



Employment Law Alert: DOL Files Brief in Overtime Rule Appeal, Seeking to Reaffirm Its Authority to Establish an Exempt Salary Level Test

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On June 30, 2017, the U.S. Department of Labor (DOL) filed a brief with the federal Fifth Circuit Court of Appeals in support of its appeal of a ruling that enjoined implementation of its 2016 overtime rule under the Fair Labor Standards Act (FLSA). Had the rule gone into effect when scheduled on December 1, 2016, it would have raised the minimum salary threshold for white collar exempt employees from \$455 per week to \$913 per week. Under the new Trump administration, the DOL informed the appellate court that it plans to revise the overtime rule that was issued during the Obama administration; however, it will not do so until the Fifth Circuit Court of Appeals confirms that it has the right to set an exempt salary threshold.

We have previously provided you with information about the legal challenges to the DOL's Obama-era overtime rule. As a quick refresher, in issuing an injunction against the rule in late November 2016, the Texas federal district court concluded that the plaintiffs had established a prima facie case that the increased exempt employee salary levels and the automatic salary updating mechanism in the new rule were set without DOL statutory authority. Of particular note was the court's statement regarding its interpretation of the FLSA that "Congress defined the EAP [executive, administrative, and professional] exemption with regard to duties, which does not include a minimum salary level." In other words, the court appeared to be questioning whether the DOL has authority to set any type of minimum salary level as a requirement for overtime pay exemption.

In its June 30th brief, the DOL asked the appellate court to "address only the threshold legal question of the DOL's statutory authority to set a salary level, without addressing the specific salary level set by the 2016 final rule." The DOL argued that the Texas district court's decision was too broad, calling into question "any salary-level test adopted by the Department," an argument against circuit precedent.

Many had anticipated that the new administration would scrap the Obama-era overtime time rule altogether. The actions by the DOL make clear that this is not going to happen, although a scale back is still possible. In recent testimony, the DOL Secretary stated that he might support raising the exempt employee salary threshold in a modest amount to account for inflation



So what happens now? Here are the possibilities:

- If the Fifth Circuit confirms that the DOL has the authority to set an exempt salary level requirement and lifts the injunction, the rule as currently written (with the \$913 weekly salary amount) will likely become effective until the DOL revises the rule.
- If the Fifth Circuit confirms that the DOL has the authority to set a salary level requirement but leaves the injunction in place, the DOL will most likely have time to update the rule, giving employers time to comply with the new requirements.
- If the Fifth Circuit affirms the lower court ruling and concludes that the DOL does not have statutory authority to require a minimum exempt employee salary, the status of the new rule will be uncertain. The DOL may choose to appeal to the United States Supreme Court, which would mean that the uncertainty about the rule would continue for some time.

At this point, the final outcome for the 2016 overtime rule and its implications for employer staffing and pay decisions remain up in the air. It will most likely be some time before employers will know what they need to do to comply with FLSA rules.

To view the brief, [click here](#).