



## **Final Overtime Rule Released**

*September 30, 2019*

After several years of rulemaking, and successful legal challenges by NAW and others which resulted in a second round of rulemaking, the Wage and Hour Division (WHD) of the Department of Labor (DoL) on Friday published a final rule “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” – the EAP or so-called “White Collar exemptions” from minimum wage and overtime pay requirements – under the Fair Labor Standards Act (FLSA.).

### **Background:**

During the last term of the Obama Administration, DoL promulgated a new rule making significant, and highly controversial, changes to the white-collar exemptions under the FLSA. The Obama rule would have more than doubled the threshold salary for qualifying for the EAP exemption from \$23,660 to \$47,476, increased the “highly compensated employee” (HCE) salary from \$100,000 to \$134,004, and provided for automatic increases of those levels every three years without any rulemaking or public comment. In the final rule published in May of 2016, DoL noted that the automatic increases would have produced a minimum salary in January 2020 of more than \$51,000.

NAW joined as a plaintiff in a lawsuit challenging the 2016 rule in the U.S. District Court for the Eastern District of Texas. A group of State Attorneys General also filed a challenge, in the same court. In November 2016 the judge enjoined enforcement of the new rule (which was to have taken effect in December 2016), and in August 2017, the court granted summary judgment, invalidating the rule. One of the primary reasons the court cited for its decision was that under the Obama rule an employee’s exempt status would be determined predominately by salary, rather than the long-standing consideration of the employee’s duties. That decision was appealed to the 5<sup>th</sup> Circuit Court of Appeals, that appeal has been held in abeyance since, and DoL has been enforcing the 2004, pre-Obama rule.

### **Actions of the Trump Labor Department:**

The Trump Labor Department did not move as quickly on initiating a new rulemaking as we had hoped, partly because they did not have a new Secretary of Labor until April of 2017 and many other key positions in the Department remained vacant for months into the Trump Administration. Finally, in July of 2017, DoL released a Request for Information (RFI) on the overtime issue, and in September of 2017, they conducted public listening sessions around the country. On March 22, 2019, DoL published a formal Notice of Proposed Rulemaking (NPRM), providing a 60-day comment period.

NAW joined our business association allies in the Partnership to Protect Workplace Opportunity in filing a comment letter in response to the RFI and submitting comments on the NPRM. And, as we did in the previous rulemaking, we sought and received feedback from NAW members on the impact of the new rule on their businesses. Based on that feedback, we filed our own separate comments.

The Department received more than 116,000 comments in response to the NPRM. Interestingly, DoL notes that “[t]he vast majority of these comments, including tens of thousands of duplicate or similar submissions, were campaign comments using similar template language.” They further note that “some commenters, including tens of thousands who submitted similar comments as part of a comment campaign ... requested that the Department reject the proposal and defend the 2016 final rule.”

***NAW has never conducted a “campaign comments” lobbying campaign and we have always encouraged NAW members communicating with Congress and regulatory agencies to write individual and personalized letters. The case made by NAW to DoL on the overtime rule was strong because of the issue-specific, detailed and individualized feedback we received from NAW members.***

**A summary of some of the key provisions of the new rule follows; to read the entire rule go to: <https://www.govinfo.gov/content/pkg/FR-2019-09-27/pdf/2019-20353.pdf>**

- **The new rule fully and finally rescinds the 2016 rule.**
- The new rule will take effect on January 1, 2020.
- **Standard salary level:** DoL used the same methodology that was used in setting the salary in 2004, rather than the methodology used in 2016 that resulted in the doubling of the threshold salary. Under the new final rule, the salary level below which an employee will be automatically nonexempt was raised to \$684 per week/\$35,568 per year (this is slightly higher than the \$35,308 in the proposed rule).
- **Highly Compensated Employee Salary:** In the NPRM, DoL proposed to increase the HCE salary from \$100,000 to \$147,414 – a dramatic increase. In the final rule, DoL changed the methodology for calculating the HCE salary, resulting in a salary of \$107,432 – a much more measured increase.
- **Regional vs national salary:** As in the 2016 rule, DoL chose not to set regional salary levels, but to retain a single, national level.
- **Non-discretionary bonuses & incentive payments (including commissions):** In the 2016 rule, DoL for the first time allowed these non-wage payments to count toward up to 10% of the minimum salary, provided that the payments were made quarterly or more frequently. In our comments to DoL, based on the strong feedback we received from NAW members, we urged DoL to allow commissions and bonuses to count, but also argued that the 10% limit on those

payments was inadequate and did not take into effect compensation practices in the sales workplace. We further argued that requiring the payments to be made quarterly did not take into account how commissions/bonuses are normally earned.

Disappointingly, while the new rule continues to allow commissions and bonuses to count, it keeps in place the 10% cap. We were hoping for an increase in this cap, but are advised that the DoL in 2016 only allowed the 10% incentive pay because they had increased the minimum salary dramatically and sought to slightly offset the added cost to employers. Since the new rule does not so dramatically increase the threshold salary, some argued in their comments to DOL that allowing even 10% of the minimum salary to be made up of incentive pay was unnecessary. DoL chose to neither eliminate nor increase the 10% allowance.

The new rule does, however, allow the payments to be made annually, and allows a “catch-up payment” to be made within one pay-period (after 52 weeks) to allow the employer to make up for an unanticipated shortfall of up to 10% of the required salary level.

- Duties test: The final rule makes no changes to the duties test(s).
- Future updates to the salary levels: The 2016 final rule provided for automatic increases in the salary levels every three years without a notice-and-comment rulemaking. The current DoL NPRM provided for NO automatic updates but called for a quadrennial update in the salary levels through a regular rulemaking process. In our comments to DoL we noted that a number of our member companies expressed concern that an arbitrary time frame for a salary review could fail to take into account economic circumstances at the time, and that a review on a pre-determined time table would automatically assume an increase even if not economically warranted. As one NAW member asked: “Would they decrease it in an economic downturn?”

In the final rule, DoL eliminated the quadrennial reviews, and “agrees with commenters who stated that this commitment could deprive the Department of flexibility to adapt to unanticipated circumstances, and believes the prevailing economic conditions, rather than fixed timelines, should drive future updates.” Instead the final rule “reaffirms [DoL’s] intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice-and-comment rulemaking.”

- Inside sales: As we have done in each of these rulemakings since 2004 – and at every other opportunity – we urged the Department to address the woefully antiquated assumption in the Code of Federal Regulations (CFR) that inside sales personnel are automatically nonexempt while outside sales personnel are statutorily exempt. Since the NPRM did not specifically address the inside sales issue, we did not assume that this final rule would remedy this inequity – a modification to the CFR would accomplish the mission – but we were hopeful and are advised that the issue is at least being discussed in the Department. We will continue to push for this overdue change.