



Déjà vu all over again? Should employers prepare to comply with the Department of Labor's new Final Rule or is this another false alarm?

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On September 24, 2019, the United States Department of Labor (“DOL”) published a Final Rule (the “2019 Final Rule”), which, among other changes, will increase the salary threshold for executive, administrative, and professional employees to \$684 per week (the equivalent of \$35,568 per year) when it goes into effect. This means that such employees must make at least that amount each year in base salary to be exempt from federal overtime laws (the prior minimum salary amount was \$23,660).

This is not the DOL’s first attempt to raise the salary threshold—employers will likely remember scrambling in late 2016 to prepare to comply with the DOL’s previous attempt to raise the salary threshold, only for a federal court in Texas to declare it invalid. Despite the feeling that history may be repeating itself, employers need to take note of the 2019 Final Rule and plan accordingly; employers should not assume that this is another false alarm. Below are some questions we have received about the 2019 Final Rule and our thoughts with respect to each issue.

When does the 2019 Final Rule go into effect?

Absent court intervention or a change in the DOL’s plans, the 2019 Final Rule will become effective on January 1, 2020.

What do employers need to know to comply with the 2019 Final Rule?

The 2019 Final Rule makes some important changes to DOL’s regulations concerning the exemptions to overtime requirements for certain categories of employees under the Fair Labor Standards Act (“FLSA”). Here is a roundup of the changes that will have the biggest impact on employers:

Executive, administrative, and professional exemption

- The 2019 Final Rule raises the standard salary level from the currently enforced level of \$455 per week (equivalent to \$23,660 per year) to \$684 per week (equivalent to \$35,568 per year).
- Up to 10% of the required \$35,568 per year may be satisfied by the payment of nondiscretionary

bonuses, incentives, and commissions, which are paid annually or more frequently. Or, in other words, employers may choose to pay employees at least 90% of the standard salary level (i.e., at least \$615.60 per week) on a salary basis and meet the annual salary threshold through these less frequent payments (but please note that these other payments need to be nondiscretionary).

- If, by the last annual pay period, the sum of the employee’s weekly salary plus nondiscretionary bonus, incentive, and commission payments is less than \$35,568, the employer may make one final payment to cover the difference by the next pay period after the end of the year. For example, if an employer decides to rely upon bonus, incentive, and commission payments to cover up to 10% of the required salary of \$35,568 per year but the employee ultimately does not earn enough in those payments, the employer may make a “catch-up” payment at the end of the year to meet the annual salary threshold and maintain the employee’s exempt classification. Employers who use bonuses, incentives, and commissions to satisfy a portion of the standard salary level should ensure that they are reviewing the status of such employees and their budgets as the end of the year approaches to ensure they will be able to cover any necessary end-of-the-year payments. Employers should also, at the beginning of the year, document their commitment to make such a “catch-up” payment to the employee if necessary.

Highly compensated employees

- The 2019 Final Rule raises the total annual compensation threshold for highly compensated employees from \$100,000 to \$107,432.
- If, by the last annual pay period, the sum of the employee’s weekly salary plus nondiscretionary bonus, incentive, and commission payments is less than \$107,432, the employer may make one final payment to cover the difference within one month after the end of the year, and if the employer does so, the exemption remains available.

Like they did in 2016, employers should review their current and prospective workforces and determine what—if any—changes they should implement, whether that is increasing or decreasing the size of the workforce, redefining certain jobs, increasing salaries or simply retooling internal budgets to accommodate more overtime payments.

Does the 2019 Final Rule change the duties tests for executive, administrative, or professional employees?

No, the 2019 Final Rule does not address the job duties necessary to satisfy the exemptions. The duties tests remain unchanged.

But is this just another false alarm?

Probably not. The DOL made certain adjustments in the 2019 Final Rule that specifically respond to the United States District Court for the Eastern District of Texas’s decision that invalidated the DOL’s previous final rule (the “2016 Final Rule”). Specifically, in *Nevada v. U.S. Dep’t of Labor*,¹ a

¹ 275 F. Supp. 3d 795 (E.D. Tex. 2017). An appeal of this decision to the United States Court of Appeals for the Fifth Circuit was held in abeyance, pending further rulemaking from the DOL regarding a revised salary threshold. The 2019 Final Rule formally rescinds the 2016 Final Rule, which will render that appeal moot.

federal court in Texas determined that the FLSA unambiguously defined the executive, administrative, and professional exemptions based on job duties—as opposed to on an employee’s salary. Based on that determination, the court invalidated the 2016 Final Rule—challenged by local and national business groups—essentially determining that the Obama administration had improperly supplanted the job duties tests for executive, administrative, and professional employees with a minimum salary level test by making the exemptions based “predominantly” on the \$47,476 threshold.

Now, under the Trump administration and mirroring the rationale from the *Nevada v. U.S. Dep’t of Labor* decision, the DOL expressly recognized that increasing the salary threshold to \$913 per week in the 2016 Final Rule was “inappropriate” because that salary threshold effectively replaced the role of the duties test in determining overtime eligibility. By contrast, according to the DOL, most employees who qualify for exempt status under the duties test will also meet the new salary threshold of \$684 per week. The DOL estimates that 1.2 million workers will be affected (i.e., entitled to either overtime pay or a salary adjustment) as a result of the increase to the standard salary level, as compared to the 4.2 million workers it estimated were affected by the 2016 Final Rule.

It may be difficult for a court to invalidate the 2019 Final Rule based on the court’s reasoning in *Nevada v. U.S. Dep’t of Labor* without nullifying the salary level test altogether. The DOL determined the \$684-per-week minimum salary threshold in the 2019 Final Rule by applying the same methodology that it previously used to reach the \$455 per week salary level in 2004. In particular, like in 2004, the DOL set the standard salary level in the 2019 Final Rule at the 20th percentile of the combined subpopulations of full-time salaried employees in the lowest wage region of the country (the South) and full-time salaried employees in the retail industry nationwide. By contrast, the 2016 Final Rule’s \$913 salary threshold was based on the 40th percentile. As a result, the DOL’s adjustment to the salary level appears to reflect a statistical change in the weekly earnings of workers between 2004 and 2019 (likely based primarily on inflation and cost-of-living adjustments), as opposed to an overhaul of the overtime exemption. It will be difficult to invalidate this new salary threshold of \$684 per week without also determining that the 2004 threshold of \$455 per week was inappropriate.

Unless a court holds otherwise, employers should expect that the 2019 Final Rule will take effect on January 1, 2020. What is more, groups who challenged the Obama-era rule may be less inclined to challenge this one, because of the potential for a *more* employee-friendly administration after the 2020 election. Conversely, those who favored the 2016 Final Rule no doubt support the minimum salary increase in the current iteration and will likely want to see some increase go into effect, even this more moderate increase. Although we’ve learned to “never say never,” employers should determine whether to prepare to convert employees from exempt to non-exempt status or to adjust employees’ salary to meet the new threshold as of January 1, 2020.

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