

# Insights

## Status of New Overtime Regulation under the FLSA

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By: Amy J. Adolay

After months of employers wondering what would happen to the new overtime rule that was to go into effect on December 1, 2016, but was halted through an injunction issued by a federal district court, we have some new insight. But first, some history.

The anticipated overtime rule under the Fair Labor Standards Act (FLSA) contained substantial increases to the salary amounts employees would have to be paid to be considered exempt from the minimum wage and overtime requirements of the FLSA. For example, the annual threshold salary for most employees would have more than doubled, going from \$23,660 to \$47,476. In addition, for highly-compensated employees, the annual minimum salary would have increased from \$100,000 to \$134,004. These expected increases to the salary requirements under the new rule did not alter the condition that employees still meet the duties tests associated with various exempt classifications, the most common of which are the executive, administrative, and professional exempt classifications.

Despite many employers preparing for, and some even already implementing, the necessary increases to maintain the exempt status of certain employees under the new rule, on November 22, 2016, just days before the new rule was to go into effect, a federal district judge in Texas issued a temporary injunction halting the new rule nationwide. This decision was quickly appealed by the U.S. Department of Labor (DOL). Employers were then left to speculate about whether they should stop or continue their plans to make salary changes given the uncertainty as to the outcome of the DOL's appeal and its effect on the new rule. If the injunction was reversed on appeal, would the new rule be in place retroactive to December 1? Or would the new rule go into effect on the date of any such reversal, requiring on-the-spot implementation by employers? Also leaving employers in limbo was how the Trump administration taking the reins of government might alter the course of the proposed rule and pending litigation.

Due to a flurry of activity over the past couple of months on this issue, we are gaining some clarity, but do not yet have final answers, on the ultimate fate of the overtime rule. On March 22, 2017, Labor Secretary Alex Acosta testified at his confirmation hearing that he found the annual salary increase to \$47,476 to be excessive, and that he felt a more reasonable level would be around \$33,000. During a subsequent DOL budget hearing in June, Acosta stated that the DOL planned to look at the overtime rule in general, and specifically the salary levels

contemplated by the rule. Importantly, Acosta indicated that the DOL planned to file a Request for Information (RFI) seeking information from the public on the salary increases. As forecasted, the DOL issued the RFI on June 27, 2017. RFIs are typically issued when a government agency is deciding whether to engage in rulemaking, here a *second* round of rulemaking to possibly reduce the 2016 salary increases.

Just three days later, the DOL submitted a brief in the pending appeal of the injunction, advising that it was abandoning its defense of the 2016 overtime rule and that, in light of the recent RFI, it plans to change the salary requirements via new rulemaking. The DOL, however, is continuing to appeal the issue of whether it has the authority to issue salary tests under the FLSA exemptions. According to the DOL's brief, the DOL will not issue a proposed new rule with lower salary thresholds until the appellate court resolves the issue of the DOL's authority to establish the salary thresholds.

The bottom line for employers is that it appears unlikely the salary increases contained in the 2016 overtime rule will last, or ever go into effect for any period of time. And while employers now have some valuable insight into where the current administration stands on the issue, we continue to wait for final answers. And wait. And wait.

For any questions regarding this article or the overtime regulations, please contact Amy J. Adolay.