

# 'Stick A Fork in It!' Updated Overtime Rules Are DOA . . . For Now

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On August 31, 2017, Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas entered a final judgment in State of Nevada et al. vs. U.S. Department of Labor et al., awarding summary judgment against the U.S. Department of Labor (the "DOL"). The case involves many technical legal issues but turns primarily on whether the DOL has the authority, under the Fair Labor Standards Act of 1938 (the "FLSA"), to implement regulations defining statutory exemptions from the premium "overtime" pay requirements of the FLSA in a

way that, if put into effect, would more than double the minimum salary that specified employees must be paid to be "exempt" from the FLSA's overtime pay requirement.

State of Nevada stems from developments beginning in 2014 when the Obama administration issued a memorandum directing the Secretary of Labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." In 2016, in response to the executive memorandum, the DOL issued regulations (often called the "Final Rule") that would have increased the required minimum salary for "exempt employees" from \$455 per week (\$23,660 annually) to \$913 per week (\$47,476 annually).

Employers generally believed that this significant leap in the required minimum salary would increase employers' payroll expenses dramatically. That was the common view because the Final Rule meant that an employer, to preserve the exemption for any previously exempt employee, would have to increase the employee's salary to at least \$913 per week. If an employer of a previously exempt employee chose not to do so, then the employee's weekly salary would fall below the minimum required weekly salary. The effect, under the Final Rule, would be that the employer would have to pay "overtime" (often called "time and a half") pay to an employee who worked more than 40 hours in a workweek, because the employee, under the Final Rule, would no longer be exempt. The Final Rule thus put many employers in a tight spot: increase — possibly substantially—the salaries of exempt employees to ensure that they remained exempt (and thus not entitled to overtime pay), or confront the possibility of having to pay—at premium hourly rates—for all hours worked over the first 40 in a workweek.

The Final Rule was set to become effective in December, 2016, but several states, including Nevada, brought suit, seeking to block the Final Rule. Last November, the court enjoined enforcement of the Final Rule, at least temporarily, on a nationwide basis.

The court has now made that injunction final. Judge Mazzant, in his August 31st order, concluded that the Final Rule is invalid because it's not "based on a permissible construction" of the FLSA. He also decided that

the Final Rule provision that creates an automatic updating mechanism that adjusts the minimum salary level every three years is "unlawful."

Developments in the days after the court's order underscore that, for now, this is the last word on the subject. On September 6, the United States Court of Appeals for the Fifth Circuit granted the DOL's unopposed request to drop its appeal of the preliminary injunction that was entered last November. The district court's order, as a result, will not be reversed.

**Bottom line:** The Final Rule is now pretty much dead unless the DOL gives it another go and issues new regulations changing the current minimum salary level. So, **the current minimum salary level for most "exempt" employees under the FLSA remains at \$455 per week.** That's the lowest weekly salary that employers who are covered by the FLSA (which is just about all of them) must pay to most employees to ensure that the employee is exempt and doesn't have to be paid overtime pay. **But employers should also be aware that the "white collar" exemptions also include very specific "duties tests" that must be satisfied for an employee to be exempt.**

The court, notably, went out of its way to say that it "is not making any assessments regarding the general lawfulness of the salary-level test or the Department's authority to implement such a test." It's possible that the Trump administration may implement a new minimum salary level, because it's widely acknowledged that the current one—of just \$23,660 per year—is antiquated and out of touch with the realities of the modern workplace. In fact, during the month before the State v. Nevada order, the DOL appeared ready to revisit the issue when it issued a request for public comment on potential revisions to "regulations which define and delimit exemptions from FLSA's minimum wage and overtime requirements for certain employees." Whether such revisions will happen, and, if so, when, is of course anybody's guess.

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