



# Analysis: Proposed Rulemaking on Overtime Exemptions

## Executive Summary

The United States Department of Labor (DOL) has published a notice of proposed rulemaking, [\*Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees\*](#), which seeks to raise the minimum salary threshold for exempt executive, administrative and professional employees from \$684/week (\$35,568/year) to \$1,059/week (\$55,068/year) with an automatic adjustment every three years.

This proposal represents the third attempt at increasing the salary threshold since 2004. In July 2015, DOL published a similar proposal seeking to raise the overtime salary threshold from \$23,660/year to \$50,440/year with an automatic adjustment every three years. After litigation that reached the Fifth Circuit Court of Appeals, DOL was found to have exceeded its authority. In March 2019, DOL again proposed to increase the salary threshold; the Department was successful in this effort and the newly raised threshold of \$35,368/year became effective in January 2020 and remains in place today.

In 2016, ANCOR launched the *Save Our Services Campaign* to educate federal officials that although well-intended, proposals to increase the salary threshold without additional commensurate funding put an unreasonable strain on already-overstrained community providers that do not control the reimbursement rates to which their services are funded. The direct support workforce crisis, which is directly attributable to stagnant reimbursement rates, already threatens access to community-based services with average turnover rates at 43.3% and vacancy rates for full-time direct support professionals (DSPs) at 16.5% nationally. Instituting significant new expenses without providing additional funding has the potential to completely collapse the system of services, which would increase not only the risk of institutionalization for those relying on these critical services, but also the risk of unemployment for the workforce DOL is attempting to protect.

The remainder of this document provides additional background and analysis on DOL's proposed rulemaking.

## Notice of Proposed Rulemaking

On September 8, 2023, DOL issued a notice of proposed rulemaking, [\*Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees\*](#) (Overtime Rule), creating a 60-day comment deadline which ends November 7, 2023.

The proposed Overtime Rule seeks to raise the minimum salary threshold for exempt workers to the 35<sup>th</sup> percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region—currently \$1,059/week (\$55,068/year). It also proposes to increase the highly compensated employee total annual compensation threshold to the annualized weekly earnings of the 85<sup>th</sup> percentile of full-time salaried workers nationally—currently \$143,988. Alongside these proposals, DOL proposes to institute the standard salary threshold in U.S. territories that are not subject to the full federal minimum wage. Finally, it seeks to add an automatic updating mechanism that would allow DOL to

adjust the salary thresholds to reflect current Bureau of Labor Statistics earnings data every three years.

## Executive, Administrative & Professional Exemption Test

In order for an employee to be classified as exempt from being eligible for overtime pay, the Fair Labor Standards Act relies on a three-part test:

- **The Duties Test:** The employee's job duties must primarily involve executive, administrative or professional duties as defined in current regulation.
- **The Salary Basis Test:** The employee must be paid a predetermined and fixed salary.
- **The Salary Level Test:** The amount of salary paid must meet a minimum specified amount.

The proposed Overtime Rule seeks to increase the Salary Level Test while leaving the Salary Basis and Duties Tests unchanged. Simply paying an employee the increased salary amount under the proposed rule will not create an exemption from overtime pay. All three parts of the test must be met.

For a more detailed comprehensive analysis of current obligations under the Fair Labor Standards Act (FLSA), please consider purchasing ANCOR's [2022 Wage & Hour Handbook for Private Providers](#).

### Increasing the Salary Threshold

In increasing the salary threshold for the Salary Level Test, DOL relies on the most recent available four quarters of data as published by the Bureau of Labor Statistics. For purposes of the overtime exemption, DOL is proposing using the 35<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region (currently the South). The preamble rationale for relying on the 35<sup>th</sup> percentile refers broadly to lessons learned in recent rulemakings. This may refer to the middle ground between the blocked 2016 rule which relied on the 40<sup>th</sup> percentile and the current rule which relies on the 20<sup>th</sup> percentile.

It is important to note that the 35<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region was \$1,059/week (\$55,068/year) *at the time the proposed rulemaking was published*. However, DOL has indicated that it will use the earning data that is current *at the time the rule becomes effective*. This may mean the final salary threshold will reflect a higher figure than the \$1,059/week identified in the proposed rule.

### Automatic Adjustment of the Salary Threshold

The proposed Overtime Rule includes a provision to update the standard salary threshold every three years using the most recent available four quarters of data as published by the Bureau of Labor Statistics preceding publication.

- For executive, administrative and professional employees, the salary threshold will be adjusted to reflect the 35<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region.
- For highly compensated employees, the salary threshold will be adjusted to reflect the 85<sup>th</sup> percentile of full-time non-hourly workers nationally.

The rule also includes a provision that would allow DOL to temporarily delay a scheduled automatic update where unforeseen economic or other conditions warrant. However, this discretion would lie with DOL and would not require the agency to return to rulemaking to adjust the salary threshold as it does currently. Community providers and employers generally would not be entitled to the same notice and comment period which currently is required through administrative procedure.

### ***Other Provisions in the Proposed Overtime Rule***

Alongside other industry-specific proposals, the Overtime Rule also proposes to apply the standard salary level threshold for overtime exemption to those U.S. territories that are not subject to the full federal minimum wage. As such, DOL is proposing to rescind the special lower threshold and apply the standard salary level to employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI). It is also seeking to set a new special salary level (\$890/week) for employees in American Samoa while it remains subject to minimum wage rates below the federal minimum wage.

### **Quantifying the Impact on Community Providers**

ANCOR needs your help quantifying the financial impact of the proposed Overtime Rule on community providers. To provide your input, please [complete this survey](#) by September 29, 2023.

Because the rule provides a 60-day comment period, we only have a short amount of time to inform our feedback to DOL and ensure the White House, Congress and other federal agencies understand the cumulative impact of this and all other current, pending and proposed regulations on the financial stability of community providers and access to services for people with I/DD.

Have questions? Want to share your perspective? Please email Lydia Dawson, Senior Director of Government Relations, at [ldawson@ancor.org](mailto:ldawson@ancor.org).