



What Is the Future of the Obama Administration’s Overtime Rule?

The Obama Administration’s Overtime Rule

Late in its last term, the Obama administration revised the Fair Labor Standards Act’s (“FLSA”) executive, administrative and professional exemption, often referred to as the “white collar” exemption. The intent of the revisions was to make more than four million Americans eligible for overtime pay and to restore the protections intended by the FLSA. The revised rule (the “OT Rule”) increased the 2004 rule’s salary level threshold for white collar employees by more than double.

<u>2004 Threshold</u>	<u>2016 Threshold</u>
\$455 per week (or \$23,660 per year)	\$913 per week (or \$47,476 per year)

The OT Rule was slated to become effective on December 1, 2016.

The Court’s Invalidation of the OT Rule and the New Trump Administration

Just prior to the OT Rule’s effective date, several states and business groups filed lawsuits seeking to enjoin the OT Rule. A district judge in the Federal District Court for the Eastern District of Texas granted the injunction. The Obama Department of Labor (“DOL”) filed an appeal to the Fifth Circuit. Briefing in the appeal was delayed due to the election of Trump. Trump’s DOL filed a brief advising the Fifth Circuit that it would not

seek to reinstate the OT Rule.

On August 31, 2017, the district judge invalidated the OT Rule. In making this ruling, the court determined that the DOL exceeded its authority by setting a salary level test that in effect eliminated the need to consider whether employees performed duties in a “bona fide executive, administrative or professional capacity.” Notably, however, the court did not rule on the general lawfulness of a salary level test or whether the DOL has authority to set any salary level for the white collar exemption.

The Future of the OT Rule

The future of the OT Rule is unknown, but there are some indications as to where the rule might be heading. Alexander Acosta (“Acosta”), Trump’s appointee as Labor Secretary of the DOL, told congressional lawmakers on several occasions that the DOL would be seeking to revise the OT Rule, setting the salary threshold somewhere between the 2004 and proposed 2016 level. Acosta criticized the Obama administration’s proposed salary level as being too burdensome on employers.

The DOL subsequently issued a request for information seeking public feedback on ways to revise the OT Rule. The comment period on the request for information recently closed on September 25, 2017. The majority of the

comments suggested maintaining the salary test, but increasing it by a much more modest amount than the 2016 rule. However the DOL chooses to proceed with the information received through its request for information, it is expected that a revised OT Rule would not come out until late 2018, at the earliest.

What Employers Should Know

- Given the court's finding that the OT Rule is invalid, the DOL's 2004 rule and the salary threshold it implemented remains in effect.
 - In light of the uncertainty of the future of the OT Rule, employers should wait to make any specific changes to their overtime policies and practices until the future of the OT Rule becomes more clear
 - If the salary threshold is ultimately increased, employers may want to consider the following to minimize the expense of complying with the new OT Rule:
 1. Capping employees hours to ensure that they do not work more than 40 hours in any given week; and
 2. Increasing certain employees' salaries so that they exceed the salary threshold and the employees will not be entitled to overtime.
- If employers reclassified employees or made other changes to their overtime policies or to employees' salaries in anticipation of the OT Rule becoming effective, the employers may revert back to their prior policies, procedures, classifications and salary levels. However, employers may not want to change course at this time given that an increase in the salary level threshold is expected (not to mention the fact that a reversal may not be good for employee morale). If there is an increase to the salary threshold, it is possible that these employers will not have to do much to comply with the new OT Rule.

If you have any questions about this Alert, please contact the author listed below or the [Aronberg Goldgehn attorney](#) with whom you work.

Amy M. Gibson
agibson@agdglaw.com
312.755.3154