

# Proposed DOL Overtime Threshold Rule

## 9/19/23

# Agenda

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  - ▣ Background
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- ▣ Data Collection
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# Disclaimer

- The presentation is not meant to be legal advice and is for informational purposes only
- If you have questions specific to your agency, you should consult a labor attorney
- OPRA members get 2 free hours of legal advice from our partners at Vorys
  - Email Christine for more information on how to access this benefit

# Proposed Rule

- Read the full proposed rule and Department of Labor's (DOL) rationale here:  
<https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>
- DOL's FAQs on the proposed rule:  
<https://www.dol.gov/agencies/whd/overtime/rulemaking/faqs#b3>

# Background

- The Fair Labor Standards Act (FLSA) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the employee's regular rate of pay.
- The FLSA determines when certain white collar salaried employees are exempt from minimum wage and overtime requirements under section 13(a)(1).
  - Exempt white collar employees: bona fide executives, administrator, or professionals (EAP) capacity as those terms are defined by the DOL

# Proposed Rule Highlights

- ▣ **Increase the standard salary level to the 35th percentile of earnings of full-time salaried workers in the lowest-wage Census Region;**
- ▣ Apply the standard salary level to Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands, and increase the special salary levels for American Samoa and the motion picture industry;
- ▣ Increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally, which would be \$143,988 per year based on current data; and
- ▣ **Automatically update these earnings thresholds every 3 years with current wage data to maintain their effectiveness.**

\*Bolded sections most likely to impact providers

# Current Overtime Exemption Test

- Employee is paid a salary
  - Meaning that the employee is paid a predetermined and fixed amount that is not subject to reduction because of variations in the quality or quantity of work performed (the “**salary basis test**”);
- Employee is paid at least a specified weekly salary level, which is \$684 per week (the equivalent of \$35,568 annually for a full-year employee) in the **current regulations** (the “**salary level test**”); and
- Employee primarily performs executive, administrative, or professional duties, as provided in the Department’s regulations (the “**duties test**”).

# Proposed Overtime Exemption Test

- Employee is paid a salary
  - Meaning that the employee is paid a predetermined and fixed amount that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”); No change in the proposed rule
- Employee is paid at least a specified weekly salary level, which is \$1,059 per week (\$55,068 annually) the “salary level test”); and
- Employee primarily performs executive, administrative, or professional duties, as provided in the Department’s regulations (the “duties test”). No change in the proposed rule



# How did DOL Select this Salary Basis?

- The current salary test is set at the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail sector nationwide
  - 2016 rule set the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South)
- The proposed salary test would be set at the 35<sup>th</sup> percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South)
  - If DOL proposed an increase at today's 20<sup>th</sup> percentile, the weekly earnings rate would be \$822/week

# How did DOL Select this Salary Basis?

- DOL analyzed current earnings under current and historical salary tests
  - Selected a weekly earning amount in between the two historical tests
- “An appropriately calibrated salary level between the long and short test salary levels would better define and delimit which employees are employed in a bona fide Executive, Administrative, Professional capacity, and thus better fulfill the Department’s duty to define and delimit the EAP exemption.”

# Duties Test

- The following four slides include information on the duties test
- The Department of Labor is NOT proposing changes to the duties test
- The following four slides are included for informational purposes so you may be able to more adequately assess how DOL's proposed rule and impending rate/reimbursement increases may impact your organization

# Duties Test (EAP)

<b>Executive Employee</b> 29 CFR 541.100	<b>Administrative Employee</b> 29 CFR 541.200	<b>Professional Employee</b> 29 CFR § 541.300
<ul style="list-style-type: none"><li>• <b>Primary duty</b> is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;</li><li>• Customarily and regularly directs the work of two or more other employees; and</li><li>• Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.</li></ul>	<ul style="list-style-type: none"><li>• <b>Primary duty</b> is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;</li><li>• Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</li></ul>	<p>Whose <b>primary duty</b> is the performance of work:</p> <ul style="list-style-type: none"><li>• Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or</li><li>• Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</li><li>• EX: accountants, lawyers, doctors</li></ul>

# Duties Test

- ▣ Fact specific inquiry
- ▣ Job titles or descriptions are not determinative
  - ▣ Must look at the actual duties performed by the employee
- ▣ DOL regulations allow for concurrent non-exempt work
  - ▣ Employees may fit into one of the exemptions even if they still perform some tasks that are not exempt
  - ▣ **Exempt duties must be the primary duties of that employee**

# Primary Duty 29 CFR 541.700

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, **the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.**

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

# Provider Considerations

- State budget increases may put some of your staff over the salary threshold
  - Some staff may get pushed over the salary threshold, but may not meet the duties test and will still need to be paid overtime
  - Some staff may be currently exempt, but even with the budget increases, may not reach the threshold and would need to be paid overtime
- If you are planning on reorganizing your agency structure, you should consider FLSA's requirements even if this proposed rule faces legal challenges

# Proposed Automatic Increase

- Every three years, the salary threshold test will automatically update
- Adjusted to 35th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region (currently the South)
  - Lowest-wage Census Region could change
- The highly compensated employee test's total annual compensation requirement would be reset at the annualized weekly earnings of the 85th percentile of full-time nonhourly workers nationally
- Allows DOL to temporarily delay an automatic increase due to unforeseen circumstances



# Additional Highlights

- The proposed rule DOES NOT change how employers calculate a workweek
- The proposed rule DOES NOT change how employers calculate an employees regular rate for the purpose of calculating overtime
- The proposed rule DOES NOT change how bonuses are counted toward the salary level requirement

# Proposed Rule's Next Steps

- The Department of Labor is taking comments on the proposed rule till November 9<sup>th</sup>, 2023
  - After the 9<sup>th</sup>, DOL will have to review the comments, respond to the comments, and issue a final rule
  - If there are substantial changes from the proposed rule, the DOL may issue a supplemental notice of proposed rule making and allow for additional comments
- Final rule will be released with an implementation timeline
  - Don't have a good idea on when this may happen
  - Last large increase 2016- proposed rule in July, 2015, released final rule in May 2016 with December 1, 2016 effective date

# Proposed Rule's Next Steps

- ▣ Likely legal challenges; probably in the same federal district court that struck down the 2016 rule
- ▣ Until we see final court action, you should start to consider how the rule will impact your organization

# Data Collection and Advocacy

# Data Collection

- ▣ Directing everyone to ANCOR's provider impact survey
  - ▣ Please complete even if you are not an ANCOR member
- ▣ Make sure there is adequate representation in the analysis on the nation's services for people with developmental disabilities
- ▣ Limit the administrative burden on providers
  - ▣ Only complete 1 survey

# Data Collection

- ▣ Complete the survey by 9-29-23:  
<https://www.surveymonkey.com/r/2023-proposed-overtime-rule>
- ▣ Note- the survey asks for your **current** employment situation
  - ▣ The waiver and ICF increases will likely impact your numbers
  - ▣ Do not try to project out, especially since we do not know the rule's effective date

# Advocacy

- You can submit comments on the Federal Register's website
- <https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>
- We will be working on talking points/template over the next few weeks