

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

Volume 39 | Issue 106 | September 21, 2016

## 21 States and Business Groups Move to Block Final Overtime Rule

On May 23, the DOL published its final overtime rule, expanding overtime eligibility to millions of public and private sector workers. By more than doubling the minimum salary threshold for the so-called “white-collar” exemptions, the rule is expected to render more than four million currently exempt workers overtime-eligible when it takes effect on December 1. Yesterday, 21 states and more than 50 business groups sued the DOL in federal court in Texas to block implementation.

### Background

The Fair Labor Standards Act (FLSA) establishes federal minimum pay standards for public and private sector employers. Employees covered by the FLSA must be paid at least the federal minimum wage and, in most cases, overtime at time and one-half of the employee’s regular rate of pay for all hours worked over 40 in any workweek. Regulations enforced by the DOL’s Wage and Hour Division (WHD) provide exemptions from federal minimum wage and overtime requirements for salaried “executive, administrative, and professional” (EAP) employees (so-called “white-collar” employees) who satisfy both minimum earnings and job duties tests set forth in DOL regulations.

In March 2014, President Obama directed the DOL to “modernize and streamline” the rules governing which employees are entitled to receive overtime pay. On May 23, the DOL published a [final rule](#) revising the white-collar overtime regulations that have been in place since 2004. It substantially narrows the availability of the exemptions by more than doubling the annual salary threshold for an EAP exemption to \$47,476, raising the annual salary threshold for highly compensated employees to \$134,004, and providing for automatic increases in the threshold levels every three years starting in 2020. Slated to take effect on December 1, 2016, the final rule left the current duties tests unchanged. (See our [May 18, 2016 FYI Alert](#).)



## Legal Challenges

Yesterday, 21 states — led by Texas and Nevada — filed [suit](#) in the Eastern District of Texas to block the new rule, naming the DOL, Secretary of Labor Thomas Perez, the WHD and of its two administrators as defendants. Alabama, Arizona, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nebraska, New Mexico, Ohio, Oklahoma, South Carolina, Utah and Wisconsin joined in the lawsuit. More than 50 business groups — including the US Chamber of Commerce, National Association of Manufacturers, National Federation of Independent Business and National Retail Federation — filed a separate [lawsuit](#) yesterday challenging the DOL's overtime rule in the same Texas district.

Both suits maintain that the DOL exceeded its statutory authority under the FLSA in promulgating the new rule, and that the new rule is arbitrary and capricious. They ask the court to issue an injunction preventing its implementation, application and enforcement.

The states also raise constitutional objections, arguing that the new federal rule violates the Tenth Amendment (which reserves to the states powers not expressly granted to the federal government) by mandating how they must pay employees and allocate their budgets. According to the suit, the rule effectively establishes a federal minimum salary level for white-collar workers (without addressing exempt duties) that would unconstitutionally deplete state resources and force service cutbacks or layoffs by state and local governments. With respect to automatic increases in the salary threshold, the states argue that Congress did not give the DOL indexing authority, and the DOL failed to follow the Administrative Procedure Act's (APA) notice-and-comment rulemaking process before seeking to impose indexing.

Like the states, the business groups argue that the DOL exceeded its statutory authority and violated the APA in issuing the final overtime rule. They argue that the rule's excessively high salary threshold for determining who qualifies for an EAP exemption would disqualify large numbers of employees who perform exempt job duties from exempt status. Business groups also take sharp aim at the automatic update or "escalator" provision that will increase the minimum salary threshold over time. Like the states, they argue the indexing mechanism was issued without a rulemaking or input from stakeholders in violation of the APA.

## In Closing

The DOL's final white-collar overtime rule is slated to go into effect on December 1. However, nearly half the states and a 50-member business coalition have now asked the courts to put it on hold. While the DOL is expected to object vigorously to any delay, it will be up to the courts to determine whether any or all of the new overtime provisions will be implemented. Both public and private employers will want to closely monitor developments.

### The Venue

Some of these same business groups recently secured a preliminary injunction from a Texas federal court blocking the DOL from implementing and enforcing another controversial rule — the new "persuader" rule that would have required employers and their labor relations advisors to publicly disclose agreements and arrangements that have long been exempt from reporting. Whether another Texas District Court will similarly enjoin the overtime rule remains to be seen. (See our [June 29, 2016 FYI Alert](#).)

## Authors

Nancy Vary, JD  
Abe Dubin, JD

## Produced by the Knowledge Resource Center of Xerox HR Consulting

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email [fyi@xerox.com](mailto:fyi@xerox.com).

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.