



## FLSA Overtime Rule Blocked – What Do CAAs Do Now?

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November 2016

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On Tuesday, November 22, 2016, a federal judge in the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction preventing the new federal Fair Labor Standards Act (FLSA) overtime rule from taking effect on December 1, 2016. The new overtime rule expands eligibility for overtime pay by increasing the salary threshold for the executive, administrative, and professional (EAP) exemption from \$455 per week to \$913 per week (or \$23,660 per year to \$47,476 per year). Under the new rule, the minimum salary level for the EAP exemption would automatically adjust every three years to correspond to national salary percentiles.

### 1 Who initiated the lawsuit?

Twenty-one states brought suit against the U.S. Department of Labor (DOL) challenging the new overtime rule. They argued that the DOL exceeded its authority under the FLSA by increasing the salary threshold so significantly and by providing for an automatic updating mechanism, which is expected to increase the salary level for the EAP exemption every three years. The states claimed that they would suffer irreparable harm if the overtime rule goes into effect, given the significant costs of complying with the new rule.

### 2 What is a preliminary injunction?

A preliminary injunction is a **temporary** measure that suspends implementation of the new overtime rule for an **indefinite** period of time in order to give the court additional time to decide the merits of the case (i.e., whether the DOL exceeded its authority under the FLSA in issuing the new overtime rule). Until that

time, the injunction maintains the status quo. This means that the current requirements for overtime eligibility will remain in place—in order to be properly classified as exempt from overtime pay, employees must generally continue to earn at least \$455 per week (or \$23,660 per year) on a salary basis and meet the requirements of the applicable EAP duties tests.

### 3 What did the court decide?

Judge Amos L. Mazzant III issued the opinion of the court, which only ruled on whether a preliminary injunction was an appropriate remedy in this case. However, to reach that decision, the judge had to find that the 21 states challenging the overtime rule had a substantial likelihood of succeeding on the merits of their argument. Thus, while Judge Mazzant has not formally ruled that the DOL exceeded its authority by increasing the salary threshold for overtime eligibility, many observers believe that he will do so shortly, and his opinion granting the preliminary injunction gives an indication of his reasoning for potentially vacating the overtime rule.

The court reasoned that Congress intended the EAP exemption to apply based on the conduct, duties, or functions that an employee actually performs—in other words, Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level. While the FLSA delegates authority to the DOL to define and delimit the EAP exemption, the court found that the new overtime rule increases the salary level so significantly that it essentially creates a “de facto salary-only test.” According to the court, this is inconsistent with the FLSA and Congressional intent, which do not contemplate establishing a salary level test that replaces the EAP duties tests.

### 4 Is the court’s opinion final?

Not necessarily. Now that the preliminary injunction is in place, the judge, as discussed above, will decide whether to make the injunction permanent by “vacating” the overtime rule (rendering it null and void). The DOL has 60 days to appeal the preliminary injunction, or it can wait until after the judge issues a final decision on the merits of the case to appeal to the Fifth Circuit Court of Appeals.

The DOL issued the following statement on the court’s opinion:

The Department strongly disagrees with the decision by the court, which has the effect of delaying a fair day’s pay for a long day’s work for millions of hardworking Americans. The Department’s Overtime Final Rule is the result of a comprehensive, inclusive rule-making process, and we remain confident in the legality of all aspects of the rule. We are currently considering all of our legal options.

### 5 Could the overtime rule return?

The overtime rule could go into effect as currently written if: (1) the DOL appeals the preliminary injunction and an appeals court overturns the injunction; (2) Judge Mazzant makes the injunction permanent by vacating the rule, but an appeals court subsequently overturns his decision; or (3) Congress takes action clarifying that the DOL has the authority to increase the minimum salary level test for the EAP exemption. The last option seems unlikely, given that committees of both the U.S. Senate and House of Representatives have issued statements supporting the court’s decision.

The DOL could also issue a revised rule by initiating a new notice-and-comment rulemaking process to set a salary level that is higher than the current level (\$455 per week, or \$23,660 per year) but lower than the level in the overtime rule (\$913 per week, or \$47,476 per year). It is not clear, however, whether the DOL under the Trump administration would pursue either an appeal of an order vacating the overtime rule or a new rulemaking process to revise the current rule.

Note that individual states could also implement the new overtime rule as written or in a revised form. The FLSA sets minimum standards for wage and hour laws, but does not prevent a state from establishing more protective standards for employees. If state law establishes more protective standards than the FLSA, those higher standards will apply in that state.

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### **If an appeals court reinstates the overtime rule, will the rule be enforced prospectively (effective only after the appeals court’s decision) or retroactively (effective going back to December 1, 2016)?**

It’s not clear. In a similar situation involving the FLSA exemption regulations in 2013, the DOL issued a new rule to provide that home health care workers were entitled to overtime. As in the current situation, a district court judge issued a preliminary injunction blocking the rule from going into effect, and subsequently vacated the rule. An appeals court, however, later reversed the lower court’s ruling. Following the appeals court’s reversal, certain home health care workers brought suits against their employers claiming that they were entitled to overtime pay going back to the initial effective date of the rule. Some courts found that the rule applied retroactively and that employers were liable for paying back wages. Other courts, however, held that the home health care workers were entitled to overtime pay only after the date of the appeals court’s decision.

Because the future of the new overtime rule is uncertain, CAAs that choose not to implement the rule by December 1, 2016 face the risk that the rule will be reinstated and will apply retroactively. Suggestions for how CAAs can mitigate these risks are described in further detail below.

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### **What should CAAs do in light of the preliminary injunction?**

Since the court blocked the overtime rule just days before it was set to go into effect, many employers, including CAAs, are in various stages of implementing and complying with the new rule. CAAs likely fall into one of the following three categories along the spectrum of implementation:

**a. The CAA has neither communicated changes to its employees nor made any changes to implement the new overtime rule.**

CAAs in this position could decide not to make any changes for the time being and wait to see how the case plays out in court. If the injunction becomes permanent, or an appeals court upholds a lower court’s decision vacating the rule, the CAA would not be legally required to implement any planned salary increases or employee reclassifications due to the new rule. This approach carries some risk, however. If the injunction is lifted, or if the rule is vacated by the lower court but later reversed on appeal, individual employees could seek to enforce the overtime rule retroactively and claim that they were entitled to overtime pay going as far back as December 1, 2016. This is a particular risk for employees who are currently classified as exempt but who would have been reclassified as non-

exempt under the new overtime rule because of the increased salary level test. If the CAA continues to classify these employees as exempt, it could be liable to pay them for all hours worked on or after December 1, 2016 (at straight time for hours up to 40 per week and at time and a half for any overtime hours) if the rule is deemed to apply retroactively.

A CAA that chooses not to implement the new rule should, at the very least, have employees track their time while the case is being resolved (or ask supervisors to track employee hours). That way, if the overtime rule is ultimately reinstated and held to apply retroactively, the CAA will have an accurate picture of the number of overtime hours that employees worked to be able to measure its potential liability for overtime pay. It is unlikely that a CAA could set aside federal grant funds now to cover potential future liabilities. However, the CAA could consider limiting overtime work by employees who might be subject to reclassification as non-exempt and thus entitled to back pay, including overtime, under the new rule if it were to go into effect.

### **b. The CAA has begun the process of implementing the new overtime rule, but has not finished making changes.**

Because the new overtime rule was set to go into effect on December 1, 2016, some CAAs may have already announced, but not formally implemented, changes to employee salaries and classification. These CAAs may decide to delay making changes and wait to see what happens with the overtime rule before implementing it. If a CAA decides not to make any changes, it should have employees track their time while the case is pending and could consider limiting overtime by employees who would be subject to reclassification as non-exempt if the rule were to go into effect (as discussed above).

CAAs that choose to delay implementation should also consider employee expectations, particularly if the CAA has already notified employees of salary increases, either in order to maintain their exempt status or because of shifting salary bands. From an employee relations standpoint, it may be difficult to roll back these changes. Further, a CAA may be subject to advance notice requirements under state law, which may limit its ability to renege on its promise to increase an employee's salary. A CAA could consider allowing salary increases to go forward, but delay reclassification of employees until there is more clarity about the outcome of the overtime rule.

Note that some CAAs may have conducted broader audits of their employee classifications in preparation for the new overtime rule and during that process, decided to change classifications based on job duties. For these employees, CAAs should move ahead with reclassifying the employees, regardless of what happens with the overtime rule.

Whether or not a CAA decides to implement the overtime rule, it should communicate clearly with employees about the preliminary injunction, as well as potential changes to the rule in the future.

### **c. The CAA has already implemented the new overtime rule.**

CAAs that have already implemented changes under the new overtime rule may find it challenging to undo those changes. Reversing salary increases for employees that the CAA intended to keep exempt under the new rule may be particularly detrimental to employee morale. CAAs that have already implemented changes to comply with the new rule should consider the consequences of voluntarily doing so. By communicating clearly with employees, CAAs could mitigate the financial burden of implementing the new overtime rule despite the preliminary injunction. For example, a CAA could let its employees know that while it will keep the salary increases in place, if the new overtime rule is not ultimately reinstated, employees may need to forgo the next regularly-scheduled salary increase.

If a CAA decides to reverse salary increases and reclassifications, it should communicate those changes to employees in advance. Some state and local laws require employers to provide advance notice prior to making certain changes to an employee's terms of employment (including decreases in salary). In addition, CAAs with unionized employees will need to ensure that any reversal of changes to union members' terms of employment complies with their collective bargaining agreement. Therefore, a CAA should consult with a local attorney experienced in labor and employment law matters before rolling back these changes.

If a CAA does reverse the changes, it should understand that there is some risk, if the new rule were ultimately to go into effect, of employees claiming that they are owed retroactive pay (as discussed in subsection (a) above). Thus, it should have employees track their time appropriately and consider limiting overtime by employees who would be subject to reclassification as non-exempt if the rule were to go into effect.

CAPLAW will continue to monitor developments on the new overtime rule and update the Community Action network on any changes as they arise. If you have questions about these issues, please feel free to contact CAPLAW for assistance.