

# The DOL's Overtime Rule: Version 3.0 – 12/02/16

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# Today's Agenda

- Background Information Relevant to Court's Decision
- Review Court's Decision Granting Preliminary Injunction
- DOL's Public Response to Date
- Government Relations Update
- What Do Providers Do Now?

# Statutory Background

- FLSA enacted in 1938, including various exemptions
- One was the “white collar” exemption for executive, administrative, and professional employees
- No statutory definition of those terms; rather delegation to the DOL to “define” and “delimit” them

# Regulatory Background

- 1938: first regulations published containing a duties test for white collar exemption, but no salary basis test
- 1940: regulations add a salary basis requirement
- 1949: regulations adopt a “short” and a “long” test, with differing duties tests and differing salary level requirements
- 2004: regulations abolish short and long tests; increase salary level, and combine and simplify duties tests
- DOL: salary level updated seven times since 1938

# Final OT Rule Challenged

- Published May 23, 2016, to be effective December 1, 2016
- Increase salary level to \$47,476 for white collar exemptions
- Indexing every three years beginning January 1, 2020
- No change to duties tests
- No change to salary basis requirement

# Review of Court's Decision

- Forum: E.D. Texas
- Judge: Hon. Amos L. Mazzant, III,  
nominated by Pres. Obama
- Plaintiffs: 21 states (including Ohio)
- Relief sought: Preliminary and permanent injunction
- Separately filed lawsuit by private employer trade groups consolidated

# Review of Court's Decision – Injunction Rules

- Court's decision was a preliminary decision, at request of the states
- Standard the court had to apply:
  - Were the states likely to prevail at trial?
  - Is there a substantial threat that the states will suffer irreparable harm without an injunction?
  - Does this threatened injury outweigh any damage the injunction may cause the defendant?
  - Will the injunction be in the public interest?

# Review of Court's Decision – Decision

- Court concludes that the OT rule was likely to be found invalid
  - No statutory authority for the rule's salary level
  - No statutory authority for automatic indexing/updating
- Declines to give deference to the DOL's interpretation of the statute because the statute was clear and unambiguous
- Rejects 10<sup>th</sup> Amendment/states' rights argument



# Review of Court's Decision: Rationale

- Starts with the FLSA's specific exemption language:  
“...any employee employed in a bona fide executive, administrative, or professional capacity...as such terms are defined and delimited from time to time by regulations of [the DOL]....”
- Dictionary definitions of “executive,” “administrative,” and “professional” do not mention salary
  - Instead, reference the person's performance, conduct, or function
- Thus, Congress intended to define the white collar exemptions without regard to salary
- Definition of “bona fide” reinforces this intent

# Review of Court's Decision: Rationale (cont'd)

- What about the DOL defining and delimiting the terms?
  - Not according to the definitions!
- Statute gives the DOL “significant leeway” to establish *duties test*
- *But...* “nothing” in the white collar exemption reflects intent to permit DOL to define and delimit with respect to a *salary level*
- With the OT rule, the salary level increases so much that millions lose the exemption “irrespective of their job duties and responsibilities”

# Review of Court's Decision: Rationale (cont'd)

- This significant increase in the salary level “creates essentially a de facto salary-only test” for the white collar exemptions
- Automatic indexing is unlawful because the rest of the rule is unlawful

# Court's Remedy

- Grants preliminary injunction: DOL enjoined from “implementing and enforcing” the OT rule
- Injunction lasts until further order of the court
- No limit to just public employers
  - States requested that the rule be “enjoined from becoming effective” without limitation
  - Court’s order grants the states’ request, and is likewise without limitation
- Nationwide applicability: not just in some states

# Important Considerations to Keep in Mind About the Court's Decision

- Preliminary, not permanent injunction
- Textual rationale defies easy and logical limits
- What about the *decades* of rulemaking on a salary level without Congressional response?
- New defense for certain wage/hour claims? Well....
- Over long-term, if the decision is upheld, may only shift the focus of DOL rulemaking

# DOL Position

- In statement issued a few days after decision, DOL says:  
“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.”
- Translation? We are going to appeal, and maybe do some other things.

# Government Relations Update

- Important Obama Administration policy
  - Would be surprising, therefore, if an appeal is not filed before the current Administration departs
- Trump Administration options:
  - Early priority for the incoming administration
  - Appeal, or continue to prosecute an appeal if one filed
  - Extend nonenforcement policy to all employers
  - Decline to appeal, or withdraw if one filed
    - Preliminary injunction stays in place; likely (but not necessarily) converted to permanent injunction after trial

# Government Relations Update

(cont'd)

- Change rule using notice and comment rulemaking
  - This takes time
- Congress
  - CRA invocation or moratorium
- What will the states do? Probably safe in Ohio, for now, but other states could jump into the breach.



# What Do Providers Do Now?

- Consult with your labor attorney or use your OPRA member benefit to consult with Vorys
- Assess the reversal or changes to any HR action take already
  - Balance cost v. employee relations considerations
- Communicate, if necessary, clearly and often with your staff
  - Staff may feel as if they had a pay raise taken back (from not being paid OT)

# What Do Providers Do Now?

(cont'd)

- Monitor legal developments and consider getting involved with ANCOR SOS Campaign
- Nonenforcement policy, if court reverses course
- Stay tuned to OPRA list serves and weekly updates
- Bottom line: one size doesn't fit all; considerations unique to each agency will determine next steps

# ANCOR Save Our Services Campaign

- National campaign
- Evergreen
- Scope
  - All federal mandates that are not accompanied by sufficient compliance resources
  - Initially included the DOL OT rule, CMS HCBS Community rule and DOL elimination of homecare exemption
  - Add value, add resources, relief or innovation to mitigate expense of unfunded federal mandates

# ANCOR SOS Campaign (cont'd)

- Media, legislative and administrative efforts
  - Nonenforcement provision – policy and advocacy impact
  - Future of HR5902
- Stay informed at Take action now – [www.disabilitysos.org](http://www.disabilitysos.org)
- Innovation and payment reform/service model redesign
  - Direct support professionals and HCBS community rule implementation
- ANCOR Government Relations Committee retreat January 10 – 11 in Baltimore, MD

# Additional Resources

- OPRA members have two hours with Vorys as an annual benefit
- HR Committee will continue to discuss – HR staff are welcome to join the committee
- Contact OPRA staff

# Questions



Please type your questions  
into the “chat box” on the screen