

Are you ready for December 1st? The FLSA Salary Changes Are Almost Here

Labor & Employment Law Update

By Sara Zorich on October 13, 2016

The U.S. Department of Labor's (DOL) implementation of its Final Overtime Rule and an increase for salaried exempt employees to \$913/week is set to go into effect on December 1st. We want to debunk the myths of what could and could not derail the implementation:

1. *New Litigation* – On September 20, 2016, two lawsuits were filed to enjoin the new regulation from taking effect: *States of Nevada et. al v. U.S. Department of Labor et. al.*, Case 4:16-cv-00731, Eastern Dist. TX and *Plano Chamber of Commerce et. al v. Thomas Perez et. al.*, Case 4:16-cv-00732, Eastern Dist. TX. Both lawsuits are seeking to enjoin the DOL from implementing the salary increase on the basis that the promulgation of the rule was done in violation of the Administrative Procedure Act and the DOL has exceeded its authority. As of today's date, there has been no date for a hearing on the request for injunctive relief. While we anticipate that a hearing may be held on the request for a stay of the salary increase before the December 1, 2016, no date is currently set. The court could enjoin the DOL from implementing the new rule but there is no certainty that such will occur.
1. *Presidential Race* – While Presidential candidate Donald Trump has expressed opposition to the DOL's salary increase, his potential election to President of the United States will likely have little impact on the implementation of the new salary increase. If he is elected, his inauguration will not occur until after the new rule goes into effect, thus making it highly unlikely that any reversal of the regulation would take effect until 2017.
1. *New Bills* – In March 2016, the Protecting Workplace Advancement and Opportunity Act (S. 2707 and H.R. 4773) to nullify the DOL proposed rule was introduced. These bills have not been sent for vote by either the House or Senate. On September 21, 2016, the Regulatory Relief for Small Businesses, Schools, and Nonprofits Act (H.R. 6094) was introduced which requests postponement of the the DOL's new overtime regulation from December 1, 2016 to June 1, 2017 for small businesses, schools and nonprofits. The House passed H.R. 6094 on September 28th and it was sent to the Senate on September 29th. To date, the Senate has not voted on the bill.

The bottom line is that there is great uncertainty if the DOL's Final Overtime Rule can or will be derailed prior to December 1st. Thus, employers must continue to push forward with analyzing their exempt positions and making determinations as to whether each position meets both the salary basis and duties tests for exemption from overtime under the Fair Labor Standards Act. While you do not need to implement any salary increases until December 1, 2016, companies should be ready to make changes on or before that day and should not rely on the "hope" that the DOL's implementation will be delayed.

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