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COMMENT

Overtime Overruled: Why the New Department of Labor Overtime Regulations Should Not Go Into Effect

*Morgan Westhues**

ABSTRACT

The United States Department of Labor recently revised its overtime regulations for white collar workers to keep up with the changing economy and inflation. While the salary level for who can receive overtime pay needs to be elevated, the proposed elevation to the salary level under the Obama Administration is too drastic. The proposed overtime regulations essentially double the current salary level for overtime eligibility. This drastic increase is already having negative effects on employees, even though it has not yet gone into effect. To prepare for the new regulations to take effect, employers have begun to find ways around the law, disqualifying employees from receiving overtime pay that would begin receiving it under the new regulations. The new overtime regulations are not meeting its intended purpose of extending the right to overtime pay to more employees and, therefore, should not go into effect. This article proposes that the new salary threshold for overtime eligibility be set at \$35,000, meaning that anyone making *below* this amount per year *would* qualify to receive overtime pay. Raising the salary threshold to \$35,000 would still inevitably make more Americans eligible to receive overtime, while not increasing the threshold so drastically that employers cannot afford to pay the additional overtime pay.

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I. INTRODUCTION

The United States Department of Labor’s (“DOL” or “the Department”) mission statement is to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.”¹ To uphold this mission statement, the DOL recently revised its overtime regulations for white collar employees. The current salary level that determines which salaried workers are entitled to overtime pay is “outdated and no longer does its job of helping separate salaried white collar employees who should get overtime pay for working extra hours from those who should be exempt” from receiving overtime pay.²

The revision came after President Obama signed a memorandum on March 13, 2014.³ The memorandum directed the Department to “modernize and streamline” the regulations that described which white collar workers are safeguarded by The Fair Labor Standards Act’s (“FLSA”) minimum wage and overtime standards.⁴ President Obama said a revision of the overtime regulations is necessary because the current regulations “have not kept up with our modern economy.”⁵ President Obama further said that “[b]ecause these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage.”⁶ The revision is supposed to “ensure that the FLSA[’s] intended overtime protections are fully implemented” as well as simplify the distinction between which employees are eligible for overtime pay and which are not.⁷ The premise of the revision is to make the overtime pay exemption easier for employers and employees to understand so the regulations will continue to be applied correctly in the future.⁸ The Department was also directed to keep in mind the “changing nature” of the workplace, which is likely caused by the changing economy.⁹ The Department estimates 4.2 million workers that are currently ineligible for overtime because they fall below the minimum salary level will automatically become eligible under the new regulations without any change to their duties.¹⁰

Part II of this article will begin by discussing details of the new overtime regulations, and identifies who will now qualify to receive overtime pay. Part III then reviews the negative feedback the proposed regulations have received, while also

1. *Our Mission*, U.S. DEP’T LABOR, <https://www.dol.gov/general/aboutdol/mission> (last visited Feb. 3, 2017).

2. *Questions and Answers*, U.S. DEP’T LABOR, <https://www.dol.gov/WHDOvertime/final2016/faq.htm#1> (last visited Feb. 3, 2017).

3. *Id.*

4. *Id.*; Nevada v. U.S. Dep’t of Labor, 218 F. Supp. 3d 520, 524 (E.D. Tex. 2016).

5. Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737 (Apr. 3, 2014), 2014 WL 1310010.

6. *Id.*

7. *Questions and Answers*, *supra* note 2; see Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. at 18,737.

8. *Questions and Answers*, *supra* note 2; see Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. at 18,737.

9. Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. at 18,737.

10. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,405 (May 23, 2016), 2016 WL 2943519.

highlighting some actions employers have already taken in order to conform with the pending changes. The new overtime regulations drastically increase the number of employees who are eligible to receive overtime pay, which is causing employers to find ways around having to pay more employees overtime. This means the new regulations are not meeting their intended purpose and, therefore, should not go into effect.

Part IV then discusses the current legal climate surrounding the new regulations, which shows just how much courts, states, Congress, and presidential administrations have struggled to agree on new overtime regulations. Part V analyzes what options the Department, now under a new administration, has going forward and how soon employers and employees are likely to see a new proposal take effect. Finally, Part VI asserts that the proposed overtime regulations should not take effect because it is not meeting its intended purpose of enabling more employees to receive overtime pay, and instead causes employers to find ways to disqualify their employees from receiving overtime pay. Part VI suggests the new salary threshold should be set to \$35,000.

II. SPECIFICS OF THE NEW OVERTIME REGULATIONS

To be clear, the revision — known as the “Final Rule” — is changing neither the definition of “overtime,” nor who classifies as a white collar employee; it is updating the salary level at which a white collar employee may either qualify for overtime pay or be exempt from receiving it.¹¹ “Overtime” pay still refers to work in excess of 40 hours in a single workweek; employees who work overtime must be paid at least one and one-half times their regular pay rates.¹² An employee is considered a “white collar” worker if they are “employed in a bona fide executive, administrative, or professional capacity, as defined” by the Department’s regulations set out in 29 C.F.R. § 541.¹³ This definition was part of the initial exemption regulations created when the FLSA was first enacted in 1938.¹⁴

In order to determine whether a white collar employee qualifies for exemption from earning overtime pay, the Department has set out three different tests.¹⁵

To qualify . . . a white collar employee must: (1) be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality of quantity of work performed; (2) be paid more than the salary level, which is \$913 per week [under the new Final Rule revision]; and (3) primarily perform executive, administrative, or professional duties.¹⁶

The first test is known as the “salary basis test,” the second is the “salary level test,” and the third is the “duties test.”¹⁷

11. *Questions and Answers*, *supra* note 2.

12. *Id.*

13. *Id.*; 29 C.F.R. § 541 (A)–(D) (2017).

14. *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 524 (E.D. Tex. 2016).

15. *Questions and Answers*, *supra* note 2.

16. *Id.*

17. *Id.*

The requirement that an employee be salaried came when the Department revised the regulations for the first time, just two years after the FLSA was enacted.¹⁸ Certain employees are not subject to either the salary basis or the salary level test, such as teachers, doctors, and lawyers.¹⁹ The Department also provides an exemption for highly compensated employees (“HCEs”) who earn a higher total annual compensation level — \$134,004 under the new Final Rule — in addition to satisfying the duties test.²⁰

The proposal for new overtime regulations is not the first time the Department has made changes to the overtime exemption regulations. In fact, the overtime exemption regulations have already seen several revisions, and discussing the revisions will provide helpful background information into how much the new overtime regulations will change the overtime eligibility compared to past revisions and why such a drastic proposed change has been subject to negative feedback.²¹ In 1949, the Department’s revision established a “long” test and a “short” test to determine whether an employee qualified for the overtime exemption.²² “The long test combined a low minimum salary level with a rigorous duties test, which restricted the amount of nonexempt work an employee could do [and still] remain exempt.”²³ On the contrary, “the short test combined a higher minimum salary level with an easier duties test that did not restrict [the] amount of nonexempt work” an employee could do to remain exempt.²⁴ Following this revision, Congress revised the FLSA regulations again in 1961 and permitted the Department to “define and delimit” the overtime exempt categories from “time to time.”²⁵

The Department last updated the regulations for white collar overtime exemption in 2004.²⁶ The 2004 regulations set the salary level at \$455 per workweek, and the total annual compensation for HCEs was \$100,000.²⁷ This revision also eliminated the “long” and “short” tests and replaced them with the “standard duties” test, which did not restrict the amount of nonexempt work an employee could perform while still being exempt from receiving overtime.²⁸ As mentioned above, the new regulations in the Final Rule set the salary level at \$913 per workweek and the total annual compensation for HCEs at \$134,004.²⁹ This means the overtime pay exempt threshold has essentially doubled since 2004.³⁰ This new salary level is “based [on] the 40th percentile of weekly earnings of full-time salarie[d] workers in the lowest

18. *Nevada*, 218 F. Supp. 3d at 524.

19. *Questions and Answers*, *supra* note 2.

20. *Id.*

21. *Nevada*, 218 F. Supp. 3d at 524.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Questions and Answers*, *supra* note 2.

27. *Id.*

28. *Nevada*, 218 F. Supp. 3d at 524.

29. *Questions and Answers*, *supra* note 2.

30. Jim Blasingame, *New DOL Overtime Rules: One Good Outcome And Seven Bad Ones*, FORBES (Oct. 21, 2016, 8:33 PM), <http://www.forbes.com/sites/jimblasingame/2016/10/21/new-dol-overtime-rules-one-good-outcome-and-seven-bad-ones/#7ce4667876d1>.

wage region in the country, which is currently the South.”³¹ The Final Rule regulations were set to go into effect on December 1, 2016, with automatic salary level updates to follow every three years, beginning on January 1, 2020.³²

The Department suggests that employers have a “range of options” to respond to the rise in salary level because many will have several employees now entitled to overtime pay who were previously exempt.³³ Employers can choose from the following:

- increase the salary of an employee who meets the duties test to at least the new salary level to retain his or her exempt status;
- pay an overtime premium of one and a half times the employee’s regular rate of pay for any overtime hours worked;
- reduce or eliminate overtime hours;
- reduce the amount of pay allocated to base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime for hours worked over 40 in the workweek, to hold total weekly pay constant; or
- use some combination of these responses.³⁴

III. THE FINAL RULE RECEIVES NEGATIVE FEEDBACK

In a Forbes article,³⁵ Jim Blasingame outlined seven “bad outcomes” the new Final Rule regulations will create, especially for small businesses.³⁶ Blasingame points out that employers have a large financial incentive to not pay overtime. By increasing the amount of employees who are eligible for overtime so drastically, employers are in fact finding ways around the law, which means the new regulations are not meeting their intended purpose and, therefore, should not go into effect. First, the new regulations will increase the number of salaried employees not exempt from receiving overtime pay.³⁷ This means businesses will have to spend additional time, and increase record keeping efforts to keep track of overtime hours that now require overtime pay.³⁸

Second, having a higher exemption threshold will create an “employee re-classification burden that by definition will result in increased payroll expense.”³⁹ Re-classifying “non-exempt” employees as “exempt,” and vice versa, could cause employees to either gain or lose benefits; employers must be careful when doing this.⁴⁰ Third, most employers and employees currently have some flexibility with their

31. *Nevada*, 218 F. Supp. 3d at 525.

32. *Questions and Answers*, *supra* note 2; *Nevada*, 218 F. Supp. 3d at 525.

33. *Questions and Answers*, *supra* note 2.

34. *Id.*

35. Jim Blasingame is the creator and host of The Small Business Advocate Radio Show.

36. Blasingame, *supra* note 30.

37. *Id.*

38. *Id.*

39. *Id.*

40. Patricia A. Moran, *Employee Benefits and New Department of Labor Overtime Rules*, NAT’L. L. REV. (Sept. 12, 2016), <http://www.natlawreview.com/article/employee-benefits-and-new-department-labor-overtime-rules>.

hours, but this Final Rule could put an end to that.⁴¹ For instance, an employer may ask an employee, who is not exempt from receiving overtime pay, to work overtime one week and take off those hours in the next workweek.⁴² Under the new regulations, the employer will now have to pay overtime for the week with the overtime hours.⁴³

Fourth, some businesses will have to respond to the new regulations by splitting employee workweek hours in half to prevent payroll from drastically increasing, which will hurt the employee who relied on those hours.⁴⁴ Fifth, some businesses will react to the Final Rule by “laying off some managers while increasing the responsibility of a smaller number of exempt managers, without increasing their compensation.”⁴⁵ Sixth, many believe that being put on salary is an accomplishment, but HR professionals have told Blasingame they are transitioning employees with salaries below the new salary level threshold to hourly status.⁴⁶ Because there are millions of employees whose weekly income falls between the old and new salary levels (between \$445 and \$913), Blasingame suggests this will be a real “morale downer.”⁴⁷ Seventh, due to the above mentioned actions some businesses will take to conform with the new regulations, experts have predicted an increase in FLSA lawsuits.⁴⁸

In her article, Patricia A. Moran said that employers simply do not have an unlimited amount of money to pay for the compensation increases that the Final Rule will bring.⁴⁹ Instead of cutting an employee’s hours in half, Moran suggests that “benefit reductions . . . are a viable source” to supplement the compensation increases.⁵⁰ To do this, employers could do the following:

- Reduce or eliminate employer premium contributions towards health and welfare plans;
- [s]hift costs to employees or otherwise reduce costs through plan design changes, such as increased deductibles and copayments, medical management, or reduction or elimination of certain costly benefits;
- [c]hange eligibility criteria to exclude cohorts of employees;
- [r]educe or eliminate 401(k) matching or other employer contributions; or
- [r]educe paid time off or other employee perks (such as subsidized child care or fitness centers, transportation subsidies, or parties).⁵¹

While all of these benefit cuts are possible and may be a better alternative than those outlined by Blasingame, employees are still likely to be upset by losing benefits they received previously, and they may also create more problems for employers. When deciding to cut any benefits, “employers should proceed with caution and

41. Blasingame, *supra* note 30.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Moran, *supra* note 40.

50. *Id.*

51. *Id.*

consider all underlying legal requirements applicable to their benefit plans.”⁵² For instance, if an employer has a safe harbor 401(k) plan, the employer’s plan contributions cannot be completely eliminated if the employer wants to keep the safe harbor in place.⁵³ The employer should also keep in mind that “nondiscrimination rules apply to retirement, medical, and life insurance plans . . . [and] are meant to ensure that the tax benefits [involved] are not skewed towards highly compensated individuals.”⁵⁴ If an employer modifies these benefits to exclude lower paid employees, these nondiscrimination rules may apply.⁵⁵

Employers started taking proactive steps without knowing whether the Final Rule would go into effect. Months before the new regulations took effect, Michael Brey, president and owner of Hobby Works, had an “uncomfortable conversation with seven of his employees.”⁵⁶ As a result of the new overtime regulations, Brey informed his employees he would need to change them to an hourly pay rate schedule instead of the salaried positions they held at the time.⁵⁷ Brey’s actions align with the fourth negative outcome Blasingame predicted to result from the Final Rule — some businesses will have to split employee hours in half.⁵⁸ As Blasingame mentioned, the negative after-effects will disrupt small businesses.⁵⁹ Hobby Works is a 35-employee gift and hobby store, and Brey says keeping those seven employees salaried would have cost him as much as \$35,000, an amount that small businesses such as Hobby Works cannot afford.⁶⁰

IV. THE LEGISLATIVE PATH OF THE FINAL RULE

Employers were confused and angry because the Final Rule brought controversy and there is still doubt as to whether the new regulations will even take effect.⁶¹ Many employers experienced limbo while waiting to act on the new regulations because the Final Rule was expected to reach almost “every sector of the U.S. economy and have the greatest impact on nonprofit groups, retail companies, hotels, and restaurants”; this is because these businesses typically pay managers a salary below the new threshold.⁶² This section discusses the current legal climate surrounding the new regulations, explains why the regulations have yet to take effect, shows how employees and employers operated in limbo, and demonstrates how much courts grappled with the new overtime regulations.

The Final Rule controversy heightened back in November 2016 when a Texas federal judge blocked the Obama Administration’s new overtime changes after an

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Jeremy Quittner, *Overtime Rules in Limbo: What Businesses Should Do Now*, FORTUNE (Nov. 29, 2016), <http://fortune.com/2016/11/29/overtime-rules-limbo/>.

57. *Id.*

58. Blasingame, *supra* note 30.

59. *Id.*

60. Quittner, *supra* note 56.

61. *Id.*

62. Reuters, *A Federal Judge Just Blocked the Obama Administration’s Signature Overtime Rule*, FORTUNE (Nov. 23, 2016), <http://fortune.com/2016/11/23/federal-judge-obama-administration-overtime-rule/?iid=sr-link3>.

emergency motion for preliminary injunction was filed.⁶³ The petition for emergency preliminary injunctive relief was filed by the plaintiffs on October 12, 2016.⁶⁴ U.S. District Judge Amos Mazzant sided with the plaintiffs, and “21 [other] states and a coalition of business groups, including the U.S. Chamber of Commerce, [holding] that the rule was unlawful and granted their motion for a nationwide injunction.”⁶⁵

A preliminary injunction is “an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden” of proving all four of the elements required.⁶⁶ The four elements that must be established are:

- (1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiffs will suffer irreparable harm if the injunction is not granted;
- (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.⁶⁷

The main claim in the lawsuit filed in September 2016 was “the drastic increase in the salary threshold was arbitrary,” meaning the increase was not based on any reason or system.⁶⁸ Plaintiffs also argued without the preliminary injunction against the new overtime regulations, the cost of complying with the regulations would cause irreparable injury.⁶⁹ To demonstrate these costs, plaintiffs submitted “declarations from seven state officials who estimate it will cost their respective states millions of dollars in the first year to comply with the Final Rule.”⁷⁰ Along with monetary costs, plaintiffs alleged that implementing the new regulations would also impact governmental programs and services.⁷¹

For example, 50 % of employees are affected by the new overtime regulations at both the Kansas Department for Children and Families and the Kansas Department of Corrections.⁷² These organizations cannot increase salaries, which would allow certain employees to become non-exempt, nor can they begin to pay more employees overtime pay, “as limited resources of both agencies are already being prioritized towards . . . critical, public safety-related functions.”⁷³ This will not only have a detrimental effect on the Departments’ employees, but on the public who benefits from the Departments’ services as well.⁷⁴ The court agreed the plaintiffs demonstrated they would suffer irreparable harm if the preliminary injunction were not granted.⁷⁵

When deciding whether to grant a preliminary injunction “courts must balance the competing claims of injury and must consider the effect on each party of the

63. *Id.*; Nevada v. U.S. Dep’t of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

64. *Nevada*, 218 F. Supp. 3d at 525.

65. Reuters, *supra* note 62.

66. *Nevada*, 218 F. Supp. 3d at 526 (quoting Nichols v. Alcatel UCA, Inc., 532 F.3d 364, 372 (5th Cir. 2008)).

67. *Id.* (citing Nichols v. Alcatel UCA, Inc., 532 F.3d 364, 372 (5th Cir. 2008)).

68. Reuters, *supra* note 62.

69. *Nevada*, 218 F. Supp. 3d at 532.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

granting or withholding of the requested relief.”⁷⁶ The plaintiffs claimed the balance of hardships favored granting the injunction “because: (1) the [s]tates will be required to spend substantial sums of unrecoverable public funds if the Final Rule goes into effect; and (2) the Final Rule causes interference with government services, administrative disruption, employee terminations or reclassifications, and harm to the general public.”⁷⁷ The defendant’s only response was the hardship weighs in favor of denying the injunction because the plaintiffs did not establish irreparable harm.⁷⁸ However, as discussed above, because the plaintiffs did in fact establish irreparable harm, and the defendants did not articulate any harm they would likely suffer if the injunction were granted, the court ruled the balance of hardships weighed in favor of granting preliminary injunctive relief.⁷⁹

The court paid special attention to the public interest and possible consequences in deciding whether to grant the injunction, and reasoned this factor overlaps substantially with the balancing of hardships requirement.⁸⁰ The court found that the public interest was “best served” by the preliminary injunction against the new overtime regulations.⁸¹ The court opined as follows:

If the Department lacks the authority to promulgate the Final Rule, then the Final Rule will be rendered invalid and the public will not be harmed by its enforcement. However, if the Final Rule is valid, then an injunction will only delay the regulation’s implementation. Due to the approaching effective date of the Final Rule, the [c]ourt’s ability to render a meaningful decision on the merits is in jeopardy. A preliminary injunction preserved the status quo while the [c]ourt determines the Department’s authority to make the Final Rule as well as the Final Rule’s validity.⁸²

The basis for Judge Mazzant’s ruling was that federal law governing overtime does not allow for the Department to determine which workers are eligible for overtime pay solely based on their salary levels.⁸³ Judge Mazzant also believed the Department “unlawfully changed the overtime rule without the consent of Congress” because the regulation was never voted on by Congress.⁸⁴

The parties also argued over the scope of the injunction.⁸⁵ The Department argued the injunction should only apply to states that actually demonstrated they would suffer irreparable harm.⁸⁶ However, the court ruled that a *nationwide* injunction was necessary here because the Final Rule is applicable to all states, so the “scope of the irreparable injury extends nationwide[,]” and a nationwide injunction

76. *Id.* (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 9 (2008)).

77. *Id.* at 533.

78. *Id.*

79. *Id.*

80. *Id.*; see *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 12 (2008).

81. *Nevada*, 218 F. Supp. 3d at 533.

82. *Id.*; see, e.g., *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

83. Reuters, *supra* note 62.

84. CJ Szafir & Libby Sobiech, *Trump Needs to Move Swiftly to Roll Back Overtime Rules*, FORBES (Dec. 16, 2016, 5:29 PM), <https://www.forbes.com/sites/realspin/2016/12/16/trump-needs-to-move-swiftly-to-roll-back-overtime-rules/#7302eee82086>.

85. *Nevada*, 218 F. Supp. 3d at 533.

86. *Id.*

will protect both employers and employees from being subject to different overtime exemptions based on their location.⁸⁷

The Department disagreed with the ruling, and stood beside its opinion that the entire Final Rule is, in fact, legal.⁸⁸ While all of these lawsuits were being filed, and were later consolidated into one action, both the House and Senate introduced legislation to delay the new overtime regulations by six months.⁸⁹ Marc Freedman, executive director of labor law and policy at the U.S. Chamber of Commerce, said, “we are[] assuming that this preliminary injunction holds and there isn’t an appeal or some other thing that disrupts it”⁹⁰ The Obama Administration appealed the decision in December; however, with only weeks left in his term, it did not get to see the appeal through, despite a request for an expedited hearing.⁹¹

In its initial brief on appeal, the Department argued the federal injunction blocking the Final Rule from going into effect was based on an error of law, and, therefore, should be reversed.⁹² The district court said the applicability of the overtime exemption should be based on the employee’s job duties alone, without regard to their salary because Congress did not include a minimum salary when defining the overtime exemptions, and it is not related to the duties test.⁹³ The Department argued the court in *Writz* rejected the argument that the minimum salary requirement was not justifiable to determine overtime exemption applicability because “the statu[t]es gives the Secretary broad latitude to ‘define and delimit’ the meaning of the [duties test]” and that the “minimum salary requirement is [not] arbitrary or capricious.”⁹⁴

The Department further argued that the updated salary level under the new regulations is “reasonable in light of the salary levels that the Department used over the past 75 years.”⁹⁵ The Department explained that the ratio between the proposed salary level and minimum wage is nearly the same as it was under the 1938 regulations.⁹⁶ In 1938, the minimum wage was \$.25 per hour, and the \$30.00 weekly salary level was three times the minimum wage for a 40-hour workweek.⁹⁷ The current minimum wage is \$7.25 per hour, thus, the proposed \$913 minimum weekly salary level is only 3.5 times the current minimum wage for a \$40 hour workweek.⁹⁸ The Department finally said the “district court did not offer any persuasive basis to overturn the approach that has been used for the past 75 years by the agency charged

87. *Id.* at 534.

88. Reuters, *supra* note 62.

89. *Id.*; Jeremy Quittner, *What You Need to Know About the New Overtime Rules*, FORTUNE (Oct. 31, 2016), <http://fortune.com/2016/10/31/new-overtime-rules/>.

90. Noam Scheiber, *Judge Suspends Rule Expanding Overtime for Millions of Workers*, N.Y. TIMES (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/business/obama-rule-to-expand-overtime-eligibility-is-suspended-by-judge.html>.

91. Sean Higgins, *Trump court filing could be the end of Obama overtime rule*, WASH. EXAMINER (Jan. 25, 2017, 3:53 PM), <http://www.washingtonexaminer.com/trump-court-filing-could-be-end-of-obama-overtime-rule/article/2612960>.

92. Brief for Appellants at *1, *Nevada v. U.S. Dep’t of Labor*, No. 16-41606, 2016 WL 7336944 (5th Cir. Dec. 2016).

93. *Id.* at *2 (quoting *Writz v. Miss. Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1966)).

94. *Id.*

95. *Id.* at *3.

96. *Id.*

97. *Id.*

98. *Id.* at *3–4.

with implementing the [FLSA] . . . [and that t]he preliminary injunction should be reversed.”⁹⁹ The State Appellees brief was filed on January 17, 2017.¹⁰⁰

The Department then moved to stay proceedings pending appeal.¹⁰¹ A district court can exercise “broad discretion to stay proceedings in the interest of justice,”¹⁰² and in doing so must “weigh competing interests and maintain even balance.”¹⁰³ In determining whether to grant a stay of proceedings pending appeal, district courts use a four-factor test:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceedings; and (4) where the public interest lies . . . [and] the movant bears the burden of showing that a stay is warranted.¹⁰⁴

While the movant bears this burden, they must only “present a substantial case on the merits when a *serious* legal question is involved.”¹⁰⁵ The court said there is no doubt that the Department’s proposed overtime regulations are “serious to both the litigants and to the public at large,” so the Department “must present a substantial case on the merits and show the balance of equities favor granting a stay.”¹⁰⁶

The court said the Department only argues that the “merits of the State Plaintiffs’ and the Business Plaintiffs’ claims will likely be controlled in large part by the Fifth Circuit’s decision on appeal.”¹⁰⁷ This alone is not enough to demonstrate that the Department is likely to prevail in establishing the court improperly issued the nationwide injunction against the proposed overtime regulations.¹⁰⁸ Since the Department did not meet this initial burden, the court did not discuss whether the balance of equities weighed in the favor of granting the stay of proceedings.¹⁰⁹ Ultimately, the Department’s motion to stay was denied.¹¹⁰

The legal background of the new overtime regulations thus far demonstrates just how much courts, states, Congress, and the Obama Administration have struggled with setting the new salary threshold for receiving overtime. The new salary threshold is arbitrary, and no data appears to support it. While many states and businesses agree that the new overtime regulations should not go into effect, it is difficult to find a proposal for what the salary threshold should instead be. To make matters worse, the legal proceedings surrounding the new overtime regulations have

99. *Id.* at *4.

100. *STATE OF NEVADA, ET AL V. LABR, ET AL*, THOMAS REUTERS WESTLAW, <https://1.next.westlaw.com/Document/I74FD4FAAB82F11E694BAE40CAD3637B1/View/FullText.html?listSource=Foldering&originContext=MyResearchHistoryRecents&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0> (last updated Mar. 26, 2018).

101. *Nevada v. U.S. Dep’t of Labor*, No. 227 F. Supp. 3d 696, 697 (E.D. Tex. 2017).

102. *Id.* at 698 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

103. *Id.* (quoting *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983)).

104. *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)).

105. *Id.* (emphasis added) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

left employers wondering when they can expect to see a new proposal, and when it is likely to take effect. The next section addresses this very question.

V. WHAT IS NEXT FOR THE DEPARTMENT?

In late January 2017, “[t]he Trump Administration . . . indicated it would kill any chance of reviving former President Obama’s federal overtime pay rule expansion with a court filing suggesting that it may withdraw [the] White House appeal of the federal court’s [decision].”¹¹¹ The Department of Justice requested a 30-day extension to March 2, 2017 to file its reply brief with the Fifth Circuit.¹¹² On February 17, 2017, the Department filed another unopposed motion to extend the time to file its reply brief.¹¹³ The Department was granted the extension, and the new filing deadline was set for May 1, 2017, however, repeated extensions continued to occur.¹¹⁴ “While the injunction is only a temporary measure that suspends the regulation until the judge can issue a ruling on the merits, many said the judge’s language indicated he was likely to strike down the regulation.”¹¹⁵ The continued extensions only add to the anger and confusion of employers and employees, as the limbo of waiting for a different proposed salary threshold seems never-ending.

Diana Furchgott-Roth, “[S]enior [F]ellow at the Manhattan Institute and a member of the Trump Administration’s transition team [for] labor policy” said there is still a long way to go if the Trump Administration wants to eradicate the new overtime regulations.¹¹⁶ “In order to properly get rid of the overtime rule, the [Trump] [A]dministration has to request that the Fifth Circuit drop the appeal of the prior administration. Then it needs to clean up matters by proposing to rescind the overtime regulation and publis[h] a . . . rule [to] rescind it.”¹¹⁷ President Trump has the authority, jointly shared with Congress, to repeal the Final Rule under the Congressional Review Act.¹¹⁸

The regulation on overtime pay has been viewed as the Obama Administration’s “contempt for the rule of law . . . and basic economics.”¹¹⁹ The Obama Administration even conceded that implementing the new regulations will cost businesses an estimated \$295 million per year in lawyer and accountant fees to help determine employee eligibility, and to develop a new system to track employees’ hours more closely.¹²⁰ However, the new regulations have also received much support. Ross Eisenbrey, of the Economic Policy Institute, said the federal judge’s decision was a “disappointment to millions of workers who are forced to work long

111. Higgins, *supra* note 91.

112. *Id.*

113. *STATE OF NEVADA, ET AL V. LABR, ET AL*, THOMAS REUTERS WESTLAW, <https://1.next.westlaw.com/Document/I74FD4FAAB82F11E694BAE40CAD3637B1/View/FullText.html?listSource=Foldering&originContext=MyResearchHistoryRecents&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0> (last updated Mar. 26, 2018).

114. *Id.*; Lynell Meeth, *FLSA Overtime Rule Update*, MRA (Nov. 7, 2017), <http://www.mranet.org/Member-Benefits/Member-Only-Benefits/Publications/Inside-HR-Newsletter/ID/1112/FLSA-Overtime-Rule-Update>.

115. Scheiber, *supra* note 90.

116. Higgins, *supra* note 91.

117. *Id.*

118. Szafir & Sobic, *supra* note 84.

119. *Id.*

120. *Id.*

hours with no extra compensation, and [disheartens] those Americans who care deeply about raising wages and lessening inequality.”¹²¹

The Department ultimately chose to dismiss the appeal and filed a motion to do so on September 5, 2017.¹²² “The [F]ifth [C]ircuit found that the appeal of the preliminary injunction had become moot, as the district court had entered a final judgment on the case.”¹²³ Judge Mazzant made the final ruling invalidating the Final Rule on August 31st, 2017.¹²⁴ While the new salary level is yet to be determined, the Department issued a request for information, which asks members of the general public for their input on what the new salary threshold for overtime eligibility should be.¹²⁵

Some business lobbyists have predicted a compromise between the Obama and Trump Administrations that would “phase in” the new salary level of the Final Rule over a longer period of time, and eliminate the automatic revision (which is likely an increase) of the salary level every three years.¹²⁶ “[T]he question remains whether the Trump [A]dministration will seek a legislative deal that would raise the salary limit above the \$23,660 that has prevailed since 2004, but [still] below the Obama [A]dministration’s preferred level.”¹²⁷ David French, senior vice president for government relations at the National Retail Federation, said that many business organizations who opposed the Final Rule are still open to some increase to the salary limit.¹²⁸

The problem now, as stated above, is many employers have already taken action in preparation for the implementation of the Final Rule; some employers have already raised the pay of some employees above the new salary limit, reasoning “it would be more cost-effective than paying them overtime.”¹²⁹ Once an employer gives an employee a pay raise, it is rare for them to reverse.¹³⁰ The Department’s new overtime regulations should not take effect. Instead of creating an avenue for more employees to receive overtime pay for working over 40-hour workweeks, employers have and will find ways to disqualify the employees that the Final Rule was designed to benefit.

VI. COMMENT

Because the Trump Administration chose not to pursue the appeal on the Final Rule injunction,¹³¹ it needs to be replaced with an alternative. In an article written in the Daily Labor Report, Ben Penn suggests there are two “likely options: repeal

121. Reuters, *supra* note 62.

122. Stephen F. Pocrass, *Labor Department to Withdraw Overtime Appeal*, OGLETREE DEAKINS (Sept. 5, 2017), <https://ogletree.com/shared-content/content/blog/2017/september/labor-department-to-withdraw-overtime-appeal>.

123. Dale A. Hudson & Jeffrey League, *Department of Labor Appeals Overtime Rule*, NIXON PEABODY (Nov. 7, 2017), <https://www.nixonpeabody.com/en/ideas/articles/2017/11/07/department-of-labor-appeals-overtime-rule>.

124. Meeth, *supra* note 114.

125. *Id.*

126. Scheiber, *supra* note 90.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Higgins, *supra* note 91.

and replace the wage-boosting regulation or drop it all together.”¹³² The problem is it is difficult to determine a median salary level that regulates which employees are eligible to receive overtime pay. Because both employers and employees have strong interests in overtime laws, it is important to realize the distinction between (1) raising the salary level high enough so more employees are eligible for overtime pay, while (2) keeping the salary level low enough so employers are not incentivized to work around the law, nor attempt to save money by reducing employee benefits.

The Final Rule, created to combat the “underpayment and overwork” issue seen in American workplaces, would allow nearly five million more employees to be eligible for overtime pay.¹³³ While this may sound like a good idea, the “consequences will end up backfiring like many of the good intentions implemented through” new regulations.¹³⁴ While the primary purpose of the Final Rule was to increase the number of employees who receive overtime pay, other purposes include boosting employment and increasing wages.¹³⁵ While most can get onboard with these objectives, “this is hardly the way to go about pursuing them.”¹³⁶ Additionally, while most would agree the former \$23,660 salary level threshold should be increased, doubling that amount, as proposed in the Final Rule, is too drastic.¹³⁷

If the Department were to issue a more “modest” salary level, this would render the pending appeal moot, which would put a clean end to the ongoing litigation.¹³⁸ Some sort of salary increase is necessary to keep up with the changing economy and inflation, thus, completely dropping the appeal should not happen without first identifying what will replace the Final Rule. The current salary threshold of \$23,660 is even below what is now considered the poverty level for a family of four, which is \$24,257.¹³⁹ Further, “expanding workers’ overtime eligibility polled favorably . . . among working-class Trump supporters[, so t]here could be political risks if [the new administration] decides to fully revoke the regulation without initiating a compromise.”¹⁴⁰ To review, the current salary threshold is \$23,660 per year, and the Obama Administration’s proposed salary level is \$47,476 per year.¹⁴¹ Because that is a drastic increase, the solution here seems to be a middle ground between the two.

The salary threshold should be set at \$35,000, meaning that anyone making *below* this amount per year *would* qualify to receive overtime pay. Raising the salary threshold to \$35,000 would still inevitably make more Americans eligible to receive overtime. As of 2014, the “middle class” of America fell between \$24,000 and \$73,000 per year for a single person.¹⁴² Increasing the salary threshold to

132. Ben Penn, *Overtime Rule Under Trump Enters Repeal and Replace Talks*, BNA (Mar. 1, 2017), <https://www.bna.com/overtime-rule-trump-n57982084585/>.

133. Veronique De Ruyg, *Extension of Overtime Pay Regulations Moves to the Final Review Stage*, NAT’L REV. (Mar. 15, 2016, 4:31 PM), <http://www.nationalreview.com/corner/432816/more-terrible-regulations-comig-down-pipe>.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Penn, *supra* note 132.

139. Joao Alhanati, *Which Income Class Are You?*, INVESTOPEDIA (Sept. 17, 2017, 1:46 PM), <http://www.investopedia.com/financial-edge/0912/which-income-class-are-you.aspx>.

140. Penn, *supra* note 132.

141. *Id.*

142. *A Portrait of America’s Middle Class, By the Numbers*, NPR (July 7, 2016, 11:35 AM), <http://www.npr.org/2016/07/07/484941939/a-portrait-of-americas-middle-class-by-the-numbers>.

\$35,000 would be well above the poverty level, and well above the “bottom” of the middle class; a \$35,000 threshold will help middle class Americans catch up with the changing economy and inflation. Alex Acosta, President Trump’s then-nominee for Secretary of Labor, also believes the “salary threshold figure [should] be somewhere around \$33,000 after figuring for inflation.”¹⁴³

VII. CONCLUSION

The Department received more than 140,000 comments from the general public after requesting their input on the new overtime regulations.¹⁴⁴ While it will take time to review all of these comments, the Department is anticipated to issue a new rule in October 2018, as listed in the fall regulatory agenda.¹⁴⁵ Hopefully, we will see a new overtime regulation issued that will increase the number of Americans receiving overtime, but will not be so drastic of an increase to cause small businesses detrimental harm. Many Americans must either sacrifice additional hours, managerial positions, and overall employee benefits, or give up receiving time-and-a-half pay; a fair and updated salary threshold will help more Americans receive both.

143. Stephen Miller, *What's Next for Employers Under the FLSA Overtime Rule?*, SOC'Y FOR HUM. RESOURCE MGMT. (Mar. 15, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/flsa-overtime-rule-forecast.aspx>.

144. Meeth, *supra* note 114.

145. *Id.*; Kate Thornone, *New overtime rule proposal coming October 2018*, HRDIVE (Dec. 19, 2017), <https://www.hrdiver.com/news/new-overtime-rule-proposal-coming-october-2018/513331/>.