

Predictions On Salary Levels In Proposed DOL Overtime Rule

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Law360, New York (April 26, 2023, 12:55 PM EDT) -- In May, the [U.S. Department of Labor](#) is expected to propose new salary thresholds for the Fair Labor Standards Act.[1] The anticipated proposed rule will update the salary thresholds for both white collar — or executive, administrative and professional, or EAP, employees — and highly compensated earners, or HCE.



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An employee who earns a salary above the white collar threshold, in a position that satisfies the FLSA's duties test, is exempt from the overtime provisions of the FLSA.[2] An employee who earns total compensation above the HCE salary threshold, including a salary above the white collar threshold, is exempt from the overtime provisions of the FLSA if they perform at least one of the duties of an EAP employee.[3]

While proposed EAP and HCE salary thresholds are expected in May, their dollar values are not yet known. This article presents a range of possibilities for these salary thresholds by applying the methodologies used in recent DOL rules.

The proposed rule in May is likely to increase the EAP salary threshold by over 68% to approximately \$60,000 per year and increase the HCE threshold by over 56% to about \$168,000 per year. These projections are consistent with the May 2016 final rule methodology and based on publicly available data that approximates the confidential pay data that has often been used by the DOL to set FLSA salary thresholds.

Recent History

The EAP and HCE salary thresholds were set at \$23,660 and \$100,000 by the DOL in 2004. In July 2015 the DOL proposed a 102% increase in the EAP threshold and a 22% increase in the HCE threshold.[4]

In May 2016, the DOL implemented a final rule increasing the EAP threshold by 101% to \$47,476 and increasing the HCE threshold by 34% to \$134,004. This final rule was to become effective on Dec. 1, 2016.

The new salary thresholds from the May 2016 final rule were challenged in court and not enforced. The Trump administration DOL addressed FLSA salary thresholds in a proposed rule in March 2019 and a final rule in September 2019.

The current white collar salary threshold of \$35,568 (\$684 per week) and the HCE threshold of \$107,432 (\$2,066 per week) are based on the September 2019 final rule and became effective as of Jan. 1, 2020.

Methodology Used to Set Salary Thresholds

Recent proposed and final rules have set FLSA salary thresholds equal to percentiles of the pay distribution of full-time employees not paid by the hour. The percentile calculations in these rules are from the current population survey, or CPS, a survey of about 60,000 households.

The CPS provides estimates of the unemployment rate, the labor force participation rate and other monthly employment statistics. About one quarter of the households surveyed each month are asked to report the usual weekly earnings and usual hours worked per week for all employed adults in the household, and whether each employed adult is paid by the hour.

The Obama administration DOL set the EAP salary threshold equal to the 40th percentile of the national nonhourly full-time pay distribution in its proposed rule and lowered the threshold to the 40th percentile of the nonhourly full-time pay distribution in the South region in the final rule.[5]

The Trump administration DOL set the EAP salary threshold equal to the 20th percentile of the nonhourly full-time pay distribution in the South region in both its proposed and final rules.

If the Biden administration DOL proposes an EAP salary threshold equal to the 40th percentile of the nonhourly full-time pay distribution in the South region, it will achieve the same threshold as if the May 2016 final rule had been enforced. This leads to a white collar salary threshold of \$60,008 (\$1,154 per week), representing a 68.7% increase in the threshold from its current level of \$35,568.[6]

Table 1 shows the EAP salary threshold set by the proposed and final rules between 2015 and 2019, and the corresponding dollar values from applying each methodology to publicly available data from the 2022 CPS. For reference, the table also includes inflation-adjusted dollar values for each threshold using the employment cost index, or ECI.[7]

A \$60,008 EAP threshold consistent with the May 2016 final rule is 47.6% higher than the current EAP threshold adjusted for inflation. An increase of this magnitude would have a substantial impact on many businesses that employ full-time white collar workers.

Table 1: Alternative Projections of the EAP or White Collar FLSA Salary Threshold

RULE	PERCENTILE	DATE	EAP THRESHOLD	CPS 2022	ECI-ADJUSTED
Proposed	40th national	July 2015	\$47,892	\$65,000	\$62,556
Final	40th south region	May 2016	\$47,476	\$60,008	\$59,540
Proposed	20th south region	March 2019	\$35,308	\$42,016	\$39,416
Final	20th south region	September 2019	\$35,568	\$42,016	\$40,664

The Obama administration DOL set the HCE threshold at the 90th percentile of the national nonhourly full-time pay distribution in its proposed and final rules. The Trump administration used the same 90th percentile in its proposed rule but lowered the HCE threshold to the 80th percentile in its final rule.

If the Biden administration DOL proposes an HCE salary threshold equal to the 90th percentile of the national nonhourly full-time pay distribution, it will achieve the same threshold as if the May 2016 final rule had been enforced. This would lead to an HCE salary threshold well above the top-coded salary of \$150,000 in the publicly available CPS data from 2022.[8]

Publicly available CPS data provides no useful information concerning the 90th percentile of the nonhourly pay distribution, so it is impossible to independently assess the HCE salary threshold using the same methodology as the May 2016 final rule.

The inflation-adjusted value of the HCE salary threshold from the 2016 final rule is \$168,012. This represents a 56.4% increase over the current HCE salary threshold.

Table 2 shows the HCE salary thresholds for all the proposed and final rules between 2015 and 2019, the corresponding dollar value from the 2022 CPS for the HCE threshold from the September 2019 final rule and inflation-adjusted values for each of the other HCE salary thresholds using the ECI to adjust for inflation.

The \$168,012 HCE threshold that is roughly consistent with the May 2016 final rule is 36.7% higher than the current HCE threshold adjusted for inflation.

Table 2: Alternative Projections of the Highly Compensated Earner FLSA Salary Threshold

RULE	PERCENTILE	DATE	HCE THRESHOLD	CPS 2022	ECI-ADJUSTED
Proposed	90th national	July 2015	\$122,148	?	\$159,588
Final	90th national	May 2016	\$134,004	?	\$168,012
Proposed	90th national	March 2019	\$147,414	?	\$164.48
Final	80th national	September 2019	\$107,432	\$125,008	\$122,876

Automatic Adjustments to Salary Thresholds

The current EAP and HCE salary thresholds are not automatically adjusted either for inflation or changes in the pay distribution over time.

The Obama administration DOL required annual adjustments in its proposed rule and adjustments every three years in its final rule. The automatic adjustments were specified as recalculations of the 40th South region and 90th national percentiles of nonhourly full-time pay distributions.

If the Biden administration DOL proposes thresholds consistent with the May 2016 final rule, we should expect automatic adjustments every three years based on recalculations of percentiles of pay distributions from the CPS.

Limitations of the Information From Current Population Survey

While the CPS asks the survey respondent from each household whether employed adults in the household are paid by the hour, this may not be an accurate and reliable method for determining the number of employees who are exempt and nonexempt from the FLSA.

In prior proposed and final rules, the DOL has attempted to connect responses to questions about being paid by the hour to exempt status for the FLSA, but these are not equivalent concepts.

Table 3 illustrates, for selected standard occupation titles, the percentage of full-time employees in these positions who were reportedly paid by the hour according to the 2022 CPS.

While most workers in executive, administrative and professional occupations are reported as not being paid by the hour, a surprisingly high percentage are reported as hourly employees in the CPS.

It does not follow that hourly employees according to the CPS are nonexempt from the FLSA. It may be true, for example, that 31.5% of full-time facilities managers are paid by the hour, but that does not mean that they are nonexempt from the FLSA.

Moreover, many workers in non-EAP occupations in the CPS are reportedly not paid by the hour, but that does not mean they are exempt from the FLSA. For example, it may be true that 41.2% of retail salespersons earn commissions and bonuses and therefore are not reported as being paid by the hour, but many of these workers may also be nonexempt from the FLSA and are eligible for overtime compensation.

Table 3: Share of Full-Time Employees Reportedly Paid by the Hour for Select Standard Occupation Codes

SOC TITLE	SOC CODE	% PAID BY THE HOUR	% NOT PAID BY THE HOUR
Facilities managers	11-3013	31.5%	68.5%
Financial managers	11-3031	18.3%	81.7%
Electrical and electronics engineers	17-2070	24.6%	75.4%
Interior designers	27-1025	26.6%	73.4%
Dentists	29-1020	15.7%	84.3%
Retail salespersons	41-2031	58.8%	41.2%
Data entry keyers	43-9021	71.8%	28.2%
Construction laborers	47-2061	72.8%	27.2%
Painters and paperhangers	47-2140	70.4%	29.6%
Home appliance repairers	49-9031	55%	45%

Conclusion

Employers should not be surprised if the white collar salary threshold is increased to about \$60,000 per year and the HCE threshold is increased to about \$168,000 per year in the DOL's upcoming proposed rule. These salary amounts are consistent with the May 2016 final rule, after adjusting for inflations and changes in the pay distribution over the past seven years.

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[1] <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/questions-remain-anticipated-proposed-overtime-rule.aspx>.

[2] The FLSA overtime provision is that nonexempt employees must receive pay at the rate of 1.5 times the employee's regular rate for any hours worked in excess of 40 hours in a workweek.

[3] <https://www.dol.gov/agencies/whd/fact-sheets/17h-overtime-highly-compensated>.

[4] In addition, the Rule specified that these thresholds were to automatically change over time as the pay distribution changed.

[5] I refer to the pay distribution of full-time employees not paid by the hour as the nonhourly full-time pay distribution. This may include employees who earn salaries, piece rates or commissions and bonuses as compensation. Full-time time employees are those who usually work 35 hours or more per week.

[6] This is based on publicly available CPS data from the entire year in 2022.

[7] The table shows that the 40th percentile of the nonhourly pay distribution has increased slightly faster than the ECI during this period.

[8] Reported annual earnings above \$150,000 are top-coded (at \$150,000) for confidentiality reasons.

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