work to understand exempt workforce landscape, including roles, general description of responsibilities, compensation range, location, etc.

3

Triage Low-Risk, High-Risk, and Grey

Partner with counsel to triage the jobs at issue: (1) likely to be reclassified; (2) unlikely to ever be reclassified; and (3) jobs in greyer territory

How to Ready for Compliance (cont.)

4

Plan the Review, Working Backwards From “Go Live”

Plan review process in conjunction with counsel to ensure adequate timing to review roles, identify changes to be made, and execute changes

5

Account for Direct/Indirect Impacts

Begin assessing steps needed to ensure smooth reclass:

1. How to pay
2. Impacts on bonuses, benefits, etc.
3. Training for employees (timekeeping, OT, meal/rest) and managers
4. System readiness and identification of timekeeping concerns (WFH)
5. Tangential impacts like fair workweek, expense reimbursement, pay transparency, and wage theft

6

Plan Communication Strategy

Begin planning communication to ensure smooth transition, reduce morale impacts, and pave line of communication for concerns

questions?

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