

2017 Winter ACCMA Conference

New Overtime Rule: It's Future in Court and Under a Trump Administration

January 25, 2017

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Outline

- ▶ The Final Overtime Rule
- ▶ Texas Court Injunction
- ▶ Potential Impact under Trump Administration
- ▶ What Do Employers Do Now?

DOL Final Rule

- ▶ Signed into law on May 18, 2016
- ▶ Originally set to take effect on December 1, 2016.



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DOL Final Rule

- ▶ In order to be exempt from overtime an employee generally must:
 - Be salaried (the “salary basis test”);
 - Be paid more than a specified weekly salary level (the “salary level test”):
 - \$913 per week, or \$47,476 per year; and
 - Perform at least one of the three following duties (the “duties test”):
 - (a) Executive - must have the ability to hire and fire and generally oversees 2 or more full-time employees;
 - (b) Administrative - exercise independent judgment in the management of general business operations of the employer; or
 - (c) Professional - having obtained advanced knowledge in the field of science or learning.

Increased Salary Level Test

- ▶ The Final Rule seeks to double the current salary level test:
 - Current Salary Level Test = \$455 per week (\$23,660 per year)
 - Proposed Salary Level Test = \$913 per week (\$47,476 per year)
- ▶ The new salary threshold is expected to impact 4.2 million workers in the United States.

Automatic Updates to Salary Level Test

- ▶ The salary test tracks the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region.
- ▶ Updated every 3 years beginning January 1, 2020 to keep the salary level current.

Employers' Options Under Final Overtime Rule

**IN RESPONSE TO THE NEW OVERTIME RULE,
EMPLOYERS CAN:**

- A) Pay time-and-a-half for overtime work.
- B) Raise workers' salaries above the new threshold.
- C) Limit workers' hours to 40 per week.
- D) Some combination of the above.



Final Rule Enjoined

*State of Nevada, et al. v. United States
Department of Labor, et al. (Eastern
District of Texas)*

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*State of Nevada, et al. v. United States
Department of Labor, et al.*

- ▶ 21 states plus various business groups petitioned to have the Final Overtime Rule declared unconstitutional.
 - 10th Amendment – Cannot mandate how state employers' are paid.
- ▶ The states challenging the rule is led by Texas and Nevada, and includes the following states:
 - Alabama, Arizona, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, New Mexico, Ohio, Oklahoma, South Carolina, Utah, and Wisconsin.

Final Rule Enjoined

- ▶ 10 days before implementation, the U.S. District Court for the Eastern District of Texas granted an Emergency Motion for Preliminary Injunction enjoining the DOL from enforcing the Overtime Final Rule on December 1, 2016.
- ▶ “A nationwide injunction protects both employees and employers from being subject to different [executive, administrative and professional] exemptions based on location.”
 - Judge Mazzant

De-Facto Salary Test

- In his ruling, Judge Mazzant noted “this significant increase to the salary level creates essentially a de facto salary-only test. If Congress intended the salary requirement to supplant the duties test, then Congress—and not the department—should make that change.”

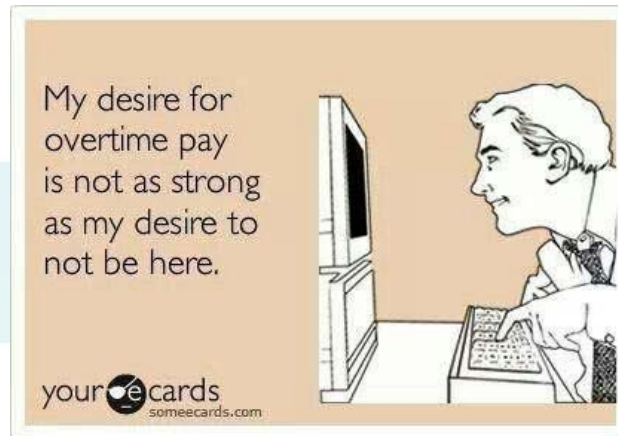


Appeal to the 5th Circuit Court of Appeals

- ▶ The 5th Circuit agreed to review the injunction on an expedited schedule.
- ▶ Oral argument scheduled January 31, 2017.

Preserving the Status Quo

- ▶ For now the 2004 salary level of \$455 per week stays in effect until the Texas court issues a ruling, or the 5th Circuit Court of Appeals overrules the injunction.



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The Trump Administration

What to Expect under President Trump



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The Facts

- ▶ President Donald Trump has appointed Andrew Puzder as his Secretary of Labor.



- ▶ Puzder's confirmation hearing has been delayed until February 2, 2017.

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The Facts

- ▶ In the past, Puzder has said the Final Overtime Rule:
 - Add to the regulatory maze that already burdens employers;
 - Leave companies that rely on the white collar overtime exemptions at a competitive disadvantage; and
 - Impair the upward mobility of workers since many management-level employees will be reclassified as hourly workers.

“Birmingham fast food workers protest Trump’s Labor nominee”

- “How can you make America great if you're trying to make the poor poor and the rich rich,”
 - Mark Myles, a local organizer who led the fast food workers through chants inside and outside the Hardee’s.



Trump Administration Possible Actions

- ▶ Withdraw the DOL appeal before the January 31 oral arguments.
 - This would keep the injunction in place until the Texas court decides the case based on its merits.
 - Unlikely due to Puzder's delayed confirmation.
- ▶ Allow oral arguments and appeal to proceed.
 - In this instance the 5th Circuit may overrule the injunction and the Final Rule would take effect at some point in 2017.
- ▶ Repeal the Final Rule and push new legislation through with a lower Salary Level Test.
 - 2004 Salary Level Test will remain in place for foreseeable future until new legislation is drafted and passed.

Where Do We Go from Here?

- ▶ Even though New Overtime Rule has been enjoined, Employers that have already provided salary increases to employees in order to maintain their exempt status should strongly consider the negative components of reducing pay.
- ▶ Consider keeping the salary increases –
 - Additional salary may greatly outweigh the lowered morale and disgruntlement.

Begin Preparing Now

- ▶ It is critical for business owners and employers to review their exempt employee classifications and job duties now to ensure continued compliance with the Fair Labor Standards Act.
- ▶ Do not assume the Final Rule is permanently barred!
- ▶ Assume Salary Test will be increased at some point in the coming 24 months.
- ▶ Create a plan now to implement if necessary in the future.

QUESTIONS???

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