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Overtime Exemptions in the Fair Labor Standards Act for White-Collar Employees: Frequently Asked Questions

May 15, 2019

Congressional Research Service

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R45722



R45722

May 15, 2019

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Overtime Exemptions in the Fair Labor Standards Act for White-Collar Employees: Frequently Asked Questions

The Fair Labor Standards Act (FLSA), enacted in 1938, is the main federal law that establishes general wage and hour standards for most, but not all, private and public sector employees. Among other protections, the FLSA establishes that covered nonexempt employees must be compensated at one-and-a-half times their regular rate of pay for each hour worked over 40 hours in a workweek.

The FLSA also establishes certain exemptions from its general labor market standards. One of the major exemptions to the overtime provisions in the FLSA is for bona fide “executive, administrative, and professional” employees (the “EAP” or “white collar” exemptions). The FLSA grants authority to the Secretary of Labor to define and delimit the EAP exemption “from time to time.” To qualify for this exemption from the FLSA’s overtime pay requirement, an employee must be salaried (the “salary basis” test); perform specified executive, administrative, or professional duties (the “duties” test); and earn above an established salary level threshold (the “salary level” test).

In March 2019, the Secretary of Labor published a Notice of Proposed Rulemaking (NPRM) to make changes to the EAP exemptions. The 2019 proposed rule would become effective around January 2020. The major changes in the 2019 proposed rule include increasing the standard salary level threshold from the previous level of \$455 per week to \$679 per week and committing the Department of Labor (DOL) to updating the EAP exemptions every four years through the rulemaking process. The 2019 proposed rule does not change the duties and responsibilities that employees must perform to be exempt. Thus, the 2019 proposed rule would affect EAP employees at salary levels between \$455 and \$679 per week in 2020. DOL estimates that about 4.9 million workers would be affected in the first year, including about 1.3 million EAP employees who would become newly entitled to overtime pay and an additional 3.6 million workers who would have overtime protection clarified and thereby strengthened.

This report answers frequently asked questions about the overtime provisions of the FLSA, the EAP exemptions, and the 2019 proposed rule that would define and delimit the EAP exemptions.

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Frequently Asked Questions

This report addresses frequently asked questions related to the overtime provisions in the Fair Labor Standards Act (FLSA) for executive, administrative, and professional employees (the “EAP” or “white collar” exemptions). For a history of DOL regulations on the EAP exemptions, see CRS Report R45007, *Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees*, by David H. Bradley. For a broader overview of the FLSA, see CRS Report R42713, *The Fair Labor Standards Act (FLSA): An Overview*.

This report proceeds in three sections. First, there is an overview of the main federal statute on overtime pay—the FLSA—and of defining and delimiting the EAP exemptions. Second, there is a discussion of the applicability of the EAP exemptions. Finally, there is information on the EAP exemptions in the 2019 proposed rule and the 2016 final rule (which was finalized but invalidated before it took effect).

Defining and Delimiting the EAP Exemptions

What are the “EAP” or “White Collar” exemptions in the FLSA?

The FLSA, enacted in 1938, is the main federal law that establishes minimum wage and overtime pay requirements for most, but not all, private and public sector employees.¹ Section 7(a) of the FLSA specifies that unless an employee is specifically exempted in the FLSA, he or she is considered to be a covered “nonexempt” employee and must receive pay at the rate of one-and-a-half times (“time and a half”) the employee’s regular rate for any hours worked in excess of 40 hours in a workweek.

When the FLSA was enacted, Section 13(a)(1) provided an exemption, from both the minimum wage² (Section 6) and overtime (Section 7) provisions of the act, for “any employee employed in a bona fide executive, administrative, and professional capacity.” Rather than define the terms executive, administrative, or professional employee, *the FLSA authorizes the Secretary of Labor to define and delimit these terms “from time to time” by regulations.*³

The general rationale for including the EAP exemption in the FLSA at the time of enactment was twofold. One, the nature of the work performed by EAP employees seemed to make standardization difficult and thus output of EAP employees was not as clearly associated with hours of work per day as it was for typical nonexempt workers. Two, bona fide EAP employees

¹ DOL estimates that in 2019, approximately 135.9 million, or 85%, of the 160.7 million wage and salary workers are covered by the FLSA and subject to DOL’s overtime regulations. U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10921, March 22, 2019. The 24.8 million individuals not covered by the FLSA or subject to DOL’s overtime regulations include military personnel, self-employed or unpaid workers, religious workers, and certain federal workers.

² While the EAP exemptions apply to both overtime and the minimum wage provisions of the FLSA, the focus of this report is on the overtime exemptions. For information on the minimum wage provisions of the FLSA, see CRS Report R43089, *The Federal Minimum Wage: In Brief*.

³ Originally, the FLSA stated that regulations implementing the EAP exemption would be issued by the administrator of the newly created Wage and Hour Division (WHD) of DOL. The Fair Labor Standards Amendments of 1961 (P.L. 87-30) changed the authority to issue regulations from the administrator of the WHD to the Secretary of Labor.

were considered to have other forms of compensation (e.g., above-average benefits, greater opportunities for advancement) not available to nonexempt workers.⁴

How are the EAP exemptions determined?

As mentioned, the Secretary of Labor is authorized to define and delimit the EAP exemptions.⁵ Including the first rulemaking on EAP exemptions in 1938, DOL has finalized nine rules.⁶

Although the determinations have changed over time, to qualify for an exemption currently under Section 13(a)(1) of the FLSA (i.e., not to be entitled to overtime pay), an employee generally has to meet three criteria:

1. The “salary basis” test: the employee must be paid a predetermined and fixed salary.
2. The “duties” test: the employee must perform executive, administrative, or professional duties.
3. The “salary level” test: the employee must be paid above the threshold established in the rulemaking process, typically expressed as a per week rate.⁷

What is the “salary basis” test?

To qualify for the EAP exemption, an employee must be paid on a “salary basis,” rather than on a per hour basis. That is, an EAP employee must receive a predetermined and fixed payment that is not subject to reduction due to variations in the quantity or quality of work.⁸ The salary must be paid on a weekly or less-frequent basis.

What is the “duties” test?

Job titles alone do not determine exemption status for an employee. Rather, the Secretary of Labor, through issuance of regulations, specifies the duties that EAP employees must perform to be exempt from the overtime pay requirements of the FLSA.⁹

To qualify for the exemption for *executive employees*, all of the following job duties tests must be met:¹⁰

- the employee’s primary duty “is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof”;

⁴ Conrad F. Fritsch and Kathy Vandell, *Exemptions From The Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees*, Minimum Wage Study Commission, Volume IV, Washington, DC, June 1981, p. 240.

⁵ For a history of WHD rulemaking on the EAP exemptions, see CRS Report R45007, *Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees*, by David H. Bradley.

⁶ Final rules on EAP exemptions were published in 1938, 1940, 1949, 1958, 1963, 1970, 1975, 2004, and 2016. As discussed below, the 2016 rule was finalized but did not take effect.

⁷ Although the EAP salary threshold is typically stated in weekly rates, 29 C.F.R. §541.600(b) indicates that the “required amount of compensation per week may be translated into equivalent amounts for periods longer than one week.”

⁸ The salary basis is specified in 29 C.F.R. §541.602.

⁹ 29 C.F.R. §541.2.

¹⁰ 29 C.F.R. §541.100.

- the employee “customarily and regularly directs the work of two or more other employees”; and
- the employee “has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.”

To qualify for the exemption for *administrative employees*, both of the following job duties tests must be met:¹¹

- the employee’s primary duty “is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”; and
- the employee’s primary duty “includes the exercise of discretion and independent judgment with respect to matters of significance.”

To qualify for the exemption for *professional employees*, the following job duties test must be met:¹²

- The employee’s primary duty is the performance of work requiring “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction”; or work “requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”

What is the “salary level” test?

In addition to the duties test, an employee must earn above a certain salary in order to qualify for the EAP exemption.¹³ Since the FLSA was enacted and the first salary thresholds were established in 1938, the standard salary level thresholds have been raised nine times. Prior to 2004, the salary level for exemption varied by the type of employee and the type of duty test. In addition to the standard salary level, in 2004 DOL created a “highly compensated employee” (HCE) exemption in which employees earning an amount above the standard EAP salary threshold annually are exempt from overtime requirements if they perform at least one (among many) of the duties of an EAP employee.¹⁴

Income Thresholds for the Salary Level Test

Standard Salary Level: For employees to qualify for the EAP exemptions (which exempts them from overtime pay requirements), they must earn at least \$455 per week, or \$23,660 annually.

Highly Compensated Employee Salary Level: For employees to qualify for the EAP exemptions by merit of less stringent duties test requirements, they must earn at least \$100,000 annually.

¹¹ 29 C.F.R. §541.200.

¹² 29 C.F.R. §541.300.

¹³ Per WHD rulemaking, employees in specified “named occupations” are not subject to the salary level or salary basis tests: teachers (29 C.F.R. §541.303), academic administrative personnel (29 C.F.R. §541.204), physicians (29 C.F.R. §541.304), lawyers (29 C.F.R. §541.304), judges (29 C.F.R. §541.304), and outside sales workers (29 C.F.R. §541.500).

¹⁴ 29 C.F.R. §541.601. See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 69 *Federal Register* 22172, April 23, 2004.

Applicability of the EAP Exemptions

Do the EAP exemptions affect independent contractors?

Because the FLSA applies to “employees,” individuals who are classified as independent contractors are not covered by the FLSA provisions.

Do the EAP exemptions apply to nonprofits?

Yes. There is no general exemption for nonprofits in the FLSA or the EAP overtime regulations. Coverage for workers in nonprofits, like other entities, is determined by the enterprise and individual coverage tests.¹⁵ It is important to note, however, that charitable activities often associated with nonprofits do not count as ordinary commercial activities and thus do not count toward the \$500,000 threshold for enterprise coverage under the FLSA. Only the commercial activities of nonprofits (e.g., gift shops, fee for service activities) count toward that threshold. On the other hand, even if a nonprofit does not meet the enterprise test for coverage, individual employees in an otherwise exempt nonprofit may be covered by the FLSA and the overtime rules if they engage in interstate commerce (e.g., regularly making out of state phone calls, processing credit card transactions).¹⁶

Do the EAP exemptions apply to institutions of higher education?

Yes. Both the FLSA and the EAP overtime regulations apply to institutions of higher education (IHEs). Due to other provisions of the FLSA, however, many personnel at IHEs are not eligible for overtime on the basis of the duties test alone and thus are unaffected by changes in the EAP standard salary level for exemption. For example, in general, bona fide teachers are exempt regardless of salary level and thus are not eligible for overtime.¹⁷ Similarly, academic administrative personnel are exempt from overtime pay if they are paid at least the EAP salary level threshold or are paid at least equal to the entrance salary for teachers at the same institution.¹⁸ On the other hand, some IHE workers would be affected by changes in the EAP salary level for exemption, including postdoctoral researchers who are employees, nonacademic administrative employees, and other salaried workers who are not covered by another exemption. Finally, like some public sector employers, but unlike private sectors employers, public IHEs may have the option of using compensatory time (i.e., a rate of 1.5 hours for each hour of overtime), rather than cash payment, to meet the obligation of providing overtime compensation.

Do the EAP exemptions apply to state and local governments?

Yes. There is no blanket exemption from FLSA and overtime rule coverage for state and local governments. In general, employees of state and local governments are covered by the overtime provisions of the FLSA and thus are affected by EAP rulemaking updating the salary level

¹⁵ For additional information on coverage tests, see CRS Report R43089, *The Federal Minimum Wage: In Brief*, by David H. Bradley.

¹⁶ U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA)*, Washington, DC, August 2015, <https://www.dol.gov/whd/regs/compliance/whdfs14a.pdf>.

¹⁷ 29 C.F.R. §541.303.

¹⁸ That is, academic administrative employees could be exempt if they earn less than the standard salary level per week as long as their earnings are equal to or greater than the starting teacher salary at the same school. 29 C.F.R. §541.204(a)(1).

threshold for the EAP exemptions. That said, other FLSA provisions apply to state and local governments that affect the applicability of overtime rules to these public sector employees.¹⁹

One way in which FLSA overtime rules apply differently in the public sector relates to the mode of compensation. State and local governments may have the option of using compensatory time, at a rate of 1.5 hours for each hour of overtime, rather than cash payment to meet the obligation of providing overtime compensation—an alternative not available to private sector employers.

Additionally, some public sector employees are not covered by the FLSA. For instance, certain state and local employees—elected officials, their appointees and staff who are not subject to civil service laws, and legislative branch employees not subject to civil service laws—are not covered and will not be affected by changes to the EAP exemptions.

The FLSA provides partial exemptions from the overtime requirements for fire protection and law enforcement employees. Specifically, fire protection and law enforcement employees are exempt from overtime pay requirements if they are employed by an agency with fewer than five fire protection or law enforcement employees. In addition, the FLSA allows overtime for all fire protection and law enforcement employees (not just those in small agencies) to be calculated on a “work period” (i.e., 7 to 28 consecutive days) rather than the standard “workweek” period (i.e., 7 consecutive 24-hour periods).²⁰

Do the EAP exemptions apply to U.S. territories?

Yes. The FLSA overtime provisions apply to employees in the U.S. territories—American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. While the exemption for American Samoa has traditionally been set at 84% of the standard salary level, the other territories have been subject to the standard level.

Are congressional employees covered by the FLSA overtime provisions?

The application of the provisions of the FLSA is determined by the Congressional Accountability Act (CAA, P.L. 104-1), which was enacted in 1995 and extends some FLSA provisions, including overtime provisions, and other labor and workplace laws to congressional employees. In addition, the CAA created the Office of Compliance (now the Office of Congressional Workplace Rights), headed by a five-member Board of Directors (Board), to enforce the CAA.

Rulemaking on the EAP exemptions would apply to congressional staff if the Board adopts them and Congress approves the Board’s regulations, pursuant to the process established in the CAA.²¹ In other words, regulations adopted by the Board do not have legal effect until they are approved by Congress.

When the Secretary of Labor issued new regulations to update the EAP exemptions in 2004, the Board adopted them; but thus far, Congress has apparently not approved the 2004 overtime

¹⁹ U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #7: State and Local Governments Under the Fair Labor Standards Act (FLSA)*, Washington, DC, March 2011, <https://www.dol.gov/whd/regs/compliance/whdfs7.pdf>.

²⁰ U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #8: Law Enforcement and Fire Protection Employees Under the Fair Labor Standards Act (FLSA)*, Washington, DC, March 2011, <https://www.dol.gov/whd/regs/compliance/whdfs8.pdf>.

²¹ Specifically, Section 203(c) of the CAA requires the Board to issue regulations that “shall be the same as substantive regulations promulgated by the Secretary of Labor to implement” the FLSA provisions that apply under the act to congressional employees. The Board may “for good cause” modify the regulations if such a modification would be more effective for the implementation of the protections in the FLSA.

regulations.²² Thus, overtime regulations that were adopted by the Board and approved by Congress in 1996, based on DOL regulations originally promulgated in 1975, currently apply to congressional staff.²³ In the absence of action by the Board and by Congress, the provisions in any future final rules would not change the status quo.

What are the options for congressional action on EAP exemptions?

Congress can pass legislation to repeal rules or compel new rules. For example, prior to the publication of the 2016 final rule, legislation was introduced that would have prohibited the Secretary of Labor from enforcing the final rule and would have required additional analysis from the Secretary before the issuance of any substantially similar rule in the future.²⁴

How might employers comply with changes in the EAP salary levels?

Given that rulemaking on the EAP exemptions typically includes increases in the salary level threshold for the EAP exemption, a greater number of employees become eligible for overtime pay with each upward adjustment of the salary level. To comply with the proposed regulations, employers would have several options, including the following:²⁵

- pay overtime to newly covered EAP employees if they work more than 40 hours in a workweek;
- increase the weekly pay for workers near the salary threshold to a level above it so that the EAP employees would become exempt and thus not be eligible for overtime pay;
- reduce work hours of nonexempt (covered) employees to 40 or fewer so that overtime pay would not be triggered;
- hire additional workers to offset the reduction in hours from nonexempt employees; or
- reduce base pay of nonexempt workers and maintain overtime hours so that base pay plus overtime pay would not exceed, or would remain close to, previous employer costs of base pay plus overtime.

²² The regulations were submitted to Congress for its approval. The regulations continue to be listed as “Pending Regulations” on the Board’s website. Office of Congressional Workplace Rights, “Pending Regulations,” <https://www.ocwr.gov/regulations-reports/pending-regulations>.

²³ The regulations became effective on April 16, 1996. A copy of these regulations is available on the Office of Congressional Workplace Rights website, <https://www.ocwr.gov/regulations-reports/final-regulations>.

²⁴ In the 114th Congress, two identical bills, both titled “Protecting Workplace Advancement and Opportunity Act,” were introduced in the Senate (S. 2707) and the House (H.R. 4773) on March 17, 2016. Each bill would have prohibited the Secretary of Labor from enforcing the 2016 proposed rule if it was finalized prior to the enactment of the bill, required the Secretary of Labor to conduct a new economic and cost-benefit analysis of any proposed “substantially similar” rules, prohibited the inclusion of automatic updates to the salary threshold in any new rule, required a minimum 120-day comment period on any substantially similar rule, required a minimum of one year between the publication of a “substantially similar” final rule and the effective date of such rule, and prohibited the Secretary of Labor from promulgating in a final rule changes to any of the duties tests for the EAP exemptions unless those changes were included in the proposed rule.

²⁵ This list of possible responses is neither exhaustive nor mutually exclusive, and it is not meant to imply equal likelihood of responses. Rather, it provides some possible channels of adjustment to a higher salary threshold for overtime pay.

The 2019 Proposed Rule

This section provides an overview of the main provisions of the 2019 proposed rule on EAP exemptions. For context, some provisions of the 2016 final rule are discussed.

What is the status of the 2016 final rule?

A final rule updating the EAP exemptions was published in the *Federal Register* on May 23, 2016, with an effective date of December 1, 2016.²⁶ However, on November 22, 2016, the U.S. District Court for the Eastern District of Texas issued a preliminary injunction blocking the implementation of the rule. On August 31, 2017, the U.S. District Court for the Eastern District of Texas ruled that DOL exceeded its authority by setting the threshold at the salary level in the 2016 final rule (\$913 per week) and thus invalidated it. Subsequently, DOJ appealed that decision to the U.S. Court of Appeals for the Fifth Circuit, which granted DOJ's motion to hold the appeal in abeyance until DOL issued new rulemaking on the EAP salary level.²⁷ Thus, DOL is currently enforcing the EAP regulations in effect on November 30, 2016, which include a standard salary level of \$455 per week.²⁸

What is the status of the 2019 proposed rule?

DOL issued a request for information (RFI) related to the EAP exemptions on July 26, 2017, seeking information from the public to assist in formulating a proposal to revise the exemptions.²⁹ On March 22, 2019, a Notice of Proposed Rulemaking (NPRM) was published in the *Federal Register* to define and delimit EAP exemptions.³⁰

The proposed rule would not only revise the regulations on the EAP exemptions but would also formally rescind the 2016 final rule. Such a rescission would provide that if any or all of the substantive provisions of the 2019 rule were invalidated or not put into effect, the EAP regulations would revert to those promulgated in the 2004 final rule.³¹ Due to the invalidation of the 2016 final rule (discussed above), DOL currently enforces the provisions of the 2004 final rule.

What are the main changes to the EAP exemptions in the 2019 proposed rule?

The main changes to the EAP exemptions in the 2019 proposed rule, as summarized in **Table 1**, include the following:

²⁶ U.S. Department of Labor, Wage and Hour Division, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 81 *Federal Register* 32391–32552, May 23, 2016.

²⁷ U.S. Department of Labor, Wage and Hour Division, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 84 *Federal Register* 10901, March 22, 2019.

²⁸ *Ibid.*

²⁹ U.S. Department of Labor, Wage and Hour Division, "Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 82 *Federal Register* 34616–34619, July 26, 2017. The comment period for the RFI closed on September 25, 2017.

³⁰ U.S. Department of Labor, Wage and Hour Division, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 84 *Federal Register* 10900–10969, March 22, 2019.

³¹ U.S. Department of Labor, Wage and Hour Division, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 84 *Federal Register* 10905, March 22, 2019.

- an increase in the salary level test from the current \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 annually);
- an increase in the annual salary threshold for the HCE exemption from \$100,000 to \$147,414;
- an allowance that up to 10% of the standard salary level may be comprised of nondiscretionary bonuses, incentive payments, and commissions;
- a salary level of \$455 per week for the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands, and of \$380 in American Samoa; and
- an increase in the “base rate” weekly salary level for employees in the motion picture industry from \$695 per week to \$1,036 per week.

Table I. Summary of Tests for EAP Exemptions in the 2004, 2016, and 2019 Rules

Test	2004 Final	2016 Final ^a	2019 Proposed
Salary Basis			
Salary Basis	Payment at a predetermined and fixed amount per week or less frequently	No change	No change
Standard Salary Composition	Bonuses not included in calculation	Up to 10% may be comprised of nondiscretionary bonuses	Up to 10% may be comprised of nondiscretionary bonuses
HCE Salary Composition	May include nondiscretionary bonuses	No change	No change
Duties Test			
Duties Test	Standard test replaced long and short test; specific duties, not job titles alone, required to qualify as bona fide EAP employees	No change	No change
Salary Level			
Standard	\$455 per week (\$23,660 annually)	\$913 per week ^b (\$47,416 annually)	\$679 per week (\$35,308 annually)
HCE	\$100,000 annually	\$134,004 annually ^c	\$147,414 annually
Territories	\$455 per week; American Samoa \$380 per week	\$913 per week; American Samoa \$767 per week ^d	\$455 per week; American Samoa \$380 per week
Motion Picture Industry	\$695 per week	\$1,397 per week	\$1,036 per week
Adjustments	None	Automatic updates every three years based on new salary data	None ^e

Source: CRS analysis of U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 81 *Federal Register* 32391–32552, May 23, 2016; and U.S. Department of Labor, Wage and Hour Division, “Defining and

Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10900–10969, March 22, 2019.

- a. As discussed in the text of this report, the 2016 rule was finalized but did not become effective and was eventually invalidated.
- b. The rule set the standard salary level at the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census region, which in 2016 was the South. Thus, in 2016 about 40% of full-time salaried workers in the South region earned at or below \$913 per week (\$47,476 annually).
- c. The rule set the HCE salary level at the annual earnings equivalent of the 90th percentile of the weekly earnings of full-time non-hourly workers nationally. Thus, in 2016 90% of full-time non-hourly workers earned at or below \$134,004 per year.
- d. This salary level was derived from DOL’s “longstanding practice” of setting the threshold in American Samoa at approximately 84% of the standard salary level.
- e. While DOL does not propose a change to the regulations for adjusting the EAP exemptions in the future, the 2019 proposed rule includes a “commitment” by DOL to issue an NPRM every four years to update the standard and HCE salary levels. See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10914–10915, March 22, 2019.

How are the salary levels determined in the proposed 2019 rule?

Since the FLSA was enacted in 1938, the salary level threshold has been increased eight times, including the proposed 2019 increase. Each of the previous increases have occurred through intermittent rulemaking by the Secretary of Labor, with periods between adjustments ranging from 2 years (1938–1940) to 29 years (1975–2004). Since 1938, measures of the salary level have fluctuated according to DOL’s identification of data sources most suitable for studying wage distributions and the department’s determinations of the proportion and types of workers who should be below salary thresholds, as well as its determinations of whether regional, industry, or cost-of-living considerations should be factored into salary tests.³² Starting with the 2004 final rule, DOL has used survey data from the Current Population Survey (CPS) in determining the salary level for the EAP exemptions, albeit with different methodological choices.³³

Standard Salary Level

Effective January 2020 (approximately), the standard salary level threshold would equal the 20th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census region, which in 2019 is the South, and/or in the retail sector nationwide.³⁴ In 2020, about 20% of full-time salaried workers in the South region and/or the retail sector nationwide are estimated to earn at or below \$679 per week (\$35,308 annually).³⁵

³² For details of DOL’s salary level determination in previous EAP rules, see CRS Report R45007, *Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees*, by David H. Bradley.

³³ The CPS is a monthly household survey conducted by the Census Bureau for the Bureau of Labor Statistics (BLS) to collect economic and demographic information on the population and is the source of the official monthly unemployment rate, among several other indicators. The CPS includes detailed information on earnings and occupations of respondents. For additional information on the CPS, see <http://www.bls.gov/cps/>.

³⁴ In its estimation process, DOL did not include in this wage distribution employees who are excluded on a statutory or regulatory basis from FLSA coverage or the salary requirement for EAP exemptions. In other words, the salary distribution does not include employees who would not be subject to either the salary test for overtime exemption (e.g., doctors, lawyers) or those excluded from FLSA coverage. Wage and Hour Division, Department of Labor, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10910, March 22, 2019.

³⁵ In the NPRM, DOL uses pooled CPS data from 2015–2017 to estimate a weekly rate of \$641 at the 20th percentile of

Highly Compensated Employee

Effective January 2020 (approximately), the HCE salary level for the EAP exemptions would equal the annual earnings equivalent of the 90th percentile of the weekly earnings of full-time non-hourly workers nationally. In 2020, 90% of full-time non-hourly workers are estimated to earn at or below \$147,414 per year.³⁶

Territories

Effective January 2020 (approximately), the salary level for the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands would be \$455 per week, and in American Samoa it would be \$380 per week.³⁷ Except for American Samoa, this would depart from past regulations by establishing a salary threshold for the territories below the standard level.

Motion Picture Industry

Effective January 2020 (approximately), the motion picture industry employee salary level for the EAP exemption would be \$1,036 per week. This level was derived by increasing the previous threshold (\$695 per week) proportionally to the increase in the standard salary level. This would continue a special salary test created in 1953 for the motion picture industry that provides an exception to the “salary basis” test. Specifically, employees in the motion picture industry may be classified as exempt if they meet the duties tests for EAP exemption and are paid a “base rate” (rather than on a “salary basis”) equal to the salary level for this exemption.³⁸

What are the provisions for future adjustments to the salary level in the 2019 proposed rule?

The 2019 proposed rule would implement a commitment by DOL to update the EAP salary level thresholds every four years by submitting an NPRM for comment.³⁹ If the 2019 proposed rule is finalized, DOL would publish its first proposed update on January 1, 2023, and subsequent updates every four years thereafter. The future salary level updates would be based on the same data source (CPS) and methodology of the salary levels established in the 2019 proposed rule:

- the standard salary level would be adjusted to the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region and/or in the retail sector,

workers in the South and/or the retail sector. DOL then uses a growth rate to project a rate of \$679 per week by the likely effective date of the new salary level (January 2020). See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10910, March 22, 2019.

³⁶ The same inflation method is used for the HCE level as for the standard salary level. The earnings data, which are from the CPS, are published at http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.

³⁷ See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10911–10912, March 22, 2019.

³⁸ *Ibid.*, p. 10912.

³⁹ See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10914–10915, March 22, 2019.

- the HCE salary level threshold would be adjusted to the 90th percentile of annual earnings of full-time non-hourly workers nationally, and
- the quadrennial NPRM would seek comment on whether to update the salary level for the territories established in the 2019 proposed rule.

Who would be covered by the changes to the EAP exemptions in the 2019 proposed rule?

The 2019 proposed rule would expand overtime coverage to EAP employees through a higher salary level threshold rather than through additional classes of employees. As such, EAP employees making between \$455 per week (the current effective level) and the new rate of \$679 per week in 2019 would likely become nonexempt (i.e., covered) by the overtime provisions and entitled to overtime pay for hours worked in excess of 40 per workweek.

How many employees would be affected by the changes to the EAP exemptions in the 2019 proposed rule?

It is difficult to project the number of employees currently exempt under the EAP exemptions who would no longer be exempt under the 2019 proposed rule. This is due in part to uncertainty about potential employer responses, such as increasing salaries above the new threshold to maintain exemption for EAP employees.

DOL estimates, with caveats, that approximately 4.9 million workers would be affected by the proposed rule. DOL identifies two groups in particular that would be affected—newly covered workers and workers with strengthened protections.⁴⁰

Specifically, DOL estimates the following:

- In the first year under the provisions of the 2019 proposed rule, about 1.3 million EAP employees would become newly entitled to overtime pay due to the increase in the salary threshold:⁴¹
 - about 1.1 million employees in this group meet the duties test for the EAP exemption but earn between the current standard salary threshold (\$455 per week) and the proposed threshold (\$679 per week); and
 - an additional 201,000 employees in this group meet the HCE duties test for exemption, but not the standard test, and earn at least the current HCE salary threshold (\$100,000 per year) but less than the proposed threshold (\$147,414 per year).
- An additional 3.6 million workers would receive “strengthened” overtime protections, including the following:⁴²
 - An additional 2.0 million white collar workers who are paid on a salary basis and earn between the current salary threshold of \$455 per week and the

⁴⁰ See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10911, March 22, 2019.

⁴¹ This total includes 1,070,000 for the EAP standard salary threshold and 201,000 for the HCE threshold. See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10927 – 10929, March 22, 2019.

⁴² See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register* 10911, March 22, 2019.

proposed threshold of \$679 per week but do not meet the EAP duties test (i.e., they perform nonexempt work but might be misclassified) would gain overtime protections because their exemption status would not depend on the duties test. In other words, this group of workers would gain overtime coverage because the higher salary threshold would create a clearer line exemption test and reduce misclassification for exemption purposes.

- About 1.6 million salaried workers in blue collar occupations whose overtime coverage would have been clearer with the higher salary threshold. As DOL notes, this group of workers should currently be covered by overtime provisions but may not be due to worker classification.

By comparison, DOL estimated that in the first year under the provisions of the 2016 final rule, approximately 13.1 million workers would have been affected.⁴³ This total would have included about 4.2 million EAP employees who would have become newly entitled to overtime pay due to the increase in the salary threshold and an additional 8.9 million workers who would have received “strengthened” overtime protections.⁴⁴

The data in **Table 2** provide a summary of the estimated numbers of affected workers under the 2019 proposed rule and the 2016 final rule.

Table 2. Number of Workers Affected by Changes to EAP Exemptions in the 2019 Proposed Rule and the 2016 Final Rule

Category	2016 Final	2019 Proposed
EAP Exempt ^a	29,900,000	31,900,000
<i>Potentially Affected</i>	22,500,000	24,300,000
<i>Named Occupations^b</i>	7,400,000	7,600,000
New Coverage	4,228,000	1,271,000
<i>Standard Salary Level</i>	4,163,000	1,070,000
<i>HCE Level</i>	65,000	201,100
Strengthened Coverage	8,900,000	3,600,000
New Coverage as Share of Potentially Affected	18.8%	5.2%

Source: CRS analysis of U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 84 *Federal Register*, March 22, 2019; and U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 81 *Federal Register*, May 23, 2016.

⁴³ See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 81 *Federal Register* 32405, May 23, 2016.

⁴⁴ This total includes 4,163,000 for the EAP standard salary threshold and 65,000 for the HCE threshold. See U.S. Department of Labor, Wage and Hour Division, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 81 *Federal Register* 32470–32500, May 23, 2016.

- a. “EAP Exempt” is a baseline estimate of the number of employees who would be exempt from overtime on the basis of job duties and current salary level above the existing exemption threshold, which is \$455 per week.
- b. The employees in this category (i.e., physicians, lawyers, teachers, academic administrative personnel, and outside sales workers) are not subject to the EAP salary level tests and are exempt from overtime regardless of salary level.

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