**Special Report

Recent Court Action Blocking the Implementation of the Final Fair Labor Standards Act Regulations**

Version Date 11/30/16

Version

Date

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**Table of Contents**

[Overview 3](#_Toc468285122)

[Frequently Asked Questions 4](#_Toc468285123)

[Options for Employers in Reaction to the Decision 6](#_Toc468285124)

[**Employer Group 1: Employers Who Have Already Made Changes** 6](#_Toc468285125)

[Sample communication for employers who will maintain previously announced and implemented status changes 7](#_Toc468285126)

[Sample communication for retracting an announced and implemented change and now taking a “wait and see” approach 8](#_Toc468285127)

[**Employer Group 2: Employers Who Have Communicated Changes, but did not implement Changes 8**](#_Toc468285128)

[Sample communication for retracting an announced change and taking a “wait and see” approach 9](#_Toc468285129)

[Sample communication for employers who will maintain previously announced status changes 9](#_Toc468285130)

[**Employer Group 3. Employers Who Have not Communicated or Implemented Changes, but were planning to make Changes 10**](#_Toc468285131)

[Sample communication for employers who will now announce and proceed with changes notwithstanding the injunction. 10](#_Toc468285132)

[Sample communication for employers who will now announce that they are not making changes due to the injunction 11](#_Toc468285133)

[State Law Considerations 12](#_Toc468285134)

[States with Higher Salary Levels for Exempt Employees than the current Federal Level ($455/week). 12](#_Toc468285135)

[State Pay Change Notification Laws 12](#_Toc468285136)

[On Demand Webcast from Jackson Lewis, P.C. 13](#_Toc468285137)

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| This content provides practical information concerning the subject matter covered and is provided with the understanding that ADP is not rendering legal advice. You should consult experienced counsel for legal advice. The communications included in this toolkit are provided as a sample and may not be suitable for every situation You should consult experienced counsel to determine whether it is appropriate for you to leverage these sample communications and whether to include the optional language. |

Overview

As you may be aware from previous ADP communications, on November 22, 2016, a Texas District Court Judge granted a nationwide preliminary injunction blocking the Department of Labor ("DOL") from implementing and enforcing the new overtime regulations ("Final Rule"), which more than double the required salary level to qualify for the Fair Labor Standards Act ("FLSA") “white collar” exemptions. The Final Rule was set to go into in effect on December 1, 2016. [*Nevada et al. v. U.S. Department of Labor et al.*](http://www.jacksonlewis.com/sites/default/files/docs/ED%20Texas%20Nevada%20v%20DOL%2011-22-16.pdf), No. 4:16-CV-00731.

**Final Rule Would Have More Than Doubled the Required Salary Need to Qualify for the Exemption**As a reminder, the Final Rule makes four changes to the white collar exemptions:

* It increases the standard salary level for the white collar exemptions from $23,660 to $47,476
* It increases the required compensation for the exemption applicable to highly compensated employees, raising that level from $100,000 to $134,004.
* It provides for automatic increases to the salary levels every three years, instead of requiring separate rulemaking, with rates to be established based on the average salary levels for full-time workers as reported by the Bureau of Labor Statistics.
* It allows employers to use commissions and other non-discretionary incentive pay to satisfy up to 10% of the salary level for the standard white collar exemptions.

**Court’s Ruling**

In granting a preliminary injunction and temporarily prohibiting implementation and enforcement of the Final Rule, the court found no indication that Congress intended the white collar exemptions to include a salary level requirement, but rather finding the exemptions dependent on the duties of the employees. The court expressed concern that the Final Rule essentially created a “de facto salary-only test” and makes approximately 4.2 million workers eligible for overtime even though their duties might qualify them for the exemption. The court also held that the DOL did not have the authority to implement the automatic updating mechanism, which would have increased the salary level every three years without separate rulemaking.

Frequently Asked Questions

1. **Does this ruling mean that I do not have to comply with the new regulations?**The white collar exemption regulations will not change effective December 1, 2016. As such, if you have employees properly classified as exempt under the existing regulations (they meet all of the exemption tests, including the current threshold of $455/week), you will not need to make any changes by December 1, 2016.
2. **How does the ruling impact employers relying on the highly compensated employee exemption?**

The degree to which the ruling impacts the highly compensated employee (“HCE”) exemption remains unclear. The ruling did not specifically address the HCE exemption. Like the other exemptions at issue under the regulations, the HCE exemption includes a duties test and a salary level test.

Under the new regulations the required minimum salary requirement was increased to $913.00 per week ($47,476 annualized) and the total annual compensation requirement was increased to $134,004 (e.g. $47, 476 on a salary basis and the remainder can be paid through other forms of compensation such as additional salary or incentive compensation). The court did not specifically address the new total annual compensation level for the HCE exemption. It might be that while the minimum salary level now reverts back to the $455.00 per week level, the overall compensation requirement remains at $134,004. The safest course of action would be to assume the overall compensation level remains at $134,004. In resolving this issue clients should consider their risk tolerance. The court might clarify this issue in the future. We will keep you updated.

1. **Is this ruling permanent?**No. A temporary injunction is just that, temporary. It simply preserves the regulation in its current state, and prohibits the changes from taking effect until one of two things happens: (1) The injunction becomes permanent; or (2) The DOL appeals the ruling and the decision is reversed, putting the changes back into play.
2. **If an appeals court finds in favor of the DOL does this mean that the Final Rule will be retroactively applied to December 1, 2016?**Possibly. If you have now decided to maintain the exempt status of impacted employees without raising salaries to the new $913/week level then you may wish to consider directing these employees to track time. This way, in the event overtime becomes retroactively due in the future (should a court rule in the DOL’s favor and retroactively apply the increase back to 12/1) you will have an accurate record of hours worked. You could also, to the extent possible, reduce overtime hours for these employees to mitigate potential exposure.
3. **Why did the court issue the injunction and halt the changes to the white collar exemptions?**The court found that the DOL lacked the authority to increase the salary level and implement the automatic updating mechanism, which would have increased the salary level every three years. The court also found that because of the significant cost to employers in complying with the regulations, there was a likelihood of irreparable harm to employers if no injunction were granted.
4. **Will the injunction become permanent?**Possibly.TheDOL might seek an immediate appeal which may or may not be successful or, depending on timing as discussed below, President-elect Trump could take action that would leave the FLSA regulations in their pre-final rule state. We will keep you updated as events unfold.
5. **What could happen when President – elect Trump is sworn in on January 20, 2016?**Since the DOL first announced its proposed rule, various bills have been introduced in Congress to block the rule entirely, delay its implementation, or stagger the increases over time. President Obama vowed to veto any of these bills, even if they were passed. President-elect Trump could sign such legislation if it is passed by the next Congress.

If an appeal from the district court’s decision is still pending when such legislation is passed, the appeal may become moot, particularly where the legislation invalidates the rule from the proposed effective date. The Trump Administration also might direct the DOL to abandon the appeal if it is still pending at the time the new president takes office. The DOL under a Trump Administration also might rescind the regulations, but would need to follow the procedures set forth in the Administrative Procedure Act, a much longer and more difficult process. Ultimately, the fate of the regulations remains unknown but we are committed to keeping our clients updated as events unfold.

1. **Can I still use Navigator OT to conduct an exemption analysis? Which version should I use?**If you have not done so already, you should consider using Navigator OT to assess the exempt status of your employees using either the current or the pre-2016 regulations version of the application (understanding that the only difference between the two is the salary level).
2. **Will the "Final Changes to the FLSA White Collar Exemptions" toolkit that was previously distributed be updated?**

Yes. The toolkit will be updated to incorporate the information covered in this special report.

Options for Employers in Reaction to the Decision

**Below you will find guidance which varies depending on the employer group with which you identify and the scenario within that group your organization is facing.**

Employer Group 1: Employers Who Have Already Made Changes
 **Scenario 1. You have increased pay to maintain exemptions.** If you have increased pay to comply with the new salary level it may be difficult from an employee relations and/ or contractual perspective (if applicable) to retract the increase in salary. The employee relations issues are likely most acute with this group and for this reason alone many employers are not likely to rescind changes.

If you have decided to rescind the increase prospectively (we do not recommend retroactive rescission) and will take a wait and see approach going forward then you may wish to consider the following additional points before prospectively rescinding the increase.

* How likely is it that rescinding raises will incentivize employees to seek counsel on the issue, whether to argue that they have been "promised" compensation that is being taken away and/or to explore whether they have historically been misclassified?
* Has your business already prepared for the economic impact of the salary increases? If so, consider whether the financial impact to your business would be less detrimental than the potential impact of retracting already-implemented compensation changes. Waiting until the new year to rescind any changes may also lessen the impact on employees.
* Consider [state law](#statelaw).

If you proceed with salary increases as planned for now but are concerned with long term financial impact then you could consider offsetting the increased costs by freezing or reducing annual salary increases in the next cycle, or by decreasing the amount of discretionary annual bonuses. Again, you should consider any contractual limitations and [state law](#statelaw).

**Scenario 2. You have reclassified employees from exempt to non-exempt because their current salary is less than $930/week.** If you have already reclassified employees as non-exempt because the salary level was not met then your decision likely depends on employee reaction to the reclassification.

* If employees are pleased to be reclassified as non-exempt (e.g. because they are earning overtime pay) then employee relations considerations may make it difficult to reclassify back to exempt status.
* If employees are unhappy with your initial reclassification decision and prefer keeping exempt status then you may decide that while the appeals process plays out you will return employees to previous exempt status. If you decide to reclassify employees back to exempt status then you may wish to consider directing these employees to track time. This way, in the event overtime becomes retroactively due in the future (should a court rule in the DOL’s favor and retroactively apply the increase back to 12/1) you will have an accurate record of hours worked. You could also, to the extent possible, reduce overtime hours for these employees.
* In either case you should consider any contractual obligations and [state law](#statelaw).

 **Scenario 3. You have performed a duties analysis, and reclassified employees from exempt to non-exempt based purely on the duties test.** If you have already reclassified due to concerns with meeting the job duties test for exempt status (an area that was not changed by the new regulations and therefore not at issue before the court issuing the injunction)then it may makes sense to move forward despite the injunction. You can however decide to reclassify back to exempt status. In making the decision to move forward with the reclassification despite the injunction or to reclassify back to exempt status, you should consult directly with legal counsel. This is important given the that the need to reclassify in the first place may have been based on a historic misclassification that is unrelated to the final regulations and therefore unrelated to the court action.

## Sample communication for employers who will maintain previously announced and implemented status changes:

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|  We previously communicated to you that [you will be reclassified as non-exempt and will be paid hourly and entitled to overtime for all hours worked over 40 in a workweek. or you will be classified as non-exempt and paid on a salary basis, and entitled to overtime for all hours worked over 40 in a workweek. or [your salary will be increased to meet the new minimum salary threshold for exemption under the FLSA’s new white collar exemptions that were expected to take effect on December 1, 2016.]  On November 22, 2016, the rule changing the white collar exemptions was temporarily enjoined, and the changes will not be taking effect on December 1, 2016. Nevertheless, we have made the decision to continue with our previously communicated changes. As such, [you will continue to maintain your salary increase and be classified as exempt] or [you will continue to be considered non-exempt and paid on a salary basis, and entitled to overtime for all hours worked over 40 in a workweek] or [you will consider to be classified as non-exempt and paid on an hourly basis, and entitled to overtime for all hours worked over 40 in a workweek].  |

## Sample communication for retracting an announced and implemented change and now taking a “wait and see” approach:

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| We previously communicated to you that [you will be reclassified as non-exempt and will be paid hourly and entitled to overtime for all hours worked over 40 in a workweek. or you will be classified as non-exempt and paid on a salary basis, and entitled to overtime for all hours worked over 40 in a workweek. or [your salary will be increased to meet the new minimum salary threshold for exemption under the FLSA’s new white collar exemptions that were expected to take effect on December 1, 2016.]On November 22, 2016, the rule changing the white collar exemptions was temporarily enjoined by court order, and the rule changes will not be taking effect on December 1, 2016.  In light of this development, [we are reducing your salary back to the amount that was in effect on [date]] or [converting your status back to overtime exempt status. **O*ptional:*** *You should however track your time by [insert time tracking method]* This change will be effective on [date].We will provide you with plenty of notice if and when [a reclassification back to overtime exempt status takes place] or [a salary increase takes effect] in the future.  |

Employer Group 2: Employers Who Have Communicated Changes, but did not implement Changes
 **Scenario 1. You have communicated a salary increase.**  If you have communicated employees will receive increased salary to comply with the new salary level then you can choose to proceed with the increase and communicate that decision accordingly. If the increase is going to be rescinded and you are now taking a "wait and see" approach then consider employee relations issues which will still be present even if the increase is yet to be implemented. Review the other considerations under the “[Employers who have Already made Changes](#madechangs)” section.  **Scenario 2. You have communicated a reclassification from exempt to non-exempt based on salary level.** If you have communicated to employees that they will be reclassified as non-exempt because the salary level was notmet then as discussed in the “[Employers who have Already made Changes](#madechangs)” section the employee’s reaction to the communication will likely dictate the decision to maintain non-exempt status or revert back to exempt status and take a "wait and see" approach.

**Scenario 3. You have communicated a reclassification from exempt to non-exempt based strictly on a duties test analysis.** If you have already communicated the decision to reclassify that was based on concerns with meeting the job duties test for exempt status then as discussed in the “[Employers who have Already made Changes](#madechangs)” section it makes sense to proceed with the reclassification but consult with your legal counsel before doing so.

## Sample communication for retracting an announced change and taking a “wait and see” approach:

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| We previously communicated to you that [you will be reclassified as non-exempt and will be paid hourly and entitled to overtime for all hours worked over 40 in a workweek. or you will be classified as non-exempt and paid on a salary basis, and entitled to overtime for all hours worked over 40 in a workweek. or [your salary will be increased to meet the new minimum salary threshold for exemption under the FLSA’s new white collar exemptions that were expected to take effect on December 1, 2016.]On November 22, 2016, the rule changing the white collar exemptions was temporarily enjoined by court order, and the changes will not be taking effect on December 1, 2016.  In light of this development, we will be postponing the [date on which your reclassification will take effect] or [date on which your salary increase will take effect.] [***Optional:*** *You should track your time by [insert time tracking method].*  This change will be effective on [date]. We will provide you with plenty of notice if and when [a reclassification takes place] or [a salary increase takes effect]. Until then, there will be no change to the amount or method of how you are paid, or to your classification. You will continue to be treated as exempt from overtime eligibility. |

## Sample communication for employers who will maintain previously announced status changes:

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|  We previously communicated to you that [you will be reclassified as non-exempt and will be paid hourly and entitled to overtime for all hours worked over 40 in a workweek. or you will be classified as non-exempt and paid on a salary basis, and entitled to overtime for all hours worked over 40 in a workweek. or [your salary will be increased to meet the new minimum salary threshold for exemption under the FLSA’s new white collar exemptions that were expected to take effect on December 1, 2016.]  On November 22, 2016, the rule changing the white collar exemptions was temporarily enjoined, and the changes will not be taking effect on December 1, 2016. Nevertheless, we have made the decision to continue with our previously communicated changes. As such, [you will continue to maintain your salary increase and be classified as exempt] or [you will continue to be considered non-exempt and paid on a salary basis, and entitled to overtime for all hours worked over 40 in a workweek] or [you will continue to be classified as non-exempt and paid on an hourly basis, and entitled to overtime for all hours worked over 40 in a workweek].  |

Employer Group 3. Employers Who Have not Communicated or Implemented Changes, but were planning to make Changes
 **Scenario 1. You were planning to increase pay, but have taken no action yet.** If you were planning to increase pay to comply with the new salary level then you can choose to proceed with the increase and communicate that decision accordingly. If you are no longer planning to make changes then you may wish to consider communicating that to employees as well understanding that there is a risk that the injunction could be lifted in the future and understand the employee relations impact of your decision. While you may not have communicated the changes, the new regulations have received media attention. Therefore employees may have been anticipating an increase in salary.
 **Scenario 2. You were planning to reclassify employees from exempt to non-exempt based on the salary level requirement.** If you were planning to reclassify employees as non-exempt because the salary level was not met then you should consider being consistent with the way you will be handling those employees you were planning to reclassify employees based on concerns with meeting the job duties test for exempt status.\*

**Scenario 3. You were planning to reclassify employees from exempt to non-exempt based strictly on the duties text analysis.** If you planning to reclassify employees based on concerns with meeting the job duties test for exempt status then it makes sense to proceed with the reclassification on the premise that injunction might be lifted in the future but consult with your legal counsel before doing so.\*

**\*** It may make sense to consider which employee group/scenario is larger. If for example you believe that the larger employee group is the group that is misclassified based on concerns with the duties test then it may make sense to continue with the reclassification of this group and the reclassification of those employees you were planning to convert to non-exempt status because the salary level was not met and tie the messaging to the Final Rule. You should discuss this strategy with your legal counsel.

Sample communication for employers who will now announce and proceed with changes notwithstanding the injunction.

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|  As you may have heard, the US Department of Labor (DOL) published regulations changing the tests for exemption from the minimum wage and overtime protections provided by federal law, impacting Professional, Administrative, Executive, and Computer Professional employees. Under the new regulations, employers needed to re-evaluate their exempt workforce to determine who would continue to maintain exemption, and who would be reclassified as non-exempt. These regulations were scheduled to take effect on December 1, 2016.On November 22, 2016, the regulations above were temporarily enjoined by court order, meaning they were blocked from taking effect, and the rule changes will not be taking effect on December 1, 2016.  Nevertheless, we have made the decision to implement certain changes. Specifically, we have decided to [increase your salary to [amount]] or [reclassify your position as hourly non-exempt and you will entitled to overtime for all hours worked over 40 in a workweek or reclassify your position as salaried non-exempt and you will entitled to overtime for all hours worked over 40 in a workweek.You should track your time track your time by [insert time tracking method]. This change will be effective on [date]. |

## Sample communication for employers who will now announce that they are not making changes due to the injunction:

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| As you may have heard, the US Department of Labor (DOL) published regulations changing the tests for exemption from the minimum wage and overtime protections provided by federal law, impacting Professional, Administrative, Executive, and Computer Professional employees. Under the new regulations, employers needed to re-evaluate their exempt workforce to determine who would continue to maintain exemption, and who would be reclassified as non-exempt. These regulations were scheduled to take effect on December 1, 2016.On November 22, 2016, the regulations above were temporarily enjoined by court order, meaning they were blocked from taking effect, and the regulations will not be taking effect on December 1, 2016.  Therefore, there will be no change to the amount or method of how you are paid, or to your exempt classification. [***Optional:*** *You should however track your time by [insert time tracking method].* You will continue to be treated as exempt from overtime eligibility. We will provide you with plenty of notice if and when a change occurs in the future. |

State Law Considerations

## States with Higher Salary Levels for Exempt Employees than the current Federal Level ($455/week).

In addition to the above considerations, how your business reacts to the rule may depend on the state(s) in which your employees work. Several states, including for example New York and California, already have their own laws that require a higher minimum salary than the current federal minimum for certain exempt employees.

For example, the New York State Department of Labor has [proposed amendments](https://labor.ny.gov/legal/laws/pdf/minimum-wage/19-amended-rule.pdf) that would raise the salary threshold for exempt executive and administrative employees to between $727.50 (outside of New York City and Westchester, Nassau and Suffolk Counties) and $825.00 (New York City) per week, effective December 31, 2016, with annual increases thereafter. (New York has no salary minimum for professional employees.).

In California the salary basis test is based on a multiple of two time the state minimum wage that is [scheduled to increase $15.00 over time](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB3) beginning January 1, 2017 based on the size of the employer (it is unclear if the size is determined with reference to employees employed only in CA and therefore we recommend assuming a national count).

It is possible that other states will seek to implement increases to the minimum salaries for exemption, especially if the new federal rule is permanently enjoined. Employers are required to comply with state laws to the extent they provide greater protections to employees than those under the FLSA.

## State Pay Change Notification Laws

Some states require employers to provide advance notice about pay changes. For example, Missouri generally requires at least 30 days' notice before a reduction in pay. Generally, California requires written notice of any pay change within seven days. Nevada, New York, and South Carolina require written notice seven days before a reduction in pay. Other states have different timelines, including notice at least one pay period in advance. As such, if you intend to make prospective pay changes, whether to implement changes for the first time, or to retract changes already implemented, you should be sure to check your state and local law to ensure compliance with any wage change notification laws.

In the absence of a specific notice requirement, provide written notice as soon as possible. You can use the sample communications provided above as a starting point and as applicable to your factual scenario.

Contact your Human Resources Business Partner for more information.

On Demand Webcast from Jackson Lewis, P.C.

Jackson Lewis attorneys Paul DeCamp, Former Administrator of the United States Department of Labor Wage & Hour Division; Jeffrey Brecher, Chair of the Jackson Lewis Wage & Hour Practice Group; and Eric Magnus, a senior Wage & Hour litigator have made available a complimentary on demand webcast.

**Topics include**:  Should employers who already communicated reclassification decisions rescind those communications? Halt plans and communications that have not been made? Could the decision be reversed? How does the Trump Administration impact the Final Rule? What about State law?  [Click here to register and access](http://www.jacksonlewis.com/event/texas-judge-issues-preliminary-injunction-blocking-dol-s-overtime-regulation-now-what).