

The New Overtime Rule: Avoiding Investigation and Misclassification

Andrew Dollman, Esquire
Latsha Davis & Marshall, PC
adollman@ldylaw.com
717.686.4778

Overtime Rule History

On September 8, 2023, the U.S. Department of Labor's ("DOL") Wage and Hour Division published a Notice of Proposed Rulemaking in the Federal Register.

The Notice outlined an updated salary level which was last raised in a 2019 Rule to \$684/week.

Prior to the 2019 Rule, the salary level was set at \$455/week.

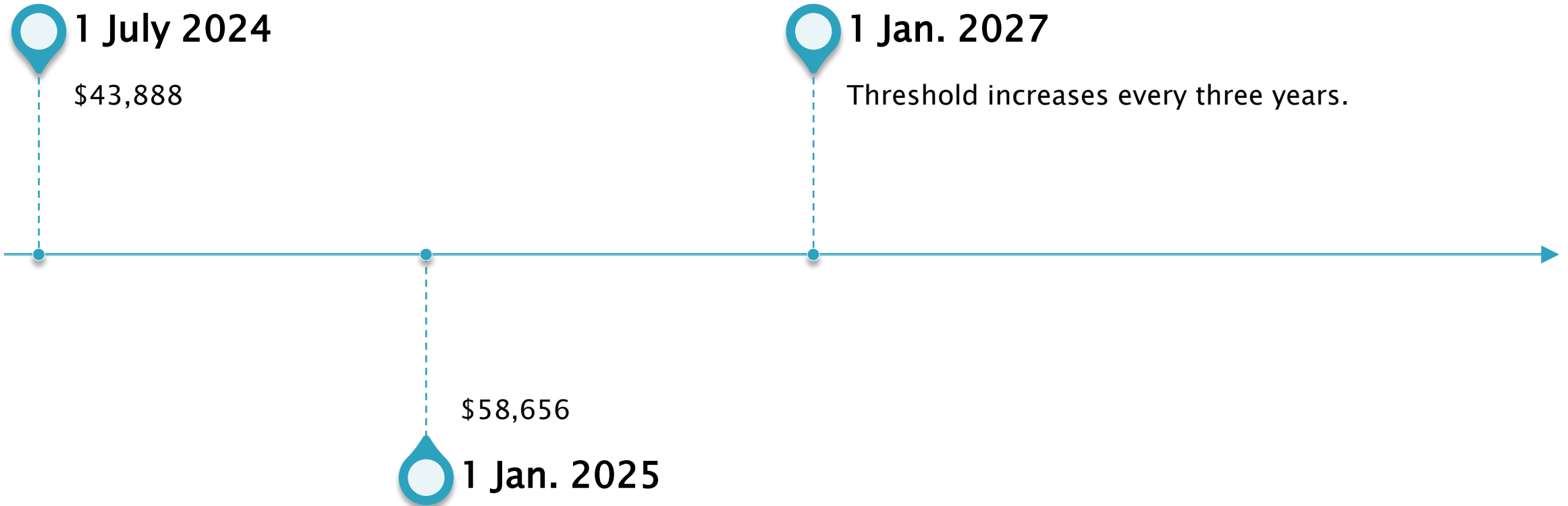
The OT Rule

The new Rule includes revisions including increasing the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).

The proposed levels differed from the actual salary threshold numbers in the current Rule.

The Office of Management and Budget (“OMB”) received the Rule on March 1, 2024, it was subsequently approved, and went into effect on July 1, 2024.

What are the actual numbers?



What are we worried about?

DOL Complaints filed by Employees

DOL lawsuits brought on behalf of improperly paid employees

DOL Audits of Personnel Files and Salary Information

Threats of private causes of action

Private causes of action

DOL Complaints Filed By Employees



Like EEOC and PHRA Complaints, employees can file Complaints with DOL through its website.



This generally triggers communication to the Employer from DOL asking for documentation and information.



Employers have the opportunity to “come clean” and work out a settlement with the Employee.



This process is facilitated and shepherded by DOL to ensure fair play.



End result is payment by the Employer and signed release from Employee.

DOL Sues on Behalf of Employee



If an Employer is unwilling or unable to reach a settlement with an Employee, DOL may “stand in the shoes” of the employee and file suit.



DOL’s suit may seek the back wages owed, an equal amount in liquidated damages, and civil money penalties, where appropriate (think “frequent flyers”).

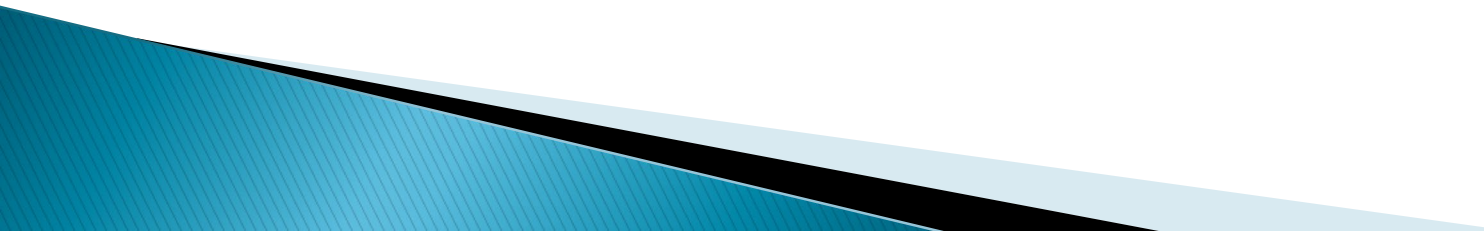


Employees may generally recover 2 years back wages or 3 if the Employer willfully misclassified and/or mispaid an employee.



DOL can also seek an injunction and CMPs.

DOL Audits of Personnel Files and Salary Information

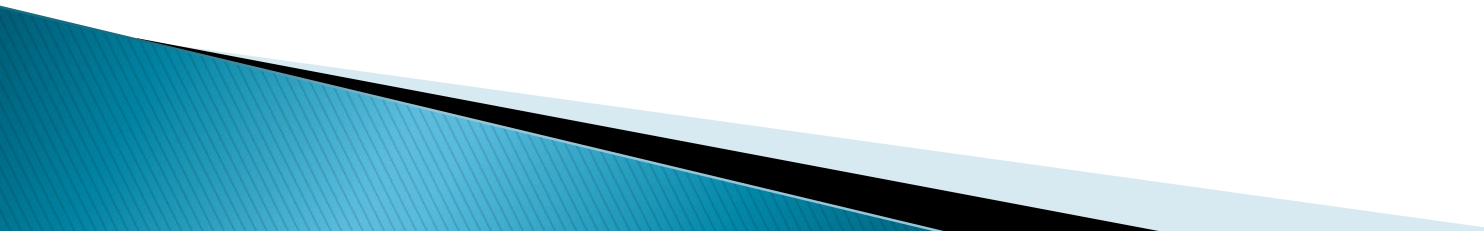
- ▶ This is one of the scarier ones.
 - ▶ Like any Administrative Agency, DOL can step in and conduct a full inspection/audit of as many or as few employees and/or personnel files as it desires.
 - ▶ If an Employer has a major “oops,” this can result in big dollars owed in back wages to multiple employees.
- 

Threats of Private Causes of Action

▶ Typical fact pattern:

- Employee feels aggrieved and believes s/he may not be receiving proper wages.
- Employee goes out and finds an attorney to review the case.
- Attorney writes a letter to the Employer outlining the issues.
- Employer conducts an investigation and finds a violation.
- Employer negotiates with Attorney and settles the claim.
- The parties sign a Settlement Agreement and Release which may NOT be enforceable*****.

Private Causes of Action

- ▶ Aggrieved employees can bring a private lawsuit in Federal Court.
 - ▶ All the remedies above are available.
 - ▶ Likely the most costly of any single-employee action.
 - ▶ Settlement is blessed by the Court so no concern about Release issues.
- 

OT Rule Basics

The Fair Labor Standards Act (FLSA) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the employee's regular rate of pay.

Section 13(a)(1) of the FLSA exempts from the minimum wage and overtime pay requirements “any employee employed in a bona fide executive, administrative, or professional capacity.”

Overtime Rule Basics



THE EXEMPTION IS COMMONLY REFERRED TO AS THE “WHITE-COLLAR” OR EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL (EAP) EXEMPTION.



THE STATUTE DELEGATES TO THE SECRETARY OF LABOR (SECRETARY) THE AUTHORITY TO DEFINE AND DELIMIT THE TERMS OF THE EXEMPTION.



THE OVERTIME RULE HAS BEEN MODIFIED FROM TIME TO TIME OVER THE YEARS, TYPICALLY BY ADMINISTRATION.

Overtime Rule - The Tests

The regs implementing the EAP exemption have generally required that each of the following three tests must be met:

- (1) The employee must be paid a fixed salary that is not reduced because of variations in the quality or quantity of work performed (the salary basis test);
- (2) The amount of salary paid must meet a minimum specified amount (the salary level test found in the Rule); and
- (3) The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regs (the duties test).

Executive Exemption (Fact Sheet 17A)

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$684* per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemptions (17A)

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684* per week;
- The employee's primary duty must be 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.

Professional Exemption (17A)

To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684* per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684* per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

More Basics



Employers need to know and review employee classifications, especially in nursing.



Can nurses be paid a salary versus hourly? Hybrid situations?



Considerations for 8/80 Rule.



See EEOC v. Medical Staffing of America, LLC

Preparing For Future Salary Bumps

Review the pay scale of affected employees. Who makes less than \$58,656?

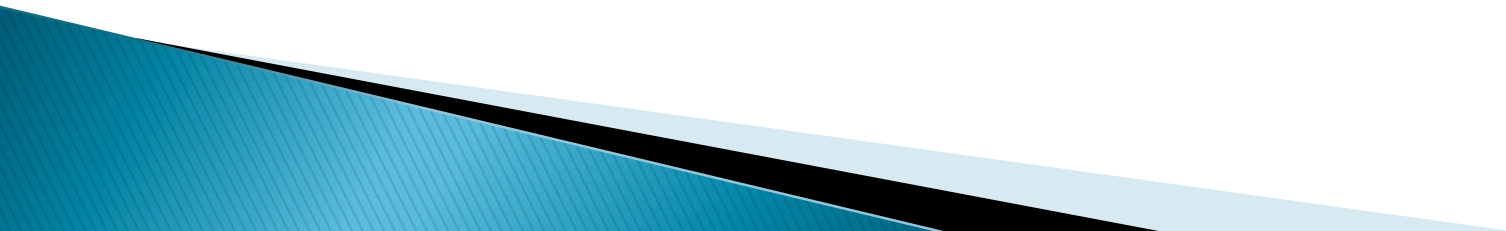
List employees/positions which have a pay scale of less than \$59K.

Estimate how much overtime those employees work.

Review job descriptions and ensure that salaried employees actually qualify to be salaried. Make sure similar JDs treated the same.

Make sure affected employees meet the other tests.

Conclusions/Questions



Contact Information

Andrew Dollman, Esq.

Email: adollman@ldylaw.com

717.686.4778

www.ldylaw.com

