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# Federal Judge Rules on the Overtime Salary Rule

By Tim K. Garrett

*Editor's Note: Judge Mazzant issued a final ruling striking down the overtime rule. The Texas Federal Judge used essentially the same reasoning on which he based his temporary injunction ruling. In light of this final decision, the appeal of his temporary injunction likely becomes moot.*

*In addition, Judge Mazzant made clear that he is not finding that the DOL is prevented from ever using a particular salary level, but rather is invalidating this particular rule as going "too far" in essentially eliminating those who perform exempt duties but make less than the high salary threshold. Thus, the pressure on the DOL to appeal to ensure its authority to use a salary level appears to be gone as well.*

*In a separate ruling, Judge Mazzant denied the motion of the AFL-CIO to intervene in the case. The union had sought to intervene in order to defend the overtime rule. Of course, the union may attempt to appeal the denial of their right to join in the lawsuit, but this final ruling goes a long way in sounding the death knell of the Obama-era overtime rule.*

The attention-grabbing "overtime salary rule" announced in spring 2016 by President Obama's Department of Labor (DOL) is not completely dead, but any survival likely will be at lower salary levels. On July 25, 2017, the DOL issued a new Request for Information (RFI) as part of a new rule-making process. Businesses should anticipate the announcement of a new, similarly crafted salary level rule, but with a less dramatic increase in salary level and perhaps a "phase-in" component over time. The initial salary increase is expected to be adjusted to a salary level in the low- to mid-\$30,000s.

What has happened to warrant this observation? Review this more detailed explanation and note the "fine line" President Trump's DOL must walk in the pending lawsuit.

## Brief Background

The Fair Labor Standards Act (FLSA) requires employers:

- To pay employees at least the minimum wage for all hours worked; and
- To pay an overtime premium of 1.5 times the employee's "regular rate" of pay for all hours worked by the employee in excess of 40 hours in a workweek.

The FLSA allows an employer to classify an employee as exempt from these requirements if the employer properly treats the employee as an executive, administrative or professional (EAP) employee. Most understand these classifications as the most prevalent "overtime exemptions." The FLSA authorizes the DOL to "define and delimit" these classifications and the types of duties that will qualify to exempt an employee under the overtime exemptions.

In 2014, President Obama directed the DOL to update and modernize the overtime exemptions. See <http://bit.ly/2tNv6m6>. At the time, and for many years prior, the DOL had used the following tests to determine whether an employee was exempt under the EAP classifications:

- Whether the employee was paid “on a salaried basis” (“the salary basis test”);
- Whether the employee was paid at a DOL-determined level (“the salary level test”); and,
- Whether the employee actually engaged in certain job duties that qualified for the applicable exemption (“the job duties test”).

In 2016, the DOL issued a final rule more than doubling the salary an employer must pay to an employee in order to meet the salary level test. See <http://bit.ly/1ON22L1>. The required salary level was increased from \$455 per week to \$913 per week (or \$47,476 annually).

The announced DOL rules were to take effect Dec. 1, 2016. In response, many employers made changes (or announced upcoming changes) in employee classifications and in the salary levels for those whom employers wished to keep as exempt, but whose salaries were too low to meet the new test. Many businesses also objected, saying that the salary level increase was too much, too quickly.

### **The Injunction Ruling**

Several lawsuits were filed, challenging the new salary level. In one of those lawsuits, in a ruling just days before the Dec. 1 effective date, U.S. District Judge Amos L. Mazzant of the Eastern District of Texas halted the effectiveness of the new DOL salary level nationwide.

The district court found that the DOL overstepped its authority in drafting the final rule. Specifically, the court found improper the application of an increased minimum salary level when the plain meanings of “executive,” “administrative,” and “professional” read together with the statute made it clear that “Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level.” By increasing the salary threshold, the DOL has created “essentially a *de facto* salary-only test.” In direct conflict with Congress’s intent, explained the court, the DOL’s final rule requires employers to extend overtime pay to any employee, regardless of their job duties, whose pay is below the heightened salary level. According to the court, “[T]he Department exceeds its delegated authority and ignores Congress’s intent by raising the minimum salary level such that it supplants the duties test.”

### **Reaction of the DOL**

Immediately after the ruling, the DOL (still within the Obama administration) issued a statement “strongly disagreeing” with the district court. The DOL filed an appeal and asked the appellate court, the U.S. Court of Appeals for the Fifth Circuit, for a prompt briefing schedule.

Not surprisingly, soon after President Trump was inaugurated, the DOL reversed course, at least on the requested “fast-track” appeal. The DOL instead asked the Fifth Circuit for more time to consider its position. The DOL’s briefing deadline was pushed back to June 30, 2017.

### **The DOL’s New Position**

The DOL has now re-evaluated the “overtime salary rule” and has announced a new rule-making procedure. Recently, new DOL Secretary Acosta announced plans for:

- Soliciting information and comments from the public, which signals a new rule-making process;
- Reconsidering the announced salary level in favor of a one somewhere in the range of \$30,000 to \$35,000; and

- Appealing only the aspect of District Judge Mazzant's ruling that appears to question the DOL's authority to consider a salary level as one component in determining whether an employee meets the overtime exemptions.

On July 25, 2017, the DOL did announce the anticipated RFI, initiating the expected new rule-making process. The RFI, <http://bit.ly/2tLfzn7>, highlights the DOL's desire to review the 2016 salary level changes with a focus on lowering the regulatory burden in keeping President Trump's regulatory reform agenda for repeal, replacement or modification of overly burdensome regulations.

The new RFI asks 11 questions for interested parties to consider and provide responses. The RFI seeks public input on various questions such as:

- Whether the salary level should be updated for inflation since last updated in 2004, and if so, what methodology to use;
- Whether the salary levels should vary based on employer size, census region, job duties in question or other such considerations;
- Whether the 2016 salary level was so high that it effectively eclipsed the role of the duties tests, and if so, at what salary level does that occur; and,
- Whether these levels should be automatically updated on a periodic basis and if so, by what measure.

The DOL will receive responses for a period of 60 days from the RFI's publication in the Federal Register, which occurred on Wednesday, July 26, 2017.

### **So, What Does This Mean?**

Practically speaking, what do these pronouncements mean?

The Obama-era overtime salary rule is essentially dead at the salary levels announced in Spring 2016, and the currently applicable salary level remains at \$455 per week (yet most everyone recognizes that some increase is needed). But, this observation comes with a caveat noted below.

The DOL initiated a new rule-making process, which must be completed before the announcement of any new salary levels.

1. Pundits believe that the DOL is under some time pressure under the new rule-making process, as detailed in the caveat herein.
2. The new salary level likely to be announced after the rule-making process is anticipated to be in the range of \$30,000 to \$35,000.
3. The DOL may provide some phase-in process to that salary level or to one slightly higher over a period of time.

The appeal of District Judge Mazzant's decision will proceed. The DOL intends to appeal in order to ensure that it retains authority to include a salary-level component determining whether an overtime exemption applies.

1. Judge Mazzant's ruling could be read as calling into question the DOL's statutory authority to have any salary level as part of the test for an exemption.
2. Thus, the DOL intends to appeal that aspect of the ruling to make sure the DOL retains the authority to set reasonable salary levels.

But, here is the caveat. The DOL's appeal could undo the injunction and cause the overtime salary rule to take effect. How?

1. The DOL will be proceeding with an appeal of Judge Mazzant's ruling, at least in part.
2. In the appeal, the DOL must walk a "fine line." The DOL desires to preserve its authority to have a salary level test. However, it also wants to preserve Judge Mazzant's injunction — presumably — because the salary level, which the ruling halted, is not the one the current DOL supports.
3. Interesting questions remain. First, how does the DOL walk this "fine line" between supporting Judge Mazzant's injunction and yet attacking its rationale, at least in part; and second, how can the Fifth Circuit overturn Judge Mazzant's ruling, at least in part, without dissolving the injunction that is part of that ruling?

## **Conclusion**

There appears to be some time pressure, as the DOL will attempt to complete any rule-making and announce new salary levels before the Fifth Circuit makes a ruling on Judge Mazzant's injunction and underlying decision.

Stay Tuned!

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