

PUBLICATION

Hang On, the Overtime Roller Coaster is Taking Another Turn

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Since 2014 when President Barack Obama directed the DOL to "modernize" the overtime law, the new overtime rules were announced, published, revised, published again, finalized, legally challenged and then judicially blocked. Just when we thought the rules were dead in the water, the overtime ride forges ahead once again. Last week, the DOL published a Request for Information (RFI) asking interested parties 11 specific questions regarding the application and challenges of the overtime rules. The request for public comment signals that the DOL is going to take another stab at updating the overtime rules but leaves the question as to what those updates may be.

Right now, the minimum salary threshold for white-collar exemptions from overtime remains \$455/week (\$23,660 annually). As you may recall, the Obama Administration did its best to push through a new overtime rule (with a salary threshold of \$913/week or \$47,476/year) before Donald Trump took office, but the Fifth Circuit Court of Appeals blocked the law before it could take effect on December 1, 2016. The Obama-DOL swiftly appealed but was unable to resolve the legal issues before the Trump Administration took over.

During his confirmation hearing, Trump's new DOL Secretary Alexander Acosta said the overtime rule was due to be updated but the Obama Administration overtime rule had raised the salary threshold too high. This is the same position the DOL has now taken with Fifth Circuit appellate court. The DOL is no longer defending the amount of the proposed salary level increase, but it is challenging the federal court's finding that the DOL does not have the authority to increase the salary level at all. In its brief, the DOL argued that it "has decided not to advocate for the specific salary level (\$913 per week) set in the final rule at this time and intends to undertake further rulemaking to determine what the salary level should be. Accordingly, the department requests that this court address only the threshold legal question of the department's statutory authority to set a salary level."

Meanwhile, the DOL is proceeding with the first steps of a new rule change – getting input and direction from stakeholders. The 11-question Request for Information provides some insight into what may be on the horizon. First, it signals that the DOL is clearly not walking away from the overtime revision issue. There is universal agreement that the overtime rules are outdated and can easily be improved and it appears the Trump-DOL is going to make its own revisions to the rule. Second, the DOL is no longer looking exclusively at the level of the salary threshold for exemption to overtime. The RFI includes questions about the role the duties test plays with respect to the salary threshold, what is the proper methodology, and whether there should be multiple salary levels to reflect different regional economies, sizes of employers and exemptions.

Since the RFI questions cover such a wide spectrum of potential areas of rule revision, it is difficult to predict what changes loom on the horizon for the overtime law. The comment period ends on September 25, but multiple public comments have already been posted. This is a good time for employers to provide the DOL with some input on the obstacles they face complying with the current overtime rules. Comments will be accepted online at www.regulations.gov and www.dol.gov/whd, and also by mail.