

House of Representatives Votes to Delay the Implementation of the Department of Labor's New Overtime Rule

By Gary Peebles

Most employers know by now that the Department of Labor's new final rule regarding overtime and white-collar workers is set to take effect on December 1, 2016. That rule can be summarized as follows: (1) the minimum salary threshold for exempt workers is now \$913 per week (\$47,476) annually, which is equivalent to the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census region (the South) of the United States (the new threshold is nearly double the old one, which was \$23,660 annually); (2) the minimum salary threshold will be automatically adjusted upward every three years to keep pace with what the Department of Labor believes to be an appropriate salary floor; and (3) employers may use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the salary minimum, so long as those bonuses are paid at least quarterly.

When the Department of Labor formally proposed the above rule, it received over 270,000 written comments from employers, trade groups, and other interested parties. Although President Obama supports the new rule, many groups remain firmly opposed to it. The House of Representatives, for example, recently voted (on September 28, 2016) to delay the implementation of the new rule by six months (i.e., until June 2017). That bill (titled the "Regulatory Relief for Small Businesses, Schools, and Nonprofits Act), which was introduced to the House by Representative Tim Walberg (R - Michigan), passed by a 246-177 vote. Five Democrats voted for the bill. The bill now heads to the Senate, where Republicans hold a majority of the seats. President Obama, however, has promised to veto the bill if it lands on his desk.

Various legal challenges to the new rule have also been filed in federal courts across the country. The most prominent example is the suit filed in the Eastern District of Texas by attorneys general from 21 states. (A copy of the complaint is available here: <http://www.wagehourinsights.com/wp-content/uploads/sites/697/2016/09/DOL-OT-Rule-Complaint-Filed.pdf>). In short, the complaint contends that the Department of Labor has unlawfully intruded upon the various states' ability to expend their funds (i.e., salaries to white-collar government workers) as they see fit. Because the complaint was filed on September 20, 2016, the Department of Labor has not yet filed an answer or a motion to dismiss.

So what should prudent employers do? The safest course of action is to proceed as though the new rule is guaranteed to take effect on December 1, 2016. Why? There are at least two reasons for such a cautious approach. The first is that the House bill likely won't become law; after all, President Obama has indicated in no uncertain terms that he intends to veto it. Second, even if the House bill were to become law, the outcome of the presidential election remains a toss-up. If Hillary Clinton wins in November, employers can be nearly certain that the new overtime rule will go into effect at some point in the near future.

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