

DOL OVERTIME RULE ON HOLD: What Employers Should Do Now

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What Just Happened???

November 22, 2016: Federal court judge grants a nationwide preliminary injunction that stops the DOL's new overtime rule from going into effect on December 1, 2016



Court's Reasoning

- FLSA describes white collar exemptions by duties, not by salary level
- FLSA delegates rulemaking authority to DOL
- BUT, court finds that raising the salary level so high “supplants the duties test” which exceeds the DOL’s authority

Key Footnote in Ruling

“The Court is not making a general statement on the lawfulness of the salary-level test for the EAP exemption. The Court is evaluating only the salary-level test as amended under the Department’s Final Rule.”



Key Provisions of New Rule

<u>Requirement</u>	<u>New</u> <u>(was to be effective</u> <u>12/1/16)</u>	<u>Old</u>
Salary Threshold	\$913/week (equates to \$47,476/yr)	\$455/week (equates to \$23,660/yr)
Highly Compensated Employees (HCEs)	\$134,004/yr	\$100,000/yr
Automatic Increases in Salary	Automatic increases every 3 years	None – had to go through DOL rulemaking process

Automatic Updates

- **Salary thresholds to be automatically updated every three years**
- **Standard salary levels will be based on 40th percentile of full-time salaried workers in lowest-wage Census region, currently the South**
- **HCE levels will be based on 90th percentile of full-time salaried workers nationally**
- **First adjustment to be announced August 1, 2019 – 150 days in advance of its January 1, 2020 effective date**

Other Key Provisions

- **Bonuses, incentive payments, and commissions**
 - Up to 10% of the standard salary threshold of \$47,476 may be met by non-discretionary bonuses, incentive pay, or commissions
 - Such payments must be made on a least a quarterly basis
 - This is new; not allowed previously

Summary of Existing White Collar Exemption Requirements

	<u>EXECUTIVE</u>	<u>ADMINISTRATIVE</u>	<u>PROFESSIONAL</u>
Salary Basis Test	Employee must be paid on a salary basis	Employee must be paid on a salary or fee basis	Employee must be paid on a salary or fee basis
Salary Level Test	\$455 per week (\$23,660 per year for a full-year worker)	\$455 per week (\$23,660 per year for a full-year worker) Special salary level for certain academic administrative personnel	\$455 per week (\$23,660 per year for a full-year worker) Salary level test does <u>not</u> apply to doctors, lawyers, or teachers
Duties Test	The employee's "primary duty" must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise (and managing 2 full- time employees as well) Additional requirements provided in 29 CFR 541 Subpart B	The employee's "primary duty" must include the exercise of discretion and independent judgment with respect to matters of significance. Additional requirements provided in 29 CFR 541 Subpart C	The employee's "primary duty" must be to primarily perform work that either requires advanced knowledge in a field of science or learning, or that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Additional requirements provided in 29 CFR 541 Subpart D

Highly Compensated Employees

Exemption for highly compensated employees (HCE's) – short test

- Employee's total annual compensation is at least \$100,000 annually
- Employee's primary duty includes performing office or non-manual work
- Employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee

Other Common Exemptions



Certain computer employees and outside sales employees



What's Next In The Legal Challenges?

States v. DOL

- Will DOL appeal preliminary injunction ruling?
- Will court enter permanent injunction?

Business Groups v. DOL

- Will court grant business groups' expedited summary judgment motion?

The Big Unknown



What Should We Do Now?

If Duties Test Not Met:

- **Classify as non-exempt**
- **Salary level doesn't matter if remaining exemption requirements not met**

What Should We Do Now?

Maintain status quo:

- If exempt under current (pre-new rule) exemption salary level, not required to make any changes
- Not required to raise salary level from current \$455 per week (or \$100,000 per year for HCE)
- Monitor legal challenges

What Should We Do Now?

What if you've already promised a raise?

- Not required to raise salary to comply with new rule yet, but consider:
 - any agreement/contractual requirement?
 - morale issues if you revoke raise?
 - goodwill that accompanies sticking with your word?
 - possible competitive advantage in recruiting and retention for paying more?

What Should We Do Now?

What if you've already converted employees to non-exempt status?

- Consider employee reaction if you revert back to exempt
 - Some exempt employees prefer the flexibility that may come with exempt status rather than being overtime-eligible
 - Others may be looking forward to overtime pay as a raise

What Should We Do Now?

You may still require exempt employees to work a set schedule

Update job descriptions if exempt status has changed

REMINDERS

Update payroll system and personnel to reflect delay in rule

Communicate with employees – don't leave them in limbo

Thank you!

QUESTIONS?

Mark B. Wiletsky

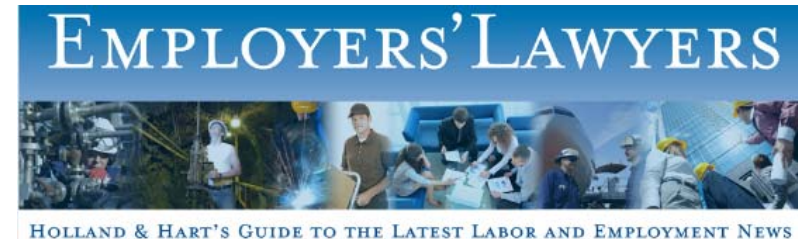
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November 23, 2016
DOL's Overtime Salary Threshold Increase Is On Hold – Now What?

By [Mark Wiletsky](#)

Many human resource professionals got into the office today not knowing whether to laugh or cry. Most are happy that the Department of Labor's (DOL's) new overtime salary requirement will not go into effect next Thursday, December 1, 2016, due to a federal judge's grant of a nationwide preliminary injunction which prevents the DOL from implementing and enforcing the new rule. (See our [post](#) yesterday reporting on the injunction.) Yet, many organizations have already spent countless hours preparing for the new rule to go into effect next week and are wondering what to do now. Let's review where things stand and your best options going forward.



Nationwide Injunction Delays Final Overtime Rule



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