

# PUBLICATION

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## Déjà Vu: DOL Argues It Has Authority to Set Overtime Salary Threshold, Requests Input to Create New OT Rule

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**As many readers know, the Department of Labor's changes to the "white collar" or "EAP" exemption under the Fair Labor Standards Act have been one of the most publicized and impactful employment law issues of the last year. A Texas district court blocked the DOL from implementing and enforcing those changes with a preliminary injunction in November 2016. The Trump Administration recently decided to go forward with appealing that court's preliminary injunction. The DOL's recent reply brief argues that it has authority to set a salary level for the FLSA exemption. The DOL has also requested information from the public to help craft a new rule.**

The FLSA requires employers to pay most employees overtime compensation for hours in excess of 40 hours per week. The statute exempts "any employee employed in a bona fide executive, administrative, or professional capacity." The DOL, who has authority to define and delimit what employees fit within this exemption, has laid out three requirements that must be met for the exemption: (1) the employee must be paid on a salary basis; (2) the salary must meet a certain threshold amount; and (3) the employee must perform executive, administrative or professional job duties. Since 2004, \$23,660 per year (\$455 per week) has been the salary threshold for purposes of determining whether an employee could be exempt from the FLSA's overtime requirements.

On May 23, 2016, the DOL published its 2016 Rule increasing that threshold to \$47,892 per year (\$921 per week) and requiring automatic updates in the threshold every three years based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage region. The 2016 Rule was set to become effective on December 1, 2016, giving employers about six months to comply with the 2016 Rule. With compliance requirements looming ten days away, a federal court in the Eastern District of Texas issued a nationwide injunction blocking the enforcement of the 2016 Rule on November 22, 2016. The court held that the DOL did not have authority to increase the salary-level threshold in a manner that supplanted the duties test. While the court stated that it was only evaluating the salary-level test under the 2016 Rule and "not making a general statement on the lawfulness of the salary-level test for the . . . exemption," the decision called into question the extent to which the DOL could use a salary-level test.

The Obama Administration DOL appealed the decision to the Fifth Circuit Court of Appeals, but after President Trump took office, the DOL requested and received multiple extensions for filing its reply brief. Many commentators speculated that the Trump Administration would withdraw its appeal of the district court's decision. Another option would have been to seek a stay of the appeal while it sought comments for a new rule making proceedings.

Nevertheless, the DOL pursued a different course and filed its reply brief on June 30, 2017. In its reply brief, the DOL asked the Fifth Circuit Court of Appeals to reverse the district court's preliminary injunction. The DOL argues that the district court based the preliminary injunction on the erroneous legal conclusion that the DOL lacked authority to set a salary level. Unsurprisingly, the DOL dropped its defense of the Obama Administration's overtime rule and stated that it would request information seeking public input on several questions that would aid in the development of a proposed rule. The DOL expressed reluctance to issue a new proposed rule until after the Fifth Circuit decided whether the DOL had authority to establish a salary-level test.

In other words, the Trump Administration is asking the Fifth Circuit to conclude that the DOL has authority to set the salary threshold, but does not want the court to rule on the validity of the specific salary threshold amount that the Obama Administration set.

As indicated in the DOL's reply brief, it recently published a request for information from the public to help formulate a proposal to revise the Obama Administration's overtime regulation. The public has 60 days, until September 25, 2017, to provide its comments in response to the rule. The DOL has sought information on 11 multi-part questions. It is seeking public input regarding, among other things, the following issues:

- What method should be used to set the salary level for purposes of the exemption and what changes, if any, would the DOL need to make to the standard duties test based on the chosen method of adjustment?
- Should regulations contain multiple salary levels? If so, what criteria should be used to set the salary levels (e.g., size of employer, census region, metropolitan statistical area, etc.)? How would multiple salary levels affect employers?
- Should the DOL set different salary levels for executive, administrative and professional exemptions, and what would the impact be on employers and employees?
- At what salary level does the duties test no longer fulfill its historical role in determining whether employees are exempt?
- To what extent did employers make changes in anticipation of the 2016 Rule? What was the impact of those changes?
- Would a duties-only test be preferable, and if so, what should a duties-only test consider?
- Did the 2016 Rule exclude particular occupations from exemption that had traditionally been exempt?
- What amount of non-discretionary bonuses and incentive payments should be considered when determining if an employee satisfies the standard salary level?
- Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should those levels be set?
- Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated periodically? If so, what mechanism should be used for automatic updates?

Assuming the Court of Appeals does not conclude that the DOL lacks authority to set the salary threshold amount for exempt employees, the Trump Administration's rule is expected to have a much lower threshold than the 2016 Rule. Nevertheless, the appeal of the preliminary injunction creates uncertainty regarding the future of the 2016 rule and the DOL's authority to promulgate a salary-level test.