

- [Announcer] You are listening to the HR Mixtape. Your podcast with the perfect mix of practical advice thought provoking interviews and stories that just hit different so that work doesn't have to feel, well, like work. Now your host, Shari Simpson.

- Joining me today is Corinne Tirone the Director of Government Relations at Paylocity. She is an attorney with over 12 years of experience in legal research, payroll, and HR compliance. Her focus is on monitoring the legislative landscape at the federal state and local levels to help inform the organization's development projects compliance strategy, and risk mitigation plans. In addition, Corinne serves on the board of the National Payroll Reporting Consortium and leverages strong relationships with agencies and industry groups to stay informed of regulatory trends in changing compliance requirements. Corinne, thank you for joining me back in the actual studio today.

- Hey, happy to be here.

- So I wanted to bring you back to have a really anticipated follow-up conversation around the update of the Department of Labor's proposed rule change for the earnings threshold associated with overtime exemption. So there definitely have been some recent developments so let's dive into those.

- That's right, Shari. The Department of Labor recently made an official announcement on the proposed changes to the earnings threshold for exempt employees and they published that to the Federal Register on September 8th, 2023. This has been in the works for over a year. The official original notice of proposed rulemaking is something that employers have been on the lookout for since spring of 2022 when it was first announced. So we've been really keeping an eye out for this since last March.

- Yeah, definitely. It's a follow-up actually to an episode that we did called the DOL Overtime proposal. If you wanna go back and listen to that episode. But as we kind of rehash some of this stuff maybe for those who don't know, we could start with what is an earning threshold to begin with?

- Absolutely. So it's part of the FLSA which is the Fairly Labor Standards Act. The earning threshold is a minimum salary that exempts certain qualified employees from the overtime requirements. To qualify for that exemption classification employees must earn a specific salary amount that's established by the government and that's really what's in scope for this particular proposed rule change. That salary has to be paid on a salary basis and the employee must meet one of the job duties tests established by the DOL such as executive administrative or professional exemptions or EAPs. Employees who earn above the earnings threshold and meet the other elements of the

government standard may be classified as exempt. Everyone else, all other employees who don't meet those tests are considered non-exempt. Non-exempt employees have to clock in and out. They're eligible for overtime if they work for more than 40 hours in a week. And that classification determination is made by employers on a job-by-job basis. And it's based on the actual job duties without regard to the title of the job.

- Which definitely, if you were around in 2016 you know what we're talking about. I'm sure you're already developing some anxiety by the conversation because my next follow-up question is as we think about what this proposal is what is the current threshold that we have for overtime exemptions?

- Sure. Yeah, and I think we did touch on that a little bit in our last episode that we've all been, many of us have been through this before and not that long ago. So right now the earnings threshold for exempt employees is a little over \$35,000 a year. It comes out to \$684 each week. The salary threshold level was last updated in 2019 under the Trump administration and the President Biden's team announced this proposed rule in 2020. Before that increase, the previous update was 2004 so it was a long time ago.

- Yeah, there definitely seems to be a much smaller span of time between these recent updates and the previous two. Has the department provided any guidance on why that might be the case?

- Yeah, so they stated that the regular updates promote greater stability avoid disruptive salary level increases that can result from lengthy gaps between these updates and then provide some appropriate wage protection. So in order to further that goal the notice of proposed rulemaking includes provisions that the earnings threshold for overtime exemption should be automatically updated every three years on a move forward basis. If that makes it into the final rule we'll continue to see increases to the earnings threshold on a regular basis for as long as this rule is in effect.

- It definitely would make it easy for employers or easier for employers at least to plan ahead for that. I think what everybody really wants to know though what is the proposed earnings threshold for overtime exemption in that proposed rule from the Department of Labor?

- Absolutely. So, you said a very key word. We've said it a couple times proposed so this is not necessarily final we'll touch on that a little more later. But in that proposed rule the earnings threshold included is \$55,068 for a full-year worker. That works out to \$1059 each week. It represents around a 55% increase from the current level. And that level is based on the 35th percentile of average weekly earnings for a full-time salaried worker from the lowest wage census

region which is currently the south. The federal government has a tremendous amount of data available that they really are using to help inform these decisions and consider in making these types of administrative rules. And by using this level, the department says that it better fulfills their obligation to define and delimit who is employed in a bonafide exempt capacity. The proposed rule would increase the salary threshold not only in all of the US states, which it absolutely will but also US territories other than US American Samoa. And interestingly, those territories have not seen a salary threshold increase since that update in 2004 that we mentioned earlier.

- And as you mentioned that threshold being at that a little bit over 55,000 it being that again proposed rule, is there any chance that that amount is going to change before the final rule gets published?

- Yeah, so yes, of course. And the notice of proposed rulemaking states in one of the footnotes that in coming to that amount they relied on data from 2022. So when publishing a final rule the department will use the most recent data that they have available to really come to a more precise crisp dollar figure and that figure might change. What we don't know is by how much. So the department projects that applying their proposed methodology the salary threshold could be \$1,158 for employees in the measurement region for the first quarter of 2024. So, that would work out to a little over \$60,000 a year. It's \$60,209 annually. So we could see some upward movement from the proposed threshold once that final rule is actually published.

- Yeah it's good to see that there's definitely likely to be different levels set out on that final rule. Do you have any insight on when we'll see a final rule or how long it sits in this proposal phase?

- So, yes and no. So currently the proposed rule, sitting in comment period and that comment period is open for the public to provide feedback until November 7th, 2023. After the comment period, the department will review and consider all of the comments that have been submitted by employers, industry groups, the public, anyone can write in and provide comment. They will go through all of that information and then after they have done that, they will publish the final rule. Just how much time it will take between, you know getting that information on November 7th and actually publishing the final rule. We don't know, but we know we have at least until that comment period is over on the seventh before anything happens.

- And you mentioned that there the way that the rule proposed right now is that there's some automatic provisions for future updates. Can you elaborate on those a little bit more?

- Sure. Yeah. So the department has proposed to automatically update the salary threshold every three years. This idea of an automatic

update was actually part of the attempted change in 2016 that did not end up going, you know, all the way into effect to update earning thresholds that we discussed a little bit earlier. There would be exceptions to the automatic update under certain conditions, but the department has stated that this would be the most viable and efficient way to make sure that that salary threshold keeps pace with changes in employee pay and is an effective part of determining who should qualify for exemption from overtime compensation. The department did also state that they anticipated a 60-day window of time after the final rule is published before it becomes effective. So employers may wanna start considering their options to prepare for these changes, you know now before we even see that final rule so that they're not kind of caught on their heels.

- It's definitely preparation, preparation, preparation is like the one thing I can say coming out of this conversation because I think no matter what the amount it looks like there's gonna be some big differences. So if you are thinking back to 2016, right and all those things that you did, all those steps you took in place to evaluate your jobs and their descriptions and where they're sitting in your salary brands it's definitely the time to do that. As you think about those steps, Corinne, is there other things that employers should be doing to prepare for this final rule?

- Yeah, I mean, absolutely. And I think, again, you know a lot of us might already have a playbook here but the main places that you would start are, you know look at the exempt employees whose compensation level may be impacted by the final rule identify exempt employees earning between that current level of, you know, \$35,000 a year and change up to the new proposed level that's over 55,000. You might even wanna look at those, you know that are a little bit above that. 'Cause we know that that final rule dollar amount could be all the way up to 60. So you've got, you know, kind of a limited demographic within your workforce of the people that are kind of in what I would call like the gray zone from the dollars perspective. And then those individuals may or may not also be in a gray zone in terms of duties perspective as might other people be in your organization. So I think it's a really good opportunity to kind of take a step back and think about, you know are there jobs that you haven't looked at in a while? Have you really done a thorough thoughtful analysis of those duties? You know, any time in the last, you know, 3, 6, 10 years whatever that might be for your organization use this to your advantage because now you have a compliance reason to say we might need to make a change here that doesn't feel, you know how it can kind of feel if you're changing people's pay. You can get some reactions to that but if you have a compliance reason, you're saying we're doing this in anticipation of this change that is coming that people feel really differently about that. So I think there's an opportunity here to use this to your advantage, but absolutely, even if that is not going on in your organization, it's a great time to just take a step back, prepare plan

take a look at who might be impacted and figure out what you would need to do to come into compliance depending on those roles.

- I love that. It's all really, really helpful. As you think about, you know kind of wrapping our conversation and in that planning phase, is there other HR operations that you can think about that you should, you know kind of incorporate in this review?

- Yeah, I mean, I think it, it kind of calls back to what I said a moment ago. So really, you know, kinda think about the last time your organization performed an audit of exempt status employees. This upcoming final rule is, it's a great opportunity for you to do that. So there are no proposed changes from the government on job duties tests for exemptions. So you can gather information on those rules from the DOL and review, you know, existing job duties for your exempt employees, and then do the job duties of the actual rules fit into those tests. You know, you could take this time to identify if there's anyone that's potentially incorrectly classified since you're already gonna be working in this space. Any communication with coworkers could be considered as part of, you know, the change management strategy to prepare anyone potentially affected by these upcoming changes.

- Change management is definitely going to be top of your list as you think about the impact of this proposed rule, is there other considerations that employers should be making when they're looking at these decisions to potentially move employees into a non-exempt and or making them overtime eligible?

- Yeah, well, I mean, you know I think the elephant in the room is like, there's a financial impact, right? I mean, you're gonna have to think about the dollars and whether the dollars make sense and how that impacts your organization, your bottom line you know, whatever that kind of rolls into there. But then the next thing is you need to think about the impact to employee morale because you know as I said, I think that there's something about being salary versus hourly that I think sometimes, you know people can kind of react to flipping from one to the other if they feel that, you know, one is more has more, you know, cachet or something like that. So think about it through that lens. Again, you know, I do think that you've got cover in terms of this is a compliance obligation and there's a way to message that and manage that that doesn't have the same morale impact. But I do think you need to be mindful of the morale impact and then, you know think about the communication plan for employees that are being moved and how that, how you wanna talk to them about it. Make sure that they understand why this is happening and that it has, you know, it's not, you know a punishment of any kind. It's just something that you need to do as an organization. Anticipate that they're gonna have questions and once that final rule is published, you can really think about what the answers to those questions might look like and prepare yourself with some kind of talk track so that you're ready to have those

conversations. And any frontline managers that need to be involved are kind of, you know, giving a consistent message. So, you know once the organization identifies those impacted employees, analyzes the cost of the different options, develops that communication plan, then it's just, you know kind of a matter of when that final rule is published, actually implementing that plan and maybe doing a little bit of a gap analysis if that dollar amount is higher than what you had originally prepared for. Just figuring out what that delta really looks like. And then by proactively preparing for that change you've ensured that your organization is really situated well to make those required changes by the effective date you can be confident in the decisions that you've made and that you've got all of the data that you need to really do this well for your organization.

- All really, really good advice, Corrine, and I'm gonna recap those steps 'cause I think they were really important. So identify your affected employees, analyze the cost of different options and develop your communication and change management plan. If you can walk away from this discussion with kind of those on your to-do list I think you'll be ahead of the game when it comes to the final ruling and have a really good sense of what you wanna communicate to your employee population. So Corinne, thanks for jumping on and talking a little bit about DOL and this proposed change.

- No problem. Thanks so much for having me.

- [Announcer] I hope you enjoy today's episode. You can find show notes and links at the hrmixtape.com. Come back often and please subscribe, rate and review.