

September Surprise? Two Federal Lawsuits Attack the Validity of the New FLSA Overtime Rule

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By [Maria Greco Danaher](#)

The effective date for the revisions to the U.S. Department of Labor (DOL) overtime regulations is less than 80 days away, and employers continue to struggle with the challenges created by changes to the existing rule. On September 20, 2016, two disparate groups filed two federal court lawsuits, both attempting to put off or halt the implementation of the revisions.

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Declaratory Judgment Action Filed by 21 States

First, a group of 21 states, led by Nevada and Texas through their attorneys general, filed a “Complaint for Declaratory and Injunctive Relief” in federal court in the Eastern District of Texas at Case No. 1:16-cv-00732. The complaint, filed against the DOL, its wage-and-hour division, Secretary of Labor Thomas Perez, Administrator of the Wage and Hour Division David Weil, and the Wage and Hour Division’s Assistant Administrator for Policy Mary Zeigler challenges the revised regulations on three bases, alleging that:

The DOL “disregarded the actual requirements” of the Fair Labor Standards Act (FLSA) and instead simply increased the minimum salary threshold.

The final rule’s automatic indexing mechanism (which automatically increases the threshold salary every three years) evades statutory language requiring notice and comment before such changes.

The new rule exceeds constitutional authorization by effectively “impos[ing] the Federal Executive’s policy wishes on State and local governments.”

According to the lawsuit, the new rule could force state and local governments, as well as private businesses, to substantially increase their employment costs and cut services or lay off employees, and asks the U.S. District Court for the Eastern District of Texas to declare that the “new overtime rules and regulations” are unlawful because they exceed statutory rights, were enacted “without observance of procedure required by law,” are arbitrary and capricious, and are unlawful as applied to the states and their employees.

While the lawsuit asks for this declaratory relief, it also goes further and asks for a “permanent injunction preventing the Defendants from implementing, applying, or enforcing the new overtime rules and regulations.” However, the potential impact that the lawsuit may have on private employers is unclear. The arguments made in the complaint focus primarily on states’ rights, and there are no private employers named as plaintiffs in the lawsuit.

Business Groups Jump into the Fray

Within hours, a similarly focused lawsuit was filed in the same federal court, this time by a coalition of over 50 business groups, including the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, National Automobile Dealers Association, and the National Federation of Independent Business. That action is brought under the Administrative Procedure Act (APA) and alleges that:

The new Overtime Rule defies the mandate of Congress to exempt executive, administrative, professional, and computer employees from the overtime requirements of the FLSA. The Rule raises the minimum salary threshold so high, that the new salary threshold is no longer a plausible proxy for the categories exempted by Congress. As a result, the exemption is effectively lost for entire categories of salaried executive, administrative, professional, and computer employees whose job duties qualify them to be treated as exempt.

The complaint spells out in detail the effect of the new rule on businesses:

The costs of compliance will force many smaller employers and non-profits operating on fixed budgets to cut critical programming, staffing, and services to the public. Many employers will lose the ability to effectively and flexibly manage their workforces upon losing the exemption for frontline executives, administrators and professionals. Millions of employees across the country will have to be reclassified from salaried to hourly workers, resulting in restrictions on their work hours that will deny them opportunities for advancement and hinder performance of their jobs—to the detriment of their employers, their customers, and their own careers.

This lawsuit specifically asks the court to “vacate” the overtime rule; but importantly, it asks the court to “postpone the effective date of the Overtime Rule and to maintain the status quo pending the Court’s review of this case.”

The DOL's response

Secretary Perez issued a statement in response to what he labeled as “partisan” lawsuits, expressing his confidence in the legality of the final rule which, as he stated, was the result of “a comprehensive, inclusive rule-making process.” He criticized the “obstructionist tactics” and said that he will “look forward to vigorously defending our efforts to give more hardworking people a meaningful chance to get by.” The full news statement can be found on [the DOL's website](#).

Now what?

While it is impossible to determine what the federal courts will do with these parallel cases, the choices are fairly black-and-white. The DOL can immediately assert either a vigorous defense and justification to convince these courts not to postpone or enjoin the implementation of the rule—which will lead to prolonged disruptive and expensive litigation, all the while leaving employers in complete confusion about the validity of the December 1 implementation date. Alternatively, it can work with these two groups of plaintiffs to come to a negotiated standstill agreement and postponement of the December 1 kick off to a later date, allowing the substantive issues to be heard and decided by the court in the interim.

Of course, either of those paths creates difficulties for various employer groups. While many employers have not taken the final steps toward reclassification or resetting wages of employees affected by the new rule, many employers already have done so and now are faced with the question of whether to inform their employees that the promised higher wages or re-evaluated job duties will be delivered or delayed.

We'll be following developments in these cases closely, and will continue to provide details as they become available.

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