

## DOL's Overtime Rule Lands in Limbo — For Now

Employers must comply with a variety of laws involving the minimum wage and overtime. As you may know, the overtime rules were going to change dramatically last year before a federal court stepped in to delay the changes. Now, the Trump administration is signaling that it may revise the current rules and is seeking feedback from the public.

### Background

The Obama administration's 2016 release of an updated rule regarding federal overtime pay for executive, administrative and professional employees (also known as "white-collar workers") caused quite an uproar among employers. No wonder — the U.S. Department of Labor (DOL) estimated at the time that 4.1 million salaried workers would become eligible for overtime under the rule.

But subsequent events, including a federal district court ruling, the election of President Trump and some moves by the DOL, have thrown the future of the overtime standards into question.

### The Current Rule

Under the existing rules, last updated in 2004, an employee generally must satisfy three tests to qualify for a white-collar exemption from the overtime requirements:

1. Salary basis test. The employee is paid a predetermined and fixed salary that isn't subject to reduction because of variations in the quality or quantity of the work performed.
2. Salary level test. The employee is paid at least \$455 per week or \$23,660 annually.
3. Duties test. The employee primarily performs executive, administrative or professional duties.

Different rules apply to certain kinds of employees (for example, doctors, teachers and attorneys) and certain highly compensated employees.

### The 2016 Revised Rule

The 2016 rule change focused mainly on the salary level test. It increased the salary threshold for exempt employees to \$913 per week, or \$47,476 per year. The levels would automatically update every three years beginning January 1, 2020.

By more than doubling the salary level test, the rule would eliminate the need for employers to even consider an employee's duties in many cases. If the employee's pay comes in under the threshold for exemption, the

duties would be irrelevant; the employee already couldn't possibly be exempt.

In addition to potentially increasing an employer's overtime liability, the revision would have a tax effect. Payroll tax liability would increase as an employer pays overtime to more employees when they work more than 40 hours per week or, alternatively, raises salaries to maintain exemptions. Not surprisingly, the revised rule was met with much criticism from employers, who claimed they would need to cut jobs or hours to manage payroll costs.

## The Court Proceedings

Twenty-one states challenged the revised rule in court, arguing that it raised the salary level too quickly. On November 22, 2016, a federal district court judge granted a preliminary injunction putting a halt to the rule, which had been scheduled to take effect on December 1, 2016.

The judge found that the DOL had exceeded its authority and ignored congressional intent by raising the salary level to the degree that it supplanted the duties test, essentially creating a salary-only test for the white-collar exemption. According to the judge, only Congress could make such a change.

On December 1, 2016, the Department of Justice appealed the judge's ruling to a federal court of appeals on behalf of the DOL, but the appeal couldn't be completed before President Trump took office. After the inauguration, the 5th U.S. Circuit Court of Appeals granted the administration three requests to delay the deadline for filing briefs in the matter. Many speculated that the DOL might just drop the appeal altogether, but, on June 30, 2017, the DOJ filed a brief in the case.

## The DOL's Latest Position

In a surprise move, the brief seeks a reversal of the district court ruling. The DOL opted not to argue for the specific salary test in the revised rule, though, instead asking the appellate court only to affirm that the department does indeed have the authority to set a salary level.

The DOL stated in the brief that it plans to pursue further rulemaking to determine an appropriate salary level. But the department said it has decided not to proceed immediately with the rulemaking process, citing its reluctance to issue a proposal while litigation over its authority to establish a salary level remains pending.

## The Resulting Uncertainty

The DOL's brief raises the potential for an odd outcome. If the 5th Circuit reverses the lower court as requested, it would presumably vacate the preliminary injunction against implementation of the revised rule. In that case, the rule would take effect, possibly retroactively to December 1, 2016, unless the DOL withdraws the rule before the court enters judgment. Should the DOL withdraw the rule, it would need to do so retroactively. It wouldn't be enough for the department to simply decline to enforce the rule — employers could still face private lawsuits by employees seeking overtime pay since the original effective date.

Further, the same district court also is considering a separate challenge to the revised rule, brought by more than 50 business groups, including the U.S. Chamber of Commerce. They've asked the court to invalidate the revisions on other grounds. If the judge finds that the rule is arbitrary and capricious or unsupported by evidence (which it didn't address in its earlier ruling), the case could end up on appeal to the 5th Circuit, too.

prolonging the uncertainty even more.

And the AFL-CIO filed a motion in December 2016 to intervene in the states' case so it could defend the revised rule if the DOL withdrew from the case. That motion is still pending with the lower court. The union also has promised to sue if the salary level is scaled back from the level in the 2016 rule.

## Seeking Comments

The DOL's Wage and Hour Division announced on July 25, 2017, that it's seeking comments about whether the overtime rule should be revised — and how. Feedback is being requested on questions related to the salary level test, the duties test, cost of living across the country, the inclusion of bonuses to satisfy a portion of the salary level, and more. Go to <http://bit.ly/2tLfzn7> for more information about commenting.

## Stay Tuned

For now, employers will continue to confront uncertainty about their future payroll and tax obligations. It seems likely that the DOL will attempt to revise the salary level for the white-collar exemption, but it's impossible to say at this point when that will happen or where the level will be set.

To learn more about how we can help you to better achieve your financial objectives, feel free to reach out to your personal advisor or contact us at: [cpas@dzhphillips.com](mailto:cpas@dzhphillips.com) or call (415) 781-2500.