

DOL PRESSES RESET BUTTON ON OVERTIME RULE

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On July 26, 2017, the [U.S. Department of Labor](#) pressed the reset button, publishing a request for information (RFI) as the first step in revising the white collar overtime exemption regulations, yet again. The DOL announced that it intends to use the information submitted by interested parties to draft a new proposal for updating the tests that define which executive, administrative, professional and high-compensation employees are exempt from overtime pay under the Fair Labor Standards Act.

Everything is Back On the Table

The DOL, under new Secretary of Labor Alexander Acosta, cites President Donald Trump's regulatory reform efforts as the basis for taking a new look at the 2016 overtime exemption regulations. The RFI invites comments by stakeholders on a wide variety of questions related to the tests to identify which employees may be exempt from overtime. The RFI does not focus merely on the proper salary level for the white collar exemptions. Instead, its sheer breadth of questions suggests that the DOL is ready to start over at square one.

Highlights of some of the key questions in the RFI include:

- Should the regulations include multiple standard salary levels, by size or location of the employer?
- Should the salary level for the executive, administrative and professional exemptions all be the same, or should there be a lower salary for executive and administrative employees as was in place from 1963 until 2004?
- Does the salary level set in the 2016 final rule work with the standard duties test, or does it eclipse the role of the duties test in determining exempt status?
- Should the exemptions rely only on a duties test without a minimum salary level at all?
- Is it more effective to go back to having two types of tests, a short test with a higher salary level and a long test with a lower salary level, but more duties requirements?
- Should nondiscretionary bonuses and incentive payments be allowed to satisfy part of the salary level, and if so, is 10 percent the appropriate percentage cap, as set in the 2016 final rule?
- Should the standard salary levels be automatically updated on a periodic basis and if so, how often and what methodology should be used? Also, should automatic updates be delayed in a period of negative economic growth?

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The RFI also seeks information related to what changes employers made in preparation for the 2016 overtime rule changes. Specifically, the DOL seeks information on whether employers increased salaries of exempt employees in order to retain their exempt status, changed hours or hourly rates for newly nonexempt employees to keep their total wages the same, or made other changes to workplace policies while preparing for the increased salary levels under the 2016 final rule. The DOL also wants to hear whether small businesses faced any unique challenges in anticipation of the 2016 rule going into effect.

Déjà vu?

Many employers may be thinking: “Didn’t we just go through years of public comments and proposals to revise the overtime rules?” Yes, we did. Here’s a brief reminder of how the 2016 revised regulations came about.

In March 2014, then-President Barack Obama directed the secretary of labor to update the overtime regulations related to the white collar exemptions. In particular, the Obama administration focused on the salary level of \$455 per week (equal to \$23,660 per year), which had not been increased since 2004. After widespread speculation about what new salary levels might be proposed, the DOL finally published its proposed new rule in July of 2015, tying the salary level for the white collar exemptions to the 40th percentile of weekly earnings for full-time salaried workers nationwide, and proposing a mechanism for automatic annual increases to the salary thresholds.

Close to 300,000 comments from businesses, organizations, associations and advocacy groups were submitted to the DOL on the proposed regulations. On May 18, 2016, the DOL issued its final rule which raised the minimum salary level to \$913 per week (equal to \$47,476 per year) for the executive, administrative and professional exemptions, more than doubling the 2004 salary threshold. The DOL arrived at that number by using the 40th percentile of full-time salaried workers in the lowest-wage census region. The new final rule raised the minimum salary for the highly compensated employee exemption to \$134,004, up from \$100,000 per year. The new regulations also provided for automatic salary level updates every three years, but did not change the duties tests for the white collar exemptions.

Litigation on 2016 Final Rule Continues

The 2016 final rule was scheduled to go into effect on Dec. 1, 2016. Two lawsuits were filed in federal court in Texas challenging the final rule, one brought by 21 states and the second filed by various business associations. After consolidation of the two cases, in late November, Judge Amos L. Mazzant III of the U.S. District Court for the Eastern District of Texas issued a preliminary injunction, stopping implementation of the rule nationwide. The judge ruled that the DOL does not have the authority to set a salary level test or create an automatic updating mechanism under the FLSA.

Last December, the DOL (then under the Obama administration) appealed the judge’s order to the Fifth Circuit, seeking to overturn the injunction. Following the election of President Donald Trump, speculation began as to whether the DOL, under a Republican administration, would continue to support the appeal of the injunction. After seeking and receiving numerous extensions to file its appellate briefs, on June 30, 2017, the DOL

filed a reply brief, stating that it is continuing with the appeal, and setting forth its reasoning for why the DOL does indeed have the authority to set a minimum salary threshold for the exemptions.

Significantly, the DOL wrote in its brief that it has “decided not to advocate for the specific salary level (\$913 per week) set in the final rule at this time and intends to undertake further rulemaking to determine what the salary level should be.” The RFI is the first step for that new rulemaking process.

What This Means for Employers

Employers need not make any changes related to their exempt white collar employees yet. The 2016 final rule is on hold until the Fifth Circuit rules on the preliminary injunction. The outcome of the appeal will direct the DOL and employers on next steps.

If the Fifth Circuit affirms the injunction order on the same grounds (i.e., that the DOL lacks the authority to set a salary level for the exemptions under the FLSA), it opens the door to doing away with any salary threshold, leaving the DOL to rely on a duties test for the exemptions. If, however, the Fifth Circuit overturns the injunction, or rules on some other grounds, then it sends a green light to the DOL to propose another new rule containing a lower salary threshold, or multiple exemption tests or salary levels.

In the meantime, interested parties have just 60 days to provide information to the DOL in response to its RFI. Employers should act quickly to weigh in on the questions posed by the DOL if they wish to do so, especially since the DOL seems to be starting with a clean slate. With so much at stake, employers can be sure that we will be talking about the overtime rule for the months and years to come.

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