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## Department of Labor Drops Defense of New Overtime Salary Threshold

As discussed in a previous Paul, Weiss Client Alert, on May 18, 2016, the U.S. Department of Labor announced a final rule (the “Final Rule”) that revised overtime exemption regulations for certain executive, administrative, and professional employees (“white-collar employees”), and other highly compensated employees, under the Federal Labor Standards Act (the “FLSA”). The Final Rule, among other things, raised the minimum salary threshold that full-time white-collar employees must earn to be exempt from overtime pay from \$455 per week to \$913 per week. However, implementation of the Final Rule was temporarily halted by lawsuits filed by 21 states and more than 50 companies challenging its validity in District Court. An emergency preliminary injunction was granted on November 22, 2016, which has since been appealed by the Department of Labor to the Fifth Circuit Court of Appeals. The case is *State of Nevada, et al. v. United States Department of Labor, et al.*, No. 16-41606 (5th Cir.). See Paul, Weiss Client Memoranda dated May 23, 2016 and December 2, 2016 for further detail regarding the Final Rule and subsequent litigation.<sup>1</sup>

In a stark reversal, in a reply brief filed on June 30, 2017 in the Fifth Circuit Court of Appeals case (the “Brief”), the Department of Labor backed away from defending the specific thresholds that the Final Rule had put in place.<sup>2</sup> In the Brief, the Department of Labor stated 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.”<sup>3</sup> Instead, the Department of Labor asked the Court to opine on only a threshold legal question: whether they have the authority to establish new salary thresholds, putting aside the specific threshold announced in the Final Rule.<sup>4</sup> The Court has not yet ruled on the pending appeal, which was fully briefed as of the end of June 2017. Oral argument has been tentatively scheduled for the week of October 2, 2017.

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<sup>1</sup> See also *Wage and Hour Division: Important information regarding recent overtime litigation in the U.S. District Court of the Eastern District of Texas*, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/whd/overtime/final2016/litigation.htm> (last visited Aug. 9, 2017).

<sup>2</sup> Reply Brief for Appellants, *State of Nevada, et al. v. United States Department of Labor, et al.*, No. 16-41606, 2017 WL 3149309 (5th Cir. June 30, 2017).

<sup>3</sup> *Id.* at \*17.

<sup>4</sup> *Id.* at \*17-18.

Before beginning the further rulemaking referenced in the Brief, the Department of Labor has issued a public request for information.<sup>5</sup> The request for information seeks input on various issues, outlined in 11 specific questions, “including whether the standard salary level set in that rule [the Final Rule] effectively identifies employees who may be exempt, whether a different salary level would more appropriately identify such employees, the basis for setting a different salary level, and why a different salary level would be more appropriate or effective.”<sup>6</sup> Comments in response to the questions posed may be submitted on or before September 25, 2017.

Employers impacted by the overtime exemption regulations should keep a close eye on the appeal, and consider providing comments to the Department of Labor in response to the request for information on this topic.

An abbreviated version of the 11 questions posed by the Department of Labor follows:

1. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?
2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method?
3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking?
4. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology?
5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status?

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<sup>5</sup> See *Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 FR 34616 (July 26, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-07-26/pdf/2017-15666.pdf>.

<sup>6</sup> *Id.* at 34618.

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6. To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times?
  7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test?
  8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?
  9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap?
  10. Should there be multiple total annual compensation levels for the highly compensated employee exemption?
  11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees?

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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