



NACo Analysis of U.S. DOL Overtime Pay Proposed Rule

Executive Summary

Over the last decade the U.S. Department of Labor (DOL) has made several attempts to increase the salary threshold for overtime pay for executive, administrative and professional employees. On March 22, DOL released its latest proposed rule to update the overtime pay threshold. The proposal would increase the threshold for employees meeting the job duties criteria for administrative, executive and professional employees from \$23,660 to \$35,308. This will require employers to pay overtime to employees meeting those criteria and earning below the new salary threshold.

Impact on Counties

If finalized, the rule would impact county governments, as the nation's 3,069 counties employ more than 3.6 million employees, while providing services to over 316 million county residents.

In 40 percent of counties, local governments do not meet the new salary threshold of \$35,308. For example, in Calhoun County, South Carolina the current average wage in local government is \$33,326.00. In 47 percent of counties in the South Census region, average wages in local government are less than the \$35,308 proposed threshold.¹ Under the previous rule 85 percent of counties overall and 97 percent of counties in the South region did not meet the salary threshold (\$47,476).

NACo supports the overall goal of providing fair and reasonable wages to its employees and appreciates that DOL's 2019 NPRM on overtime pay addresses many of the issues raised in our comments to the Department's Request for Information in 2017. Nevertheless, counties remain

concerned that DOL's latest proposed rule could still negatively impact local governments, particularly rural ones and the communities we serve.

Major Changes

Salary Level Threshold Change:
\$23,660 to \$35,308 per year

Effective Date: January 1, 2020

Periodic Adjustments: Would occur every four years with an opportunity to comment, prior to effective date of salary level threshold adjustment

Duties Test: The proposed rule does not change any of the existing job duty requirements or "duties test" to qualify for an exemption

¹ All figures based on 2017 data from the Bureau of Labor Statistics

Background

Under the Fair Labor Standards Act (FLSA) – [29 USC 201 et al](#) – most workers are entitled to minimum wage and overtime pay for working more than 40 hours a week. However, under what is known as the “white collar” exemption, employers are not currently required to provide overtime pay for employees who earn above a certain salary threshold – currently \$23,660 – and meet the job duties criteria for administrative, executive and professional employment. The current overtime pay rules governing executive, administrative and professional (EAP) employees have not been updated since 2004, during the Bush Administration, though Congress has instructed DOL to define and delimit the overtime and minimum wage exemptions “from time to time.”

In 2016, the Obama Administration proposed a final rule that would have nearly doubled the salary threshold for EAP employees who qualify for overtime pay to \$913 per week, as well as provide for automatic adjustments to the threshold every three years. This rule ultimately did not advance due to concerns expressed over the significant pay threshold increase and a court case filed by several states and businesses. On November 22, 2016, the U.S. District Court for Eastern District of Texas issued a preliminary injunction, blocking DOL from implementing the rule, which had been slated to take effect December 1, 2016. Subsequently, on August 31, 2017, the district court granted summary judgement against DOL, citing that the 2016 final rule’s salary level exceeded the Department’s authority and the entire final rule was therefore invalid.

Now, the Trump administration is revisiting this issue, and on March 22, DOL released a Notice of Proposed Rulemaking that would boost the overtime pay threshold to \$35,308. The Department utilized the methodology from 2004 to calculate the new overtime pay salary threshold of \$35,308.

New Salary Threshold

In DOL’s Notice of Proposed Rulemaking (NPRM), the agency would raise the standard minimum level for salaried, exempt workers from the current \$455 per week (\$23,660 per year) to \$679 per week (\$35,308 per year). The new level is pegged to the 20th percentile of weekly earnings for full time salaried

Region	# of Counties	# below \$35,308	Share
Midwest	962	425	44.18%
Northeast	193	9	4.66%
South	1384	655	47.33%
West	530	152	28.68%
All Counties	3069	1241	40.44%

workers from the lowest wage Census region in the country (currently the South). The South Census region includes Alabama, Arkansas, Delaware, the District of Columbia, Georgia, Florida, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. In 2017, **40 percent** of counties had an average annual local – county and municipality – government pay below the proposed \$35,308 DOL overtime threshold.²

In total, according to DOL, the rule would impact an estimated 1.1 million workers across the U.S. who are currently exempt from the overtime pay requirements but will be newly eligible under the increased threshold. This contrasts with the 2016 final rule, which was estimated to impact 4.2 million workers.

² Source: NACo Analysis of Bureau of Labor Statistics – Quarterly Census of Employment and Wages (QCEW)

DOL's 2019 NPRM would also raise the compensation level for highly compensated employees (subject to less-stringent duties tests) from the current amount of \$100,000 to \$147,414 annually beginning in January 2020. That rate was established to match the 90th percentile of annual earnings of full-time salaried workers nationally, similar to the 2016 final rule.

Bonuses and Incentive Payments

According to DOL's NPRM, employers would be permitted to satisfy up to 10 percent of the standard salary requirement with non-discretionary bonuses, incentive payments and commissions, provided these forms of compensation are paid at least annually or on a more frequent basis. The 2016 final rule required these types of payments be paid at least quarterly to satisfy up to 10 percent of the standard salary requirement.

Periodic Updates

DOL's proposed rule would update the salary threshold level every four years and provide an opportunity for comment prior to effective date. In contrast, the 2016 final rule called for automatic updates of salary levels every three years. Also, the 2016 final rule was based on maintaining a salary threshold equal to the 40th percentile of weekly earnings of full-time salaried workers. The 2019 proposed rule is based on the 20th percentile of weekly earning of full-time salaried workers.

Duties Test

The proposed rule does not change any of the existing job duty requirements, or duties tests, that determine which employees are exempt from overtime pay requirements. The duties test will still be relevant in determining whether those employees who earn \$679 or more per week qualify for overtime pay. This is similar to the 2016 rule, however, the duties test would have been relevant to a much smaller number of employees, because all employees earning less than \$913 per week would have been automatically eligible for overtime pay in the 2016 rule.

[Public comments](#) on DOL's proposed rule are due May 21, 2019 and counties are encouraged to submit comments on the rule's potential impact for local governments.



U.S. Department of Labor (DOL) Overtime Pay Proposal Analysis

Key Issues	Current Law	2016 Obama Rule	2019 Trump Rule
Salary Threshold	\$23,660 annually (\$455 per week)	\$47,476 annually (\$913 per week)	\$35,308 annually (\$679 per week)
Number of Workers Impacted	24.3 million employees	4.2 million additional employees	1.1 million additional employees
Counties Impacted	23 counties (1 percent)	2,533 counties (83 percent)	1,241 counties (40 percent)
Bonus and Incentive Payments	Employers may pay employees additional compensation in the form of bonuses, but these payments do not count toward the payment of the required minimum salary.	Bonus and Incentive Payments could be used to satisfy up to 10 percent of the salary level at which employees qualify for overtime pay, provided that these payments were paid at least on a quarterly or more frequent basis.	Bonus and Incentive Payments can be used to satisfy up to 10 percent of the salary level at which employees qualify for overtime pay, provided that these payments are paid at least on an annual basis.
Updates to Salary Level	No automatic update mechanism included, though Congress has instructed DOL to update the threshold "from time to time."	The final rule would have provided for automatic updates of salary levels every three years.	The proposed rule would update the salary threshold every four years, with a public comment period available prior to the effective implementation date.
Duties Test	The duties test is used to determine whether an employee's job qualifies as an administrative, executive or professional position and establishes eligibility for overtime pay.	Would not make changes to the duties test.	Would not make changes to the duties test.