

Is it Over for the New Overtime Rules? What Employers Should Do Now



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HOT OFF THE PRESS!

This morning,
DOL appealed
federal Texas
court injunction to
the 5th Circuit
Court of Appeals





PART I: OVERTIME – THE FUNDAMENTALS

FLSA –WAGE & HOUR LAW

The Fair Labor Standards Act (FLSA) was passed in 1938 and requires that most employees be paid:

- at least the federal **minimum wage** for all hours worked and
- **overtime pay** (at time and one-half the **regular rate of pay**) for all hours worked over 40 hours in a workweek.

The FLSA is an employee protection act and employees are generally presumed entitled to overtime. Strict record-keeping requirements.

The FLSA, however, provides an exemption from both minimum wage and overtime pay for certain **“white collar”** workers.

“WHITE COLLAR” EXEMPTIONS

The FLSA provides minimum wage and overtime shall not apply to:

“any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher . . .) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary).”

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“WHITE COLLAR” EXEMPTIONS

Non-exempt employees = eligible for overtime


Exempt employees = ineligible for overtime

SO WHICH EMPLOYEES ARE “EXEMPT”?

- for EAP employees whether they are exempt or non-exempt depends on:
 - how they are paid
 - how much they are paid
 - what kind of work do they do



REQUIREMENTS FOR EXEMPTION

Remember, exemption depends on three things:

1. **How** employees are paid  **SALARY BASIS**
 - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed
 - no partial day deductions




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2. How much they are paid  **SALARY LEVEL**
 - currently this is \$455/week or \$23,660 per year
3. What *kind of work* do they do  **JOB DUTIES TEST**
 - exempt work must be the employee's "primary duty" – "principal, main, major or most important duty that the employee performs." Qualitative not quantitative analysis.

REQUIREMENTS FOR EXEMPTION

Remember, exemption depends on three things:

1. How employees are

-

Must satisfy ALL THREE of these tests to be exempt from overtime.

3

that is
ity or

2.

Paying salary alone is not enough!

3.

**Salaried employee is not the same as
“exempt” employee.**

NON-EXEMPT DUTIES TEST



PART II: THE NEW RULE . . . AND ITS CHALLENGERS

THE FINAL RULE

Remember, exemption depends on three things:

1. How employees are paid → **SALARY BASIS**
 - employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.
 - no partial day deductions
2. **How much** they are paid → **SALARY LEVEL**
 - currently this is \$455/week or \$23,660 per year
3. What kind of work do they do → **JOB DUTIES TEST**
 - each category of exemption – Executive, Administrative & Professional have different required white collar job duties as set forth in the regulations (ex. regularly supervises 2 or more employees)

THE FINAL RULE – SALARY THRESHOLD

- 40th percentile of weekly earnings of FT salaried workers in the lowest wage Census Region – the South

**FINAL RULE:
\$913/wk
\$47,476**

REGION	40 th Percentile (4 th Qtr. 2015)
South	\$913
Midwest	\$994
Northeast	\$1,036
West	\$1,050

AUTOMATIC UPDATE

The salary threshold would **automatically update every three years** beginning January 1, 2020



THE LEGAL CHALLENGE

- brought by 21 states
 - Alabama, Arizona, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, South Carolina, Texas, Utah and Wisconsin
- and more than 50 business organizations
 - including US Chamber of Commerce, National Automobile Dealers Assoc. National Assoc. of Manufacturers, National Federation of Independent Business, National Retail Federation, American Bakers Assoc., American Hotel & Lodging Assoc., Associated Builders and Contractors Independent Insurance Agents and Brokers of America, International Franchise Assoc., National Assoc. of Homebuilders
- cases merged



THE LEGAL CHALLENGE

- Case brought in Eastern District of Texas
 - assigned to Judge Amos Mazzant, an Obama appointee
- Plaintiffs argued:
 - overtime rule violates U.S. Constitution and exceeds congressional authority
 - new rule would force many businesses, including state and local governments, to unfairly and substantially increase their employment costs
 - it would “wreck State budgets” and violates the Tenth Amendment by forcing states to pay their workforces a specific amount, indirectly controlling state budgets
 - violates the Administrative Procedure Act by revising the salary threshold every three years



THE LEGAL CHALLENGE

- October 12, 2016: the States moved for an emergency preliminary injunction.
 - **What is a preliminary injunction?** a court order requiring parties to continue or cease a particular action and preserve the *status quo* pending a final decision of a case.
 - Remains in effect, unless modified or dissolved, during the pending court case.
 - **What is the standard for a preliminary injunction?**
 1. a substantial likelihood of success on the merits;
 2. a substantial threat that plaintiffs will suffer irreparable harm if the injunction isn't granted;
 3. the potential injury outweighs any damage the injunction might cause to the defendant; and
 4. injunction will not disserve the public interest.

THE LEGAL CHALLENGE

- November 16, 2016: the court heard oral argument on the preliminary injunction.
- November 22, 2016: Judge Mazzant entered a **nationwide preliminary injunction** preserving the *status quo* (old salary threshold) until the court could make a final determination on the DOL's authority to make the Final Rule and the Final Rule's validity.



THE LEGAL CHALLENGE

- The court held that the states were able to effectively show "irreparable harm" if the rule went into effect and that the DOL exceeded its authority when it raised the salary threshold.
 - The court held that while the DOL had authority to define the duties performed by employees under the executive, administrative and professional exemptions, it did not have authority to raise the minimum salary level "such that it supplants the duties test."
 - Remember the FLSA? “[a]ny employee employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time to time by regulations of the Secretary.”
 - The salary level was purposefully set low to “screen[] out the obviously nonexempt employees making an analysis of duties in such cases unnecessary.”

DOL's RESPONSE

- *“The Department strongly disagrees with the decision by the court, which has the effect of delaying a fair day's pay for a long day's work for millions of hardworking Americans. The Department's Overtime Final Rule is the result of a comprehensive, inclusive rule-making process, and we remain confident in the legality of all aspects of the rule.”*
- DOL Secretary Thomas Perez stated in an interview it simply is not possible to single out the Obama salary limit as extreme or arbitrary while accepting the previous increases.
- Today, the DOL appealed the ruling to the 5th Circuit.

FLSA SALARY HISTORY

- 1938 - \$30/week for executives and administrators
- 1940 - \$30/week for executives; \$50/week for administrators and professionals
- 1947 - \$55/week for executives; \$75/week for administrators and professionals
- 1959 - \$80/week for executives; \$95/week for administrators and professionals
- 1963 - \$100/week for executives and administrators; \$115/week for professionals
- 1970 - \$125/week for executives and administrators; \$140/week for professionals
- 1975 - \$155/week for executives and administrators; \$170/week for professionals
- 2004 - \$455/week for executives, administrators and professionals
- 2016 - \$913/week for executives, administrators and professionals



PART III: NOW WHAT???

DOL APPEAL

- Questionable arguments made and adopted by District Court . . . surprising ruling for many.
- 5th Circuit is a traditionally conservative court.
- Timetable issue:
 - appeal is by Obama-administration DOL
 - 50 days until Trump takes office . . . no DOL Secretary named yet
 - DOL has 40 days from when the District Court record is submitted to file an initial brief – will likely request expedited appeal procedures
 - will need oral argument, briefs, etc. before January 20th
- Still some unpredictability regarding future of the rule.

DOL APPEAL

- What can the 5th Circuit Do?
 - uphold the nationwide preliminary injunction
 - modify the injunction
 - reverse District Court order
 - possibility could make it retroactive to December 1st
- Under Trump Administration
 - not a high agenda item for first 100 days
 - depending on 5th Circuit ruling may have to comply with rule pending appeal to Supreme Court
- If 5th Circuit does not make decision before Trump takes office
 - new Secretary of Labor could withdraw the appeal

CONSIDERATIONS

- **COMMUNICATION**

- What has been communicated to employees about reclassification and eligibility for overtime?
 - do the communications create a potential employee relations problem or—worse—a potential legal problem?
 - decide how any new communications will address these issues and whether the original exempt classification was defensible

- **COSTS**

- What is the cost of undoing the changes already made to employer payroll processes and systems?
- Can those changes be put into place again quickly if the new rule is ultimately implemented, and especially if it is implemented retroactively?

WHERE ARE YOU IN THE PROCESS?

1. Notified employees of increase to \$47,476.00+ in order to maintain exempt status:
 - if you do not implement the increase . . . consider:
 - employees prepared for salary increase may have an adverse reaction – morale issues
 - employees who do not understand the reason for the changes may go to DOL or attorney (this may be of concern if the employee is currently misclassified or if the exempt job duties can be challenged)
 - potential fraud claim or breach of implied contract

WHERE ARE YOU IN THE PROCESS?

2. Already increased employees' salaries to \$47,476.00+ in order to maintain exempt status:
 - cannot recoup money already paid to employees
 - be careful about inconsistent salary adjustments (i.e. rolling back higher increases) – may be grounds for discrimination claims
 - same issues as with notification – morale, employees understanding, potential fraud claim or breach of implied contract
3. Employees reclassified as nonexempt because did not meet new salary threshold of \$47,476
 - DOL will not penalize employers for treating employees as nonexempt and paying overtime
 - if want to maintain exemption, still track hours

RECOMMENDATIONS

- Consider tracking hours of any employees who may be reclassified to non-exempt if the DOL's new rule is ultimately implemented (i.e. exempt employees earning under \$47,476).
- Check state notice requirements.
 - if you plan to roll back changes, your state may require prior notice, especially for reductions in pay
- Remember you will not be penalized for treating employees as non-exempt (which means tracking hours and paying overtime).
- No legal obligation to revert back to old rule.
- Plan communication to employees – important message is clear and employees understand state of law and employer's position.
- If a misclassification was identified, proceed with any changes to be in compliance with existing law.

FINALLY

- Ultimately, the new overtime rule is facing an uphill battle.
- Employers, however, should proceed with caution.
 - keep abreast of the status of overtime litigation
 - be on the lookout for possible changes to overtime law under Trump administration (possible modification to new salary threshold)
 - until case/matter is resolved, consider having employees who may be reclassified as nonexempt under the new rule keep track of hours, even while maintaining their current exemption

Thank
You!



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