

## Overtime Rules Changes: More News

08.10.17 | Linda J. Rosenthal, JD



A little over a year ago, the Obama Administration Department of Labor announced [a huge pay raise](#) for millions of American workers – just in time for the 2016 holiday season. This gift came in the form of [final overtime regulations](#), set to take effect on December 1, 2016. Under the new formula, [the number of employees](#) eligible to receive time-and-a-half when they have to work long hours would greatly increase. Some [four million more or so](#) U.S. workers would be eligible to receive overtime pay for extra hours worked. Now – in mid-2017 – the fate of these dramatic changes is still up in the air.

### *Overtime Rules Originally Proposed*

While, normally, employment matters are governed by the individual states, the federal government has a role to play in guaranteeing “fair labor standards” nationwide. The Obama Administration rules would have altered the-

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*compensation requirements relating to which employees may be treated as exempt under the Fair Labor Standards Act’s (FLSA) overtime and minimum wage requirements under the ‘white collar’ exemptions. Once effective, the minimum salary threshold you would have had to pay in order to characterize an employee performing the requisite work as exempt would have increased from \$455 to \$913 per week, which annualizes to \$47,476 (up from \$23,660 per year). Also, this amount would have been ‘updated’ every three years (meaning that it would have likely increased with each update) with the first update scheduled for January 1, 2020.*

These regulations were to have applied to for-profit businesses as well as to many nonprofit-organization employers.

The original delay in effective date (from May 2016 to December 2016) was to give the affected employers time to make plans for these dramatic cost hikes.

All along, there was mixed reaction in the charitable community to these dramatic changes: On the one hand, the sector generally supports improving wages and benefits for workers; on the other hand, there is real concern about further strains on already tight organizational budgets.

There was pushback as well from the for-profit world and from Republican politicians. The GOP-controlled Congress took action last fall to legislatively place roadblocks to these changes with the understanding – of course – that any Democratic president would exercise a veto.

At the same time in 2016 when these legislative blocking methods were being advanced, a litigation strategy also developed. Two lawsuits were filed; the most successful challenge came from —

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*a group of 21 state attorneys general who filed suit in federal court, asserting that the DOL exceeded its authority in changing the compensation cutoff amount. On November 22, 2016, a federal district judge in Texas issued a preliminary injunction with nationwide effect. The judge wrote that it was “improper for the USDOL to adopt a salary test that categorically excludes a substantial number of workers who meet the exemptions’ duties-related requirements.*

Of course, there was a seismic event a bit earlier in November 2016 that created a giant wave of uncertainty about the ultimate fate of these labor regulations.

The Obama Administration filed an expedited appeal to the Fifth Circuit Court of Appeals, with a

request for an expedited briefing schedule that was granted. The originally scheduled effective date – December 1, 2016 – came and went. So, too, did Inauguration Day 2017.

### *The New Administration Takes Its Time*

It was possible – even likely – that the new Administration would nix the entire new regulatory scheme, but that would take more than a photo op and a quick swipe of a fancy pen. Final regulations that have been adopted can only be unwound through a lengthy process. We posted a mid-April 2017 update in [“What’s the Latest with the Overtime Rules?”](#)

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*On January 20, 2017, the Trump Administration at least nominally stepped into the shoes of the Department of Labor as appellant against the GOP state attorneys general. [Curiously] instead of quickly and definitively withdrawing support for the federal government position – like Jeff Sessions’ Department of Justice did in connection with a Texas voting rights case – the new Administration asked for a continuance of the due date of its brief [in the Fifth Circuit appeal] in order to give ‘new personnel’ time to evaluate the case.*

The hunt for a new Secretary of Labor took considerable time. The first nominee, Andy Puzder, a restaurant magnate who was known to be against raising the minimum wage, eventually withdrew his name for unrelated reasons. Alexander Acosta, the nominee eventually confirmed, is not as hard-line on this matter:

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*At a confirmation hearing in March, Acosta said the salary threshold for overtime exemption should be raised from \$23,660 to ‘somewhere around \$33,000’ after figuring for inflation to the cost of living since 2004—the last time the regulation was successfully adjusted.... Acosta said that once confirmed, he would decide whether the department would continue to appeal the November 2016 federal court decision that halted the Obama-era rule on overtime pay.*

On April 14, 2017, before Acosta’s official confirmation, the Department of Labor asked the appellate court for more time to file a brief in the ongoing litigation. That request was approved; a deadline was set for June 30. “The DOL [was] obviously keeping its options open as it awaits the confirmation of a new secretary of Labor,....”

## *Newest Developments*

On June 7, 2017, the new Labor Secretary told House Appropriations hearing members that the DOL will “submit a request for information” (RFI) on this issue within a few weeks. As explained on the DOL’s own website: “Agencies generally use RFIs when they want public input on whether a new rule or changes to an existing rule are needed and comments on what course the agency should take should it decide to move forward.”

Officially, on July 26, 2016, the Labor Department issued a formal request for public comment with a 60-day comment deadline.

## *Conclusion*

Members of the philanthropic community as well as academics and professional advisors are strongly encouraged to take advantage of this DOL public comment opportunity before the late-September deadline.

Even if the new federal overtime rules never take effect, or are tweaked somewhat, the overtime-eligibility cutoff amount in some states is already considerably higher than the existing federal cutoff of \$23,660. In California, for instance, the state salary threshold is \$41,600. Also, that amount is “increasing each year along with the minimum wage” until 2022. In these states, any new federal rules would only have a minimal impact.