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Cara S. Donels

Bridget R. Penick

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## The 2020 Overtime Pay Rule: What Employers Need to Know

**Legal Update**

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By Cara S. Donels and Bridget R. Penick

The DOL's new overtime rule is likely to survive the legal challenges that stopped the 2016 rule from going into effect. In the meantime, what should employers do to prepare for the rule's effective date?

### Overview of the 2020 Overtime Pay Rule

On September 24, 2019, the Department of Labor (DOL) announced its final rule updating the salary threshold for the FLSA's so-called "white collar" exemptions. The new rule is scheduled to go into effect January 1, 2020. The new rule increases the exempt salary threshold by \$229 per week compared to the existing regulation, but is \$229 less than the salary threshold in the Obama-era rule that a court prevented from going into effect in November 2016. The DOL's 2020 final overtime rule makes the following changes from the 2004 overtime rules:

- The standard salary level for exempt employees is raised from \$455 (\$23,660/year) to \$684 per week (\$35,568/year);
- The standard salary level for exempt employees could be updated every four years by submitting a notice of proposed rulemaking for comment;
- The total annual compensation level for "highly compensated employees" is raised from \$100,000 to \$107,432;
- Employers are allowed to use commissions, nondiscretionary bonuses and other nondiscretionary payments (like incentive payments) that are paid at least annually to satisfy up to 10 percent of the standard salary level; and
- The special salary levels for workers in U.S. territories and in the motion picture industries have been revised to \$455 and \$1043 respectively.

The most impactful change is the first—the change in the standard salary from \$455 to \$684. The DOL has estimated that this change will allow an additional 1.2 million workers to be eligible for overtime. However, it should be noted that the salary level increase does not solely dictate who is eligible for overtime. If an employee makes more than \$684 per week under the new rule, the employee may still be eligible for overtime if they are *not* employed as an EAP. Essentially, the DOL uses the standard

salary as a way to filter out employees that likely are not exempt as EAPs. EAPs are likely to make more than the standard salary, so the standard salary is an efficient tool for determining who is eligible for overtime pay.

## The DOL Wrote the 2020 Rule to Avoid the Pitfalls of the 2016 Rule

This is not the DOL's first recent attempt to issue new overtime rules. The current standard salary is from the DOL's 2004 overtime rule—enacted in the Bush era. Under the Obama administration in 2016, the DOL issued a final overtime rule that changed the standard salary level from \$455 to \$913. The 2016 rule was quickly challenged and, ultimately, an injunction issued, preventing it from going into effect.

### The 2016 Rule

Businesses and states banded together to challenge the 2016 Obama overtime rule. The 2016 overtime rule stated in relevant part that “[w]hite collar employees subject to the salary level test earning less than \$913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, irrespective of their job duties and responsibilities.” Judge Mazzant of the Eastern District of Texas took issue with the DOL's use of the standard salary to define who was an EAP, rather than the employee's duty. As a statutory interpretation matter, Judge Mazzant noted that Congress clearly expressed an intent to exempt *all* EAP employees, and not just EAP employees that made more than the standard salary. Because he found that the DOL's rule was contrary to Congress's intent, Judge Mazzant granted a preliminary injunction that stopped the 2016 rule from going into effect. The preliminary injunction was appealed to the Fifth Circuit, but the appeal was stayed pending the DOL's issuance of the 2020 rule.

While the preliminary injunction was being appealed, Judge Mazzant granted summary judgement against the DOL, finding that the 2016 rule exceeded the DOL's power for many of the same reasons that he granted the preliminary injunction. Notably, while the DOL is authorized to issue regulations relating to the EAP exemption, the DOL's use of salary in the 2016 rule as an approximation for when an employee is a bona fide EAP exceeded the DOL's authority. The standard salary from the 2004 overtime rule (\$455) was calculated differently than the 2016 standard salary—in fact, while the 2004 standard salary was “somewhere near the lower end of the range of prevailing salaries for [nonexempt] employees,” calculated as the 20<sup>th</sup> percentile of salaries for nonexempt employees, the 2016 rule's standard salary (\$913) was more than double that of 2004 and was calculated at the 40<sup>th</sup> percentile of salaries for nonexempt employees. Judge Mazzant noted that if the standard salary had been adjusted for inflation, rather than doubled, “we wouldn't be here today.” This ruling was never appealed, as the DOL moved on to its 2020 overtime rule instead of pursuing the 2016 rule.

## The 2020 Rule

The question remains—is a standard salary increase from \$455 to \$684 going to meet similar legal challenges? The DOL seems to think not. The final rule spends several pages differentiating the 2020 rule from the 2016 rule and Judge Mazzant's decision. The 2020 rule, unlike the 2016 rule, takes a moderate approach to increasing the standard salary. Because the standard salary is increased to reflect wage increases, while still calculated as the 20<sup>th</sup> percentile of salaries for nonexempt employees—the same calculation used in the 2004 overtime rule. The 2020 final overtime rule's standard salary looks reasonable in light of these similarities to the 2004 standard salary. Given the similarities, it is less likely a court will find that the DOL exceeded its authority, as it did with the 2016 rule.

## Takeaways

1. The standard salary changes on January 1, 2020, from \$455 to \$684. Employees making less than \$684 per week will likely be eligible for overtime pay, some of them for the first time.
2. The most recent attempt to change the standard salary was struck down by a district court. While the 2020 rule appears to walk a more careful line, we will not know if the DOL is exceeding its authority until the 2020 rule is challenged.
3. In the meantime, the most important action for employers will be to analyze the status of employees who earn below the new salary threshold but were previously exempt. Employers will have to consider whether to reclassify those employees as nonexempt hourly workers, or give them raises to bring them up to the new threshold.
4. The new rule provides a good opportunity for employers to update their exemption analysis to reexamine whether jobs now classified as exempt continue to be exempt from the duties perspective.
5. If employees now classified as exempt are reclassified as nonexempt workers, employers should make sure those newly reclassified employees know what is expected of them as hourly workers and what procedures they need to follow.