November 13, 2023

The Fair Labor Standards Act (FLSA) Exemption for Executive, Administrative, and Professional (EAP) Employees: 2023 Proposed Rule

The Fair Labor Standards Act (FLSA) establishes a federal minimum wage for most private and public sector employees and generally requires overtime compensation at a rate of one and one-half times an employee's regular hourly rate for hours worked beyond a 40-hour workweek. While broadly providing these employment protections to most employees, the FLSA also includes exemptions for certain specified employees. Section 13(a)(1) of the FLSA, found at 29 U.S.C. § 213(a)(1), exempts from the statute's minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, and professional [EAP] capacity," and authorizes the Secretary of Labor to "define and delimit" this exemption, known as the "EAP exemption," through regulations. On September 8, 2023, the Department of Labor (DOL) issued a proposed rule to update and revise the agency's existing regulations implementing the EAP exemption. This In Focus provides a brief overview of the current and proposed rules.

The Current and Proposed Rules

In general, to qualify for the EAP exemption under current regulations, an employee must (1) be paid on a salary basis, (2) be paid a salary that is above an amount determined by DOL regulations (i.e., salary threshold), and (3) perform specified duties, which vary based on whether an individual is an executive, administrative, or professional employee. A discussion of past rules and the current rule is in CRS In Focus IF12480, *The Fair Labor Standards Act (FLSA) Exemption for Executive, Administrative, and Professional Employees*.

The Current Rule

The proposed rule would largely adjust the salary threshold used to determine the EAP exemption. Under DOL's current regulations:

- **Standard Threshold**: An employee must be compensated on a salary basis at a rate of not less than $684 per week ($35,568 annualized) for the EAP exemption to apply. More specifically, $684 is equal to the 20 percentile of earnings of the combined weekly earnings distribution of full-time salaried workers in the lowest-wage region (the South) and workers in the retail industry nationally in July 2018 to July 2019.
- **U.S. Territories**: The weekly salary rate is lower—$455 per week—for employees (other than those employed by the federal government) in the Commonwealth of the Northern Mariana Islands (CNMI), Guam, Puerto Rico, or the U.S. Virgin Islands. The weekly salary rate is $380 for employees (other than those employed by the federal government) in American Samoa.
- **Motion Picture Producing Industry**: Employees in the motion picture producing industry need not be paid on a salary basis as long as they are compensated at a base rate of at least $1,043 per week (or a proportionate amount based on the number of days worked) and the EAP duties test requirements are met.
- **Highly Compensated Employees (HCE)**: Certain HCEs may be exempt from the FLSA's overtime pay requirement even if they do not perform all of the specified duties assigned to their occupation group. Under DOL's current regulations, an employee paid on a salary basis with total annual compensation of at least $107,432 is exempt from the requirement if the employee "customarily and regularly" performs any one or more of these duties.

The Proposed Rule

DOL proposes to set the standard salary threshold equal to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) and the HCE threshold equal to the 85th percentile of full-time salaried workers nationally. The proposal sets these levels at $1,059 per week ($55,068 annualized) and $143,988 per year, respectively. These levels were calculated based on earnings data for 2022; however, DOL provides that in the final rule it will use the most recent data available, which would likely change the dollar figures.

DOL proposes to set the weekly salary threshold for each U.S. territory that is subject to the federal minimum wage to be equal to the standard salary threshold. That is, the proposed standard salary weekly threshold for CNMI, Guam, Puerto Rico, and the U.S. Virgin Islands would be the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($1,059 per week pending the final rule). The proposed standard salary level for American Samoa would be 84% of the new standard salary level ($890=$1,059 x 84%). DOL proposes to increase the required base rate for motion picture producing industry employees by the same percentage increase in the standard salary level (i.e., by $1,059/$684 – 100% ≈ 55%), resulting in a proposed $1,617 per week (= $1,043 + (55%) ($1,043)).

In addition, DOL proposes to automatically update the standard salary level and the HCE annual compensation threshold every three years with current wage data. The updated standard salary level would affect the salary level for American Samoa and the base rate for the motion picture industry.

Table 1. Current and Proposed Salary Thresholds for the FLSA EAP Exemption

	Current Rule	Proposed Rule
Standard	$684/week	$1,059/week
HCE	$107,432 annually	$143,988 annually
U.S. Territories	$455/week (American Samoa $380/week)	$1,059/week (American Samoa $890/week)
Motion Picture Producing Industry	$1,043/week	$1,617/week
Automatic Updates	No	Every three years

Source: 29 C.F.R. Part 541 and 88 *Federal Register* 62152 (September 8, 2023).

Notes: The salary thresholds in this table are as presented in the proposed rule. DOL indicates that the salary thresholds will be updated in the final rule using the most current data available.

Estimated Impacts

DOL estimates that 3.6 million workers who are currently covered by the EAP exemption would no longer meet the salary threshold after the final rule is implemented and would become subject to the FLSA overtime pay and minimum wage provisions. An estimated 24.7 million workers would remain covered by the exemption.

DOL estimates that employers may collectively incur $1.2 billion in regulatory familiarization costs, adjustment costs, and managerial costs during the first year of implementation of the final rule. These direct costs are expected to decrease over time. DOL also estimates that the rule would result in the transfer of approximately $1.2 billion from employers to employees in the first year of implementation. These transfer costs would include overtime payments to newly covered workers and salary increases for some workers.

Potential Court Challenge

The 2023 proposed rule has been criticized by the U.S. Chamber of Commerce and other opponents of the rule because of its anticipated financial impact on employers. Arguing that employers have already been forced to raise wages to attract new employees, the Chamber contends that "[i]ncreasing the cost of labor even further through this regulation will add to their burdens and will be felt particularly severely among small businesses, and charitable nonprofits."

In 2016, the Chamber joined 21 states and a group of business organizations to challenge a similar 2016 rule that raised the salary threshold from $455 per week ($23,660 annualized) to $913 per week ($47,476 annualized). Like the current proposed rule, the 2016 rule did not alter the duties that an individual must perform to be exempt from the overtime pay requirement. The 2016 rule also provided for the automatic updating of the salary threshold every three years.

In *Nevada v. U.S. Dep't of Labor*, the U.S. District Court for the Eastern District of Texas invalidated the 2016 rule, concluding that the updated salary threshold was so high that it contravened congressional intent, which was to focus on an employee's job duties when determining whether an individual is an exempt EAP employee. The court maintained that Congress's use of the terms "executive," "administrative," "professional," and "capacity" in Section 13(a)(1) of the FLSA emphasized the duties performed by an individual. In applying the updated salary threshold from the 2016 rule, it was possible that some employees would be deemed nonexempt from the overtime pay requirement without any consideration of their job duties. According to the court, DOL "fail[ed] to carry out Congress's unambiguous intent" and "create[d] a Final Rule that makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." DOL initially appealed the court's decision to the U.S. Court of Appeals for the Fifth Circuit, but later asked the appellate court to hold the appeal in abeyance while it undertook new rulemaking. DOL issued a new rule in 2019 that established the current salary threshold, and the case was dismissed in 2020.

Some observers believe that the 2023 rule could face a similar challenge if it is finalized with the current proposed standard salary threshold of $1,059 per week. Challengers of the rule may argue that the increased salary threshold would result in many employees becoming eligible for overtime without any consideration of their job duties. Conversely, DOL could contend that the proposed 2023 rule would increase the standard salary threshold by only 55% from the 2019 rule, whereas the 2016 rule increased that threshold by 104%. Following the court's *Nevada* decision, the Chamber indicated that it was not opposed to adjusting the salary threshold, but insisted on "a more appropriate update." Unlike the 2016 rule, the 2019 rule, which increased the salary threshold from $455 per week established in the 2004 rule to $684 per week, was not challenged.

Legislative Proposals

In March 2023, Senator Sherrod Brown and Representative Mark Takano introduced legislation to amend the FLSA to establish statutorily a minimum salary threshold for the EAP exemption. If enacted, the Restoring Overtime Pay Act of 2023 (S. 1041/H.R. 2395) would set the salary threshold at $45,000 on the act's effective date, with $10,000 annual increases until January 1, 2027, when the threshold would be an annualized amount equal to the rate of the 55th percentile of weekly earnings of full-time salaried workers nationally, as determined by the Bureau of Labor Statistics based on data from the second quarter of 2026. After 2027, the threshold would be updated annually. The act would also permit the Secretary of Labor to establish higher salary thresholds based on a data set and methodology established by the Secretary.

Sarah A. Donovan, Specialist in Labor Policy
Jon O. Shimabukuro, Legislative Attorney

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