

# Chapman Client Alert

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Current Issues Relevant to Our Clients

## Be Prepared: New Department of Labor Overtime Rules Move Toward Finalization

In a move that has been anticipated for months, on March 15, 2016, the Department of Labor (the “*Department*”) took one of the final steps toward making its new overtime rules a reality. As previously reported, on June 30, 2015, the Wage and Hour Division of the Department released a Notice of Proposed Rulemaking (“*NPRM*”) that overhauls the Fair Labor Standards Act’s (“*FLSA*”) overtime regulations, officially titled “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees” (the “*Rules*”).<sup>1</sup> The Rules have now gone through a two-month comment period, which despite protest, was not extended.

While the Department previously hinted that the Rules would go into effect in 2016, the Department has not yet announced the official effective date. However, on March 15, 2016, the final Rules were submitted to the Office of Management and Budget’s Office of Information and Regulatory Affairs (“*OMB*”). The OMB must now review the Rules, after which they will be sent to be published in their final form. Once the final rules have been published, an agency usually must wait at least 30 days before implementing the reviewed final rule. That means that the new Rules could become effective this Spring.

This push to finalize the Rules comes as the Obama Administration draws to a close and is likely fueled by the fact that the Congressional Review Act empowers Congress to review, by means of an expedited legislative process, new federal regulations issued by government agencies and, by passage of a joint resolution, to overrule a regulation when such resolution is signed by the President. With a presidential election looming, the Department is may be anxious to get through the review period with the current President so that a new President, who may be more hostile to the Rule, isn’t sitting in the Oval Office if and when a nullifying joint resolution is passed.

The new Rules make sweeping changes. The current threshold salary for being exempt from overtime is \$455 a week (\$23,660 for a full-year worker). The highly compensated exemption has an additional salary threshold of \$100,000. The Rules will change those numbers drastically: it raises the standard salary level to the 40th percentile of earnings for full-time salaried workers, which functionally increases the weekly salary required under the salary basis test to \$921 per week (\$47,892 for a full-year worker).<sup>2</sup> In addition, the Department proposes to increase the highly compensated exemption’s additional salary threshold to \$122,148. Further,

the Department has proposed using a mechanism that would automatically update the salary and compensation thresholds on an annual basis and which would necessitate reviewing employees for correct exemption status every year.

Because the Rules more than double the amount of the salary basis test, the ramifications are significant. Conservative estimates predict more than 21.4 million workers in the United States will be affected by the new regulations, and the Department estimates there are approximately 4.6 million workers currently classified as exempt who may have to be re-classified because of the new regulations. The changes will likely result in an extra \$1.2 billion to \$1.3 billion in overtime paid nationwide. Impacted the most will be institutions in service sectors like the financial industry, which historically have large numbers of white-collar employees.

In addition to the difficulties, expense, and complications that come with reclassifying employees, it is also likely that the new Rules will bring more lawsuits as well. The Department last changed the overtime classification rules in 2004. In the years since, lawsuits spiked from nearly 4,000 FLSA suits to nearly 7,000. In 2015, nearly 9000 suits were filed. If the new Rules take effect, 2016 and the years that follow will almost certainly see a substantial increase in those numbers.

The Rules may not have smooth sailing, however, because of Congress. On March 17, 2016, lawmakers introduced the Protecting Workplace Advancement and Opportunity Act in both the House of Representatives and the Senate (the “*Act*”).<sup>3</sup> The Act would nullify the proposed Rules, require the Department to first conduct a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofit organizations and public employers; prohibit automatic increases in the salary

threshold; and require that any future changes to the duties test must be subject to notice and comment. The Act has been referred to the House Committee on Education and the Workforce and to the Senate Committee on Health, Education, Labor, and Pensions.

The likelihood of passage and signing of the Act is unknown, so it is in the best interest of employers to think early and begin planning now on the assumption that the Rules will become law. As time ticks toward a likely effective date of the new Rules, it is imperative that businesses begin assessing their impact, including pinpointing employees who may need to be reclassified, and planning for necessary organizational changes.

## For More Information

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- 1 See Client Alert, "[Impacting Millions and Costing Billions: New Proposed "White Collar" Overtime Rules Announced.](#)"
- 2 The Department relied upon 2013 data in the development of the NPRM. The Department will update the data used in the final rule resulting from this proposal, which will change the dollar figures for both salary thresholds. If, after consideration of comments received, the final rule were to adopt the proposed salary level of the 40th percentile of weekly earnings, the Department would likely rely on data from the first quarter of 2016. The latest data currently available are for the first quarter of 2015, in which the 40th percentile of weekly earnings is \$951, which translates into \$49,452 for a full-year worker. Assuming two percent growth between the first quarter of 2015 and the first quarter of 2016, the Department projects that the 40th percentile weekly wage in the final rule would likely be \$970, or \$50,440 for a full-year worker.
- 3 Protecting Workplace Advancement and Opportunity Act of 2016, S. 2707, 114th Cong. (2016); Protecting Workplace Advancement and Opportunity Act of 2016, H.R. 4773, 114th Cong. (2016).



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