



## FLSA Overtime Rule Update

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Last November 22, 2016, a federal judge in the U.S. District Court for the Eastern District of Texas [issued a nationwide preliminary injunction](#) blocking the Obama administration's federal Fair Labor Standards Act (FLSA) overtime rule (the 2016 overtime rule) shortly before it was set to take effect. The rule would have expanded eligibility for overtime pay by increasing the salary threshold for the executive, administrative, or professional (EAP) exemption from \$455 per week to \$913 per week (or \$23,660 per year to \$47,476 per year). Under the rule, the minimum salary level for the EAP exemption would have been automatically adjusted every three years to correspond to national salary percentiles. CAPLAW issued a [set of FAQs](#) advising CAAs on their options for compliance in light of the preliminary injunction.

Clarity about the fate of the 2016 overtime rule has emerged in recent weeks and is addressed by this FAQ:

1. What is the current status of the 2016 FLSA overtime rule?
2. Is the DOL taking any further action regarding the salary levels for the EAP exemption?
3. What issues does the DOL address in the Request For Information (RFI)?
4. What is the deadline for responding to the questions posed by the DOL in the RFI?
5. What will happen after the RFI comment period closes?

### What is the current status of the 2016 FLSA overtime rule?

On August 31, 2017, the federal judge in the U.S. District Court for the Eastern District of Texas unexpectedly issued an order striking down the 2016 overtime rule.<sup>1</sup> The court held that the DOL's rulemaking with respect to the 2016 rule was invalid because the DOL exceeded its authority under the FLSA when it more than doubled the salary levels for the EAP exemption and, in doing so, rendered the duties test unnecessary. The court reasoned that Congress "unambiguously intended" for the EAP exemption in the FLSA to apply to employees who perform certain job duties. Even though the FLSA authorizes the DOL to "define and delimit" the duties for the EAP exemption, the court explained that Congress' intent, as reflected in the plain meaning of the words in the FLSA, was to impose a duties test as

a criteria for the EAP exemption and not to give the DOL authority to use a salary-level test that effectively eliminates an analysis of an employee's job duties. In finding that the new salary level exceeded DOL's authority, the court also determined that, similarly, the automatic updating mechanism was unlawful.

The court's order ends the life of the 2016 overtime rule because the Trump administration has explicitly said that it will not defend the rule and thus will not appeal the court's order.<sup>2</sup> However, as discussed below, the Trump administration, through the DOL, has been pursuing other avenues regarding the salary level test for the EAP exemption.

## 2 Is the DOL taking any further action regarding the salary levels for the EAP exemption?

Having determined that it would no longer advocate on behalf of the 2016 overtime rule, the DOL issued a [Request for information](#) (RFI) in late July 2017 to gather input from the public on issues relating to the EAP exemption. Generally, an RFI is issued when a federal agency is considering either proposing a new rule or making changes to existing rules. The DOL issued the RFI because it believed that soliciting public input on the questions posed in the RFI would aid in developing a notice of proposed rulemaking (NPRM).<sup>3</sup>

## 3 What issues does the DOL address in the Request for Information (RFI)?

The RFI generally invites comments on the now defunct 2016 overtime rule, including whether the standard salary level set in that 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. It specifically seeks feedback on and information relating to 11 questions, a few of which are summarized below:

- **QUESTION #1:** What methodology should the DOL use to set a new salary threshold?
- **QUESTION #2:** Should the regulations contain multiple salary levels (set by size of employer, census region, industry, etc.)?
- **QUESTION #3:** Should the DOL set different salary level tests for different exemptions (e.g., administrative, professional, executive), as it did prior to 2004?
- **QUESTION #5:** At what salary level does the duties test no longer fulfill its historical role in determining exempt status?
- **QUESTION #6:** Did you, as an employer, make changes in anticipation of the effective date of the 2016 overtime rule and, if so, have you reversed course?
- **QUESTION #7:** Should the DOL eliminate the salary level test altogether and just rely on a duties test for the EAP exemption?
- **QUESTION #11:** Should the standard salary level test and the highly compensated employee total annual compensation level test be automatically updated on a periodic basis?

## 4 What is the deadline for responding to the questions posed by the DOL in the RFI?

The DOL invites members of the public to [submit comments](#) electronically on the questions raised in the RFI on or before **September 25, 2017**.

5

## What will happen after the RFI comment period closes?

The DOL will likely issue an NPRM, based on the feedback collected from the RFI, with a new proposed rule in the coming months, for which it would again solicit public comment.

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### End Notes

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1 *State of Nevada, et al. v. U.S. Department of Labor, et al*, Civil Action No. 4:16-CV-731 (E.D. Texas August 31, 2017).

2 82 Fed. Reg. 34616, 34617 (July 26, 2017).

3 *Id.*

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