

Overtime Rule Put On Hold: What's Next? What experts say

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A federal district court judge's decision to block Department of Labor's (DOL) new overtime pay regulations, scheduled to go into effect on December 1, 2016, comes as a blow to employers who were already grappling with how to comply with the rule in the first place. The decision issued on November 22, 2016 overturned a major rule, especially at a time when businesses were all set to implement new policies adhering to the rule that would have come into place a week later. So much for nothing!

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Should employers roll-back the changes that they had set forth to comply with the overtime rule? What does this call for from HR? How to deal with employees who were expecting a raise? Will the rule be completely shelved? If not, what are the changes expected?

We have compiled the responses from a few experts to answers these and more.

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Employers have the option of putting any changes on hold or they can move forward with any reclassifications or salary adjustments that they had been planning. It is important for employers to remember that they can always treat an employee as non-exempt who meets the exemption, they just have to be paid at least minimum wage plus overtime and be provided statutorily required breaks.

Employers should evaluate whether any changes they were planning on would have addressed any misclassifications based on not clearly meeting the duties tests. If it would have, they should move forward with reclassifying those employees as nonexempt.

Employees expecting a raise are clearly going to be affected. This could be a significant morale issue, especially if employees have already made commitments based on the expected additional pay.

On the other hand, non-profits, educational Institutions and small businesses with lower salaries will benefit the most from this reprieve as they were most impacted by the increased salary level.

HR is in the best position to review the situation and advise management including how to respond — to wait, continue to plan, undo changes that already have been started, etc. Information that would be helpful for senior management includes: what is the financial impact if you continue with the planned changes vs. if you undo them, whether any reclassification is required by the duties test (and therefore unrelated to the injunction), what is the likelihood that the injunction might be lifted, and what is the impact on employee morale, especially on those expecting a salary increase effective December 1.

The major objections that arose in the lawsuit related to a technical issue of whether the Department of Labor had the right to set a salary threshold of this magnitude. The court signaled the importance of this consideration in a footnote, quoting from a Supreme Court opinion that, “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”

The statute defines the white collar exemptions in terms of their work, not in terms of their earnings. The major practical objections that led 21 states to challenge the rule were largely led by the substantial financial impact on states as employers and the hard fact that the cost of compliance will inevitably lead to a loss of services.

Right now, the only thing we know is that the court hit the pause button on the rule. The injunction is preliminary, not final (although the opinion signals that the court has serious doubts about the agency’s legal authority and that might hint to what a final decision might be). Also, with the upcoming change in administration in January that will appoint a new Secretary of Labor, it is anyone’s guess what will happen. The case could proceed, or the new administration may send the rules back to the drawing board.



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The court’s order blocks the DOL’s regulations that would have: (1) more than doubled the minimum salary threshold for the executive, administrative, and professional (EAP) exemptions from the current level of \$455 per week (\$23,660 annualized) to \$913 per week (\$47,476 annualized); (2) automatically updated the minimum salary level every three years beginning January 1, 2020; and, (3) increased the “Highly Compensated Employee Exemption” from \$100,000 to \$134,004 annually.¹

The court's findings and analysis were no less dramatic in their substance and scope:

- "Congress intended the EAP exemption to depend on an employee's duties rather than an employee's salary."
- The DOL exceeded its Congressional authority "by raising the minimum salary level such that it supplants the duties test" and "creates ... a de facto salary-only test."
- "Because the Final Rule is unlawful ... the [DOL] also lacks the authority to implement the automatic updating mechanism."
- Plaintiffs have shown "a likelihood of success on the merits, will "suffer irreparable harm if the injunction is not granted," and "the public interest is best served by an injunction."
- A "nationwide injunction is proper in this case" because "the scope of the alleged irreparable injury extends nationwide."

As its name implies, the "preliminary" injunction does not ultimately seal the fate of the regulations, as the court could still decide not to issue a "permanent injunction" and uphold the regulations in part or whole. However, given the court's findings and analysis, this seems highly.

Furthermore, an eventual appeal by the DOL would also seem less probable under President-Elect Trump's administration. Given this injunction, employers can—for now—hold off complying with the new overtime pay regulations, with two important caveats: First, if an exemption analysis revealed that an employee did not satisfy the current "duties test" for any exemption, the employer should still consider reclassifying that individual as non-exempt and pay overtime (regardless of the employee's salary level).

Second, those employers that have already communicated and/or implemented compensation and exempt status changes in advance of the December 1 deadline will quickly have to decide whether to rescind those changes.

Given the potential legal and employee morale risks involved in both situations, it is recommended that you consult with legal counsel to analyze your options and messaging.

1 While the Court's opinion states that the entire "Final Rule" was enjoined, which includes the Highly Compensated Employee Exemption ("HCE"), the Court omitted the HCE section in its specific enumeration of regulations enjoined. This appears to have been an oversight

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Employers across the nation will not have to be in compliance with the new overtime rule on December 1, 2016, as the Department of Labor had previously required before the judge blocked the rule.

Some employers have already implemented their plans for compliance, some employers have created plans to achieve compliance on December 1, 2016, and some employers are still scrambling to get their plans in place. Since employers are now not required to come into compliance by December 1, they should make a business decision based on costs, including potential morale issues.

Employees who were informed that they were receiving an increase in salary to remain exempt may be very disappointed if told they are now not receiving an anticipated increase, but employees who were going to be transitioned from exempt to non-exempt may actually welcome the reprieve. Any transitions which have already occurred can be kept in place if the economic impacts are minimal.

HR should keep in mind that the prohibition is not permanent, and could be removed at any time by the judge that blocked the rule. Plans to achieve compliance should be shelved, not scrapped, as the rule's future is very uncertain at the moment. HR should also keep in mind that the new rule only altered the minimum salary level, it did not change the duties tests required for an employee to be exempt.

The new rule basically doubled the minimum salary level for exempt employees from \$23,660 per year up to \$47,476 per year, and included a provision to automatically update the minimum salary level going forward. The most affected employers are those with a workforce predominately made up of salaried employees who are paid less than \$47,476 per year. Affected employees would have needed to be reclassified as non-exempt, or have received an increase in salary to meet the new minimums, or have been subject to other changes to avoid legal liability or additional overtime costs for the employer.



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Essentially, nothing changes for now. The minimum salary threshold remains at \$455 a week, and there are no automatic increases as there would have been under the new rules. However, note that the minimum salary threshold is only one factor used to determine if a particular job is exempt from overtime.

There is also what is known as the “duties test”. The new rules would not have affected that. Therefore, even if employers would have met the new minimum salary threshold, if the employee’s primary job functions did not meet the criteria under any of the FLSA’s exemption categories, the employee still would not have been overtime-exempt.

Employers should still be reviewing their employee classifications, and paying particular attention to those employees’ primary duties and whether through their job duties they fall within any of the exemption categories under the FLSA. They should also review and update their job descriptions. If a job description is outdated and does not accurately reflect an employee’s primary job functions, the job description might not support an overtime-exempt classification.

Employees who were properly classified under white-collar exemptions are among the most affected, because, under the new rules they might no longer have been exempt from overtime and might have stood to earn a lot more money, which, for now, will not be happening.

Employers of these types of employees are also among the most affected because they at least have a reprieve from rules that probably would have resulted in them having to shell out significantly more money to pay their employees.

This ruling does not portend changes, but rather the opposite. For now, the status quo remains. If the ruling is appealed, which I assume it will be, then, of course it depends what happens on appeal – particularly if the case goes up to the Supreme Court. Ultimately, it is possible that either the Department of Labor could try to amend its Final Rules and still push for an increase in the minimum salary requirement, just a smaller one, or Congress could also introduce legislation that would amend the FLSA to produce the same result.

By way of background: the ruling seems to take issue in large part with the amount of the increase in the minimum salary requirement. To be exempt from overtime pay, with very few exceptions, a position must pay a pre-determined salary, which must meet the minimum threshold requirements, and the primary job functions must meet the criteria of at least one exemption category under the FLSA.

The judge essentially said that the increase was so large, that it effectively supplanted the duties test in determining exempt status. Therefore, it is still possible to increase the minimum salary requirement to keep up with inflation, without running into the type of trouble that this particular judge said these rules did. **WFM**

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