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Wage & Hour Developments



The U.S. Department of Labor (DOL) [published](#) a Notice of Proposed Rulemaking on August 30, 2023, which proposes revisions to the regulations issued under the Fair Labor Standards Act (FLSA). The proposed rule seeks to increase the federal minimum salary threshold required for employees to qualify as exempt employees to roughly \$55,000 per year.

### **White-Collar Exemptions**

The FLSA generally provides that employees are entitled to overtime pay unless they are exempt employees. Under the FLSA, in addition to other criteria, employees can qualify for the executive, administrative, and professional employee exemptions (collectively, white-collar exemptions) if their salary meets the FLSA minimum salary requirement. The current federal minimum salary for white-collar exemptions is \$35,568. The DOL's proposed rule seeks to change the minimum salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest wage census region, which is expected to be \$55,068. However, the proposal includes a footnote that indicates that the final rule could land on a higher salary basis level of up to \$60,209. The proposal also includes a provision that would automatically update the salary threshold every three years.

### **Highly Compensated Employee Exemption**

The FLSA exempts highly compensated employees from overtime if they meet certain criteria. Currently, employees earning \$107,432 a year can qualify for this exemption (in addition to meeting other criteria). The proposed rule seeks to increase the highly compensated salary threshold to match the annualized earnings of the 85th percentile of full-time salaried workers, which is expected to be \$143,988. The rule also proposes the highly compensated threshold salary be automatically updated every three years.

### **Next Steps**

The comment period for the proposal closes 60 days after publication in the *Federal Register*, which will likely be around October 31, 2023. Because the Biden Administration will be looking to position this rule as a win for workers in time for the 2024 election, it is likely that efforts to extend the comment period will be rejected. As such, the rule will likely be finalized early next year.

The political and legal reality of federal rulemaking has made legal challenges to the final rule a certainty. A similar proposal to raise the salary threshold to over \$48,000 was blocked by a federal judge in 2016, and a lawsuit was filed in 2022 challenging the 2019 revision of the salary basis threshold. As with those previous efforts, litigation will likely ensue, challenging this effort primarily on the grounds that the DOL exceeded its authority to promulgate the rule. Additional legal headwinds exist that the previous efforts did not face. There is a significant disagreement related to whether the acting secretary has the authority to act in her full capacity as a cabinet level official. How this dispute plays out could affect her ability to finalize rules. Further, at least one U.S. Supreme Court justice has questioned whether the DOL has the authority to regulate monetary thresholds. In *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39, Justice Brett Kavanaugh's dissenting opinion questioned whether the FLSA's regulations improperly focus on how much an employee is paid.

We will continue to monitor the developments and provide additional insights.

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## **Wage & Hour Developments**

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