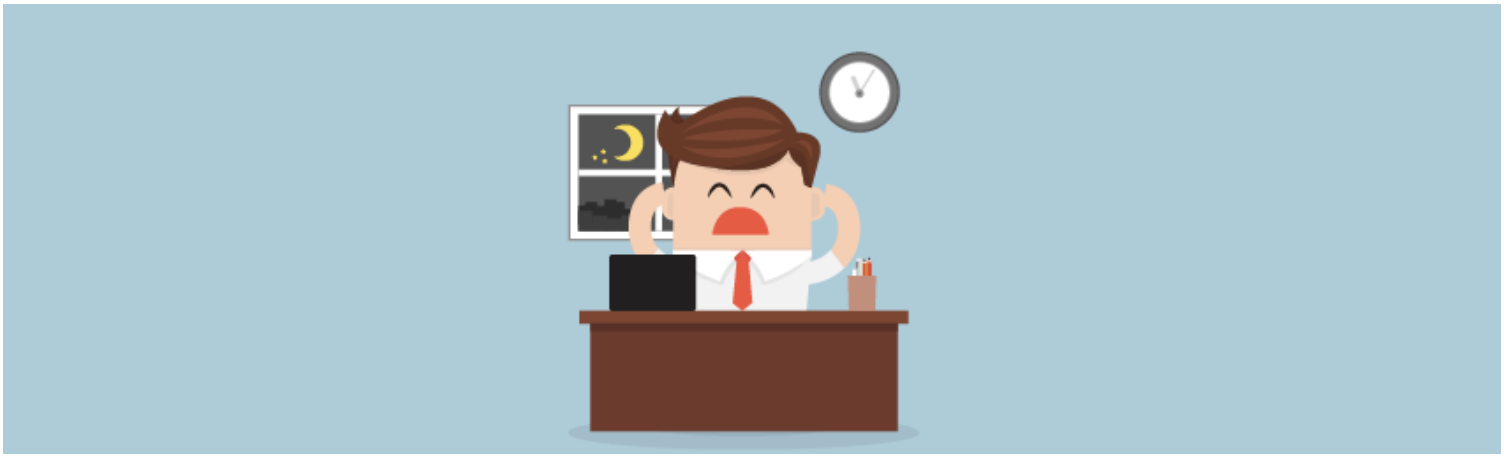
DOL plans to issue new overtime rules in March 2019



The U.S. Department of Labor says it will propose a new salary threshold for paying overtime to white-collar workers next March. The announcement of a new date for issuing a notice of proposed rulemaking came in the DOL's fall regulatory agenda report, published Oct. 16.

Meeting the March deadline would cap what has so far been a drawn-out process. The DOL originally began seeking public comment on revising the overtime rules in the summer of 2017.

Issued under the Fair Labor Standards Act, the regulations implement exemptions from the overtime pay requirements for executive, administrative, professional and certain other employees.

Last year, Labor Secretary Alex Acosta announced the DOL plans to update the overtime rule, and the department began gathering public input in July 2017. This spring, the DOL said it hoped to release new overtime rules in 2019.

Possible rules revisions include raising the salary threshold above its current $23,660 per year. Anyone who makes less than that is eligible for overtime pay when they work more than 40 hours in a workweek.

Acosta has previously said he supports raising the salary threshold to somewhere in the neighborhood of $33,000, a figure that roughly corresponds to cost-of-living increases since 2004, when the overtime rules were last revised.

The DOL could also revise the duties test that determines what kind of work warrants overtime pay.

Listening sessions started Sept. 7 in Atlanta, with additional events throughout September in Denver; Kansas City, Mo.; Providence, R.I.; and Seattle.

An Aug. 28 notice in the Federal Register said the listening sessions focus on finding answers to 4 questions:

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1. What is the appropriate salary level (or range of salary levels) above which the overtime exemptions for bona fide executive, administrative or professional employees may apply?
2. What benefits and costs to employees and employers might accompany an increased salary level? Could an increased salary level reduce litigation costs by reducing the number of employees whose exemption status is unclear?
3. Should the update derive from wage growth, cost-of-living increases, actual wages paid to employees or some other measure?
4. How frequently should the DOL update the salary threshold and other overtime rules?

Think you're too small to qualify for the FLSA ... think again

The Department of Labor has suffered a rare rebuke after it tried to press an employer to reveal information that might expand a Fair Labor Standards Act claim to cover related entities. The 8th Circuit Court of Appeals refused to allow questions about whether shareholders of one entity also owned other businesses.

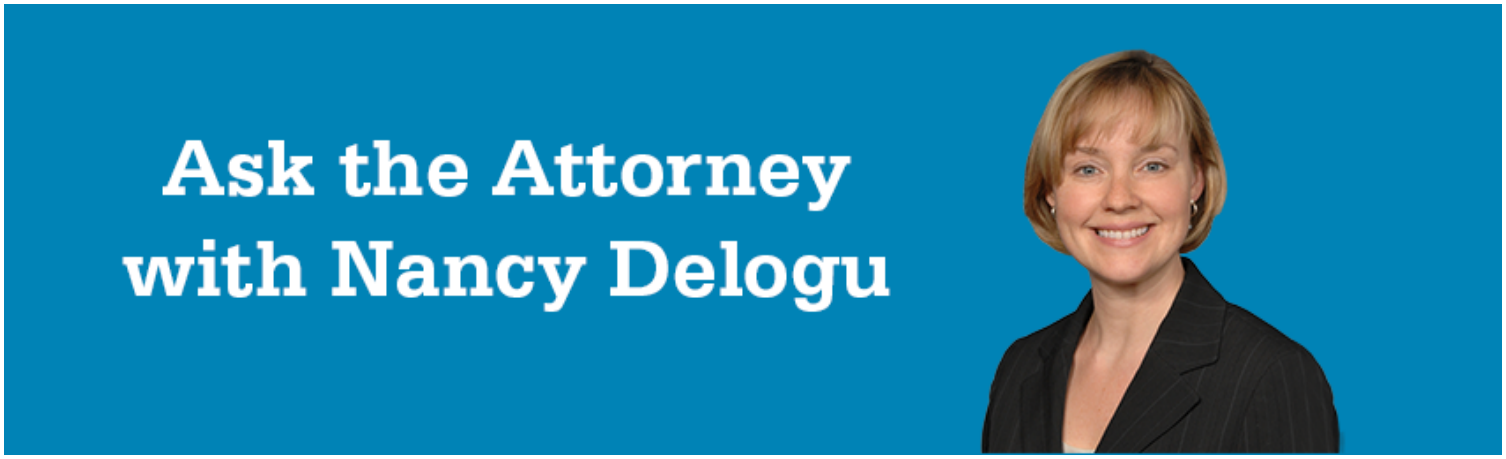
Recent case: The DOL issued a subpoena as part of its investigation into how a small Mexican restaurant, El Mezcal, paid its employees. Among the documents demanded was a list of other businesses owned by El Mezcal shareholders.

The subpoena demanded a list of shareholders, the names and addresses of other locations owned or partially owned by those shareholders and the annual sales volume of each location. The company refused to turn over the information and the DOL moved to hold them in contempt, which sometimes means prison time. The trial court found the company in contempt.

The company appealed, arguing it wasn't even subject to the FLSA because El Mezcal had less than $500,000 in annual gross sales. It also argued that it didn't have in its possession any information about other business activities that their shareholder owners might be engaged in, and that it was under no obligation to go looking for that information.

The 8th Circuit Court of Appeals agreed with the company. It dismissed the contempt order and said the DOL would have to find some other way to get the information, perhaps by issuing separate subpoenas to each owner or during discovery. It could not, however, compel the company to obtain and provide that information. (*Acosta v. El Mezcal*, 8th Cir., 2018)

Final note: You may think your business is too small to be covered by the FLSA, but the DOL may try to bring associated businesses into the calculation.



What constitutes a "workweek" under the FLSA?

***Reader Question*:** "I am attempting to understand the FLSA rules on overtime. I have an employee who works

at a reception counter greeting guests, directing them to their stations, checking them in and out. This employee is an hourly employee making $13.50/hour, working between 35-45 hours per week. Is she entitled to overtime over 40 hours per week? Also, we get paid on the 15th and end of the month and our workweek runs from Sunday to Saturday. This past pay period, we had three weeks, as follows:

Week 1: June 1 – June 2

Week 2: June 3 – June 9

Week 3: June 10 – 15

"With the exception of week two, this employee did not have a chance to work a full week. In this situation, I feel like I am not looking at the workweek correctly…?" – *Katie, Louisiana*

***Nancy Delogu, Esq.*:** Yes, your hourly employee is entitled to overtime pay for any work in excess of 40 hours in the workweek.

It sounds like your workweek starts on 12:00 a.m. on Sunday and runs through midnight the following Saturday. If the work is seasonal, or her job started on June 1, then a first week pay period of June 1 – 2 makes sense (really, your pay period started the prior Sunday, May 27, but she did not work until June 1). June 3 – 9 is consistent with your Sunday to Saturday pay period, but the next pay period would have run June 10 – the 16th, not the 15th. I suspect the confusion is arising from the fact that you are paid on the 15th and the end of the month. If you are not paid in arrears—that is, for example, pay on the 15th is for the weeks ending on the 9th—then pay on the 15th would NOT change the fact that the workweek did not end until midnight on the 16th. Any hours worked on the 15th and 16th not paid mid-month would still count as worked in the week of June 10, and overtime hours would be included in the month-end payment.

Rulings from the Courts: 2 recent FLSA cases put the overtime violations on payroll

Riverside, Calif. —A U.S. Department of Labor investigation found that Carnegie Schools Riverside, a private Christian school, failed to make several payrolls to teachers, substitute teachers, coaches, administrative aides and cafeteria workers.

The result for the pre-K – 12 school outside Riverside: Several Fair Labor Standards Act violations.

The missed payrolls caused some employees' pay to fall below the federal minimum wage of $7.25 per hour. Additionally, the school violated overtime rules for employees who worked more than 40 hours per week during the affected pay periods.

In all, 75 employees were affected. The school will pay them $134,046 to make up for the missing paychecks.

Note: As soon as an employer knows it will miss a payroll, it should contact the DOL at (866) 4US-WAGE (866-487-9243).

The Woodlands, Texas — Conn's Appliances, based in The Woodlands, Texas, learned the hard way that payroll deductions often have unintended consequences. The chain will have to pay $540,870 in back pay and liquidated damages to 1,991 employees.

Reason: Investigators from the U.S. Department of Labor's Wage and Hour Division found the company was overzealous in requiring pay deductions for uniforms and paperwork processing mistakes. That created Fair Labor Standards Act violations. Because the deductions lowered exempt employees below the FLSA's overtime threshold, it destroyed their exempt status. Additionally, Conn's failed to include commissions and bonuses when calculating base pay for overtime purposes, resulting in underpayments to the employees.

Conn’s operates 164 appliance, furniture and mattress stores from Nevada to Virginia.

Note: Payroll deductions often have FLSA consequences. For example, employers may not deduct so much that employees do not earn the federal minimum wage of $7.25 per hour. Plus, anyone paid less than $455 per week cannot be exempt from the FLSA.