

Can Employers Expect a New Overtime Rule Under Biden?

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A controversial overtime pay rule from the former President Barack Obama's administration would have doubled the salary threshold for employees to be classified as exempt from overtime pay under federal law. In 2016, before the rule was implemented, a judge held that the administration exceeded its authority by raising the rate too high, but employers may be wondering if President-elect Joe Biden will revisit the rule.

Here's what employment attorneys had to say.

'A More Measured Approach'

Kathleen Caminiti, an attorney with Fisher Phillip in Murray Hill, N.J., thinks the Biden administration will prioritize raising the federal minimum wage from \$7.25 to \$15 an hour. Employers also may see efforts to increase the exempt salary threshold, she said, but the proposal would likely be lower than what was introduced by Obama's administration.

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To be exempt from overtime under the federal Fair Labor Standards Act's (FLSA's) white-collar exemptions, employees must be paid a salary of at least the threshold amount and meet certain duties tests. If they are paid less or do not meet the tests, they must be paid 1 1/2 times their regular hourly rate for hours worked in excess of 40 in a workweek.

Effective Jan. 1, 2020, President Donald Trump's administration raised the salary threshold (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/ready-for-new-federal-overtime-rule.aspx) to \$35,568 from \$23,660, whereas the Obama administration's blocked rule would have made the cutoff \$47,476.

"Biden is likely to take a more measured approach, given the pushback that the Obama administration faced when it proposed significant increases to the salary threshold," Caminiti said.

For example, the Society for Human Resource Management (SHRM) and other business groups noted (<https://advocacy.shrm.org/wp-content/uploads/2020/12/SHRM-541-FINAL-SUBMITTED-9-4.pdf>) that the rule's proposed increase to the salary threshold was too high.

Brett Coburn, an attorney with Alston & Bird in Atlanta, said any attempts by the new administration to raise the exempt salary threshold will take time. The U.S. Department of Labor (DOL) would have to go through a formal notice and rulemaking process, which includes an opportunity for members of the public to comment on the proposal. The administration would also have to consider how the litigation that halted the Obama-era rule would affect a new proposal.

James Plunkett, an attorney with Ogletree Deakins in Washington D.C., thinks it's a good idea for employers to be prepared for future changes by reviewing and updating policies and procedures. "But knee-jerk changes aren't advised," he said. "Politics and regulatory changes can take time to develop, and there can always be intervening matters—such as a worldwide pandemic—that derail planned agendas."

If the Biden administration does revisit overtime regulations, Plunkett noted, it could try to change the duties test, too. Each of the three white-collar exemptions has slightly different criteria (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/review-duties-tests-for-overtime-exemptions.aspx).

In the meantime, employers should evaluate employees' exemption status in light of changes to the workplace caused by the COVID-19 crisis, Caminiti said.

Under the executive exemption, for example, an employee must customarily and regularly direct the work of at least two employees, among other criteria. However, roles may have changed during the pandemic, she noted. A manager may no longer have direct reports if the employer had to lay off workers.

Focus on State Overtime Rules

Jeffrey Brecher, an attorney with Jackson Lewis in Long Island, N.Y, thinks the new administration is unlikely to make raising the exempt salary threshold a priority in light of the litigation that shut down the Obama administration's rule. "Advocates seeking to increase the minimum salary for exempt employees will instead likely focus further efforts at the state level," he said.

Employers should note that several states already have higher salary cutoffs for exempt workers. In California, for example, the salary threshold for the executive, administrative and professional exemptions is calculated by doubling the state minimum wage. California's cutoff will rise on Jan. 1, 2021, to \$58,240 (annualized) for businesses with at least 26 employees and \$54,080 for those with fewer.

Alaska's salary threshold is also double the minimum hourly wage. In New York, the state's minimum salary threshold for executive and administrative employees has been increased in phases, and the actual rate depends on location.

States may also have different thresholds for computer professionals and other job categories.

Wage and Hour Priorities

In addition to raising the minimum wage to \$15.00 an hour, Biden's DOL may take a more aggressive position on wage and hour enforcement and litigation, Brecher said.

Additionally, some of the current administration's priorities may be dropped. During the Trump administration, for example, the DOL resumed the use of opinion letters (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/opinion-letters-return.aspx) that describe how the agency would enforce federal wage and hour laws in specific circumstances. There is a safe harbor for employers if they can show that they relied on an opinion letter—even if they were not the party that requested the letter.

"Opinion letters are useful in helping employers comply with the law," Coburn said.

The Obama administration stopped issuing these letters in 2010 and replaced them with more general guidance. Brecher noted that Biden's DOL may seek to make broad changes through administrator interpretations on the issues that the department deems important instead of releasing opinion letters that answer specific questions from employers and workers.

The future is also uncertain for several DOL rules. For instance, the Trump administration is close to finalizing a rule clarifying (<https://advocacy.shrm.org/wp-content/uploads/2020/12/SHRM-Comments-on-DOL-Independent-Contractor-NPRM-10.26.20.pdf>) which workers can be classified as independent contractors under the FLSA. The rule will likely be issued prior to Biden's inauguration, Brecher said, but if there are legal challenges to the rule, the Biden administration may decide not to defend the rule or find another avenue to rescind it.

Similarly, the Trump administration finalized a rule (<https://advocacy.shrm.org/wp-content/uploads/2020/12/6.25.19-SHRM-Joint-Employer-FLSA-Comment-Letter.pdf>) narrowing the definition of "joint employer" under the FLSA, but a federal judge in New York invalidated substantial portions of the rule, prompting the DOL to appeal the decision.

"When Biden takes over, the DOL might withdraw the appeal," Brecher said.

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