

## 5 Things To Know About The DOL's New Overtime Rule

By Vin Gurrieri

*Law360 (March 8, 2019, 10:17 PM EST)* -- While the U.S. Department of Labor's overhaul of its white-collar overtime exemption regulations avoided sweeping changes, the agency's middle-of-the-road approach won't spare it from criticism from advocates on both sides of the worker-employer divide.

The DOL on Thursday released its highly anticipated proposed rule to update the Fair Labor Standards Act's overtime exemptions for executive, administrative and professional, or EAP, workers, and replace a currently enjoined rule that was finalized in 2016.

If finalized, the latest iteration of the DOL's white-collar overtime rule would raise the salary threshold to qualify for one of the exemptions to \$35,308 per year or \$679 per week — up from the \$23,660 annual salary that was last updated in 2004 but lower than the Obama administration's proposed \$47,000 cutoff.

"It just struck me as funny that it's within \$5 per week of the exact midpoint between the \$23,660 and the \$47,476," said Alexander Passantino, head of Seyfarth Shaw LLP's wage-and-hour litigation practice and a former acting administrator of the DOL's Wage and Hour Division. "It is as close to the middle as you can get without making it totally in the middle."

Besides the salary cutoff, the DOL also declined to adopt the Obama-era rule's controversial mechanism for automatically increasing the salary threshold every three years, and raised the "highly compensated worker" threshold from \$100,000 to \$147,414 — two provisions that were being watched closely by employment law observers. "Highly compensated" workers face looser qualifications for being exempt from overtime.

Meanwhile, another provision will allow employers to count certain nondiscretionary bonuses and incentive payments like commissions as constituting up to 10 percent of a worker's salary.

### OVERTIME OVER TIME

#### April 2004

Bush-era DOL Issues "white collar" overtime exemption rule that sets salary threshold at \$23,660 per year or \$455 per week.

#### May 2016

Obama-era DOL finalizes a rule increasing the salary level to \$47,476 annually or \$913 per week.

#### November 2016

U.S. District Judge Amos Mazzant blocks the rule from taking effect.

#### March 2017

Labor secretary nominee Alex Acosta says during his confirmation hearing that the overtime rule's salary level is due for an update and suggested it be set around \$33,000.

#### July 2017

Trump DOL issues a public request for information about various ways to update the overtime rule.

#### August 2017

Judge Mazzant declares the rule invalid.

#### September 2017

Public comment period on DOL's RFI closes; comments show sharp divide on what the OT salary threshold should be.

#### March 2019

DOL proposes rule setting a white-collar overtime exemption salary level at \$35,308.

Here, Law360 looks at five things in the new rule employers should be aware of.

### **In Line With Expectations**

While Thursday's overtime rule, which clocked in at well over 200 pages, touched on numerous aspects of the EAP exemptions, the DOL's setting of an approximately \$35,000 salary level was the most closely watched element of the rule, and the number wasn't unexpected, attorneys said.

"It's definitely the headline because it's the major piece of this rulemaking," said Al Robinson of Ogletree Deakins Nash Smoak & Stewart PC, himself a former WHD acting administrator. "It is the highlight and the main attraction, but I think it's the right attraction and that it is a very appropriate salary level."

Morgan Lewis & Bockius LLP partner Susan Harthill, who until late 2018 was the DOL's deputy solicitor of labor for national operations, one of the highest career positions within the agency's Office of the Solicitor, said the salary level was largely in line with public comments that have been made by Labor Secretary Alex Acosta.

"Secretary Acosta in congressional testimony had indicated that he thought the salary level should be right around \$33,000 give or take, so the \$35,308 is not really unexpected," Harthill said. "Obviously, the salary level is the main feature."

But while the \$35,308 salary level is in the ballpark of what most management side attorneys expected, worker advocates vociferously urged the DOL in the run-up to Thursday's notice of proposed rulemaking to set the number far higher.

Many contended in comments responding to the agency's 2017 request for information that it should keep close to the \$47,000 level set by the Obama administration — if not exceed it. Those criticisms reemerged following the DOL's release of its proposed rule.

Rep. Bobby Scott, D-Va., who heads the House Education and Labor Committee, said that while the DOL's proposal does benefit some workers, it "would exclude millions ... who would have benefited under the 2016 Obama administration rule" that increased the salary threshold to over \$47,000.

"Workers have not seen a meaningful update to the overtime rules for nearly 15 years," Scott said. "This is a missed opportunity to implement significant reforms to ensure that workers are compensated for all of the hours they work."

The National Employment Law Project, a nonprofit worker advocacy group, said in a statement that the DOL's proposal was "weak" and that it leaves millions of workers in the lurch who would have otherwise been covered by the FLSA's overtime protections had the salary level set by the Obama regulation been in effect.

NELP executive director Christine Owens noted in a written statement Friday that had the 2016 rule been implemented, the salary level would have increased to \$51,064 by 2019.

"That regulation was supported by rigorous economic analysis," Owens said. "It would have meant that about a third of the salaried workforce would receive the protections of our nation's overtime laws — a

far cry from the more than 65 percent who were covered in the 1970s, but far better than the less than 7 percent presently covered.”

### **Automatic Updates Scuttled**

Although the salary threshold question was the top-line takeaway for many employment law observers, another aspect of the rule that the business community was closely monitoring was whether the DOL would include a provision that allows for the salary level to automatically increase after a period of time, as the 2016 rule did.

The DOL did not include such a provision, which could have spurred a legal challenge from business advocates had it been included in a final rule. Instead, the agency asked for public comments on a plan to increase the salary threshold every four years going forward, with each increase to be preceded by a period of public comments.

“There is not automatic updating in the proposed rule,” Harthill said. “However, there is in the preamble the department stating an intention to update every four years. They’ll go through notice and comment rulemaking, and they have specifically asked for comment on if that’s the right way to go. So, that’s something that was controversial in the 2016 rule and it’s not automatic in this proposal.”

Like with the salary threshold, Passantino said the DOL largely tried to toe the line between the preferences of the employer community and worker advocates. Yet the department will likely end up simply receiving critical comments from both camps on the issue.

“I think the automatic update strikes me as an attempt to go down the middle again,” Passantino said. “They’re going to get comments that say there should be automatic updates, and they’re going to get comments that say there shouldn’t be. I can’t imagine there are going to be very many comments that say there shouldn’t be, but you should totally think about it every four years.”

### **More Six-Figure Workers Now Eligible**

One aspect of the new overtime rule that caught practitioners off guard was the increased salary threshold for so-called highly compensated employees. The \$147,000 salary level represents a nearly \$50,000 jump from the 2004 rule and a \$13,000 spike from the amount proposed by the Obama administration.

Lee Schreter, co-chair of Littler Mendelson PC’s wage-and-hour practice, said this particular provision could result in significant blowback from management-side stakeholders, calling the new level “a pretty significant jump.”

“I think the biggest impact of the rule will not be the minimum salary. I think the place where the impact is going to be felt most and where I think you’re going to see some employer push back is on the increase in the highly compensated,” Schreter said.

“There are quite a few employers out there that rely on the highly compensated test for certain employees as a means of meeting the exemptions, and I think that’s a pretty significant jump. I understand how the department got there, but we’ll see how that plays out in the comments,” she added.

Paul Hastings LLP partner Zach Hutton, co-head of the firm's wage-and-hour practice, said the provision is among the most important elements of Thursday's proposed rule since many employers rely on it, and it could spur lawsuits over whether workers who make over \$100,000 can bank overtime pay.

"If that's adopted, there may be litigation over whether people who are earning over six figures qualify for overtime compensation," Hutton said. "It's possible to have someone who's high-income earning over \$100,000 who doesn't have a primary duty that cleanly falls into one of the existing exemptions, and the highly compensated employee exemption provides for a less rigorous duties test that's easier to satisfy."

For employers with workers earning between the old \$100,000 figure and the new \$147,000 threshold, they will need to take a fresh look at whether they qualify as overtime-eligible under a more stringent duties test that applies to people who earn less than the threshold. Businesses can also choose to give a pay raise to workers who are close to \$147,000 level to push them over the threshold or reclassify them, Hutton said.

Seyfarth Shaw's Passantino noted that the highly compensated exemption essentially allows businesses to use a more streamlined duties test for determining whether a worker qualifies as overtime-exempt, but stressed there aren't many positions in that salary range that are only exempt under the highly compensated exemption, meaning the provision's ultimate impact is unclear.

"It doesn't strike me as having that big an effect, and the reason why is most people who are earning that much money are going to meet the exemption regardless of whether they're highly compensated," he said. "I think it's hard to put your finger on exactly what the impact of the [\$100,000 to \$147,000 salary level increase] is going to be because in order to know what the true impact of that is, you have to know how many people that fall in that range are otherwise not exempt."

### **Court Challenges Less Likely**

One area where the DOL's new overtime rule broke from its Obama-era predecessor was in the formula it used to calculate the salary threshold.

In this case, the DOL tied the \$35,000 salary level to the 20th percentile of full-time worker earnings in the south and in the retail sector — the same method used to calculate the salary level in 2004. The Obama-era rule had used a different calculation method.

Hutton for one said the DOL's choice of methodology might have been made with at least an eye toward potential legal challenges that could come the agency's way if the rule is finalized.

"I think it's no accident that they tied the minimum salary to the economic metric that they used in the 2004 regs that were not challenged or invalidated," Hutton said. "I think they did it intentionally to make it more likely that the new increase would withstand scrutiny and not be invalidated."

### **Exotic Elements Don't Make the Cut**

When it issued its 2017 request for information, the DOL floated a series of potential changes that could be made to the EAP exemptions that didn't ultimately make the cut into Thursday's proposed rule.

For example, the agency asked whether it would be appropriate to have different salary levels for each of the EAP categories — executive, administrative and professional.

It also asked commenters to weigh in on whether it would make sense to have different salary thresholds for each geographic region to account for cost-of-living differences, or whether it should make any changes to the so-called job duties test, which is another element of the existing rule that helps identify individuals who are legitimate EAP employees that are FLSA-exempt.

Robinson for one said Friday that “some of the things that are absent from the rule” are just as important as what was included, pointing specifically to the lack of automatic increases as well as the department’s decision not to make any changes to the duties test.

With respect to different salary levels for geographical regions, Robinson said it was likely the DOL received feedback from both the employer and worker sides that “there wasn’t a great hue and cry for regional variations” in the salary level, and that such a provision would make compliance more difficult for national employers.

--Editing by Philip Shea and Emily Kokoll.