

# WORKING TOWARD A CONSENSUS

Be prepared to bring yourself into compliance with new DOL rules

By **JEFFREY H. RUZAL AND ADRIANA S. KOSOVYCH**

Owners/operators and practitioners in the hospitality industry who have kept up with the ongoing litigation surrounding the Department of Labor's Final Overtime Rule—which would have more than doubled the minimum salary threshold for the executive, administrative, and professional (“EAP”) exemptions—now have a new development to consider. On August 30, 2017, the Judge Amos Mazzant of the Eastern District of Texas issued a Decision and Order in which it granted summary judgment in favor of the plaintiffs, a coalition of 21 states and a number of business advocacy groups who had challenged the Final Overtime Rule, and ruled that the DOL exceeded its rulemaking authority in issuing the salary level-centric Final Overtime Rule.

By way of background, Section 13(a) of the Fair Labor Standards Act exempts from the minimum wage and overtime pay requirements of the Fair Labor Standards Act “any employee employed in a bona fide executive, administrative, or professional capacity” who are paid a salary (as opposed to an hourly wage) of a specified salary level and satisfy a duties

test that is tailored to the specific exemption. The Final Overtime Rule would have increased the minimum salary threshold for the EAP exemptions from \$23,660 per year (\$455 per week) to \$47,476 per year (\$913 per week), beginning December 1, 2016—changing an estimated 4.2 million salaried white collar workers from exempt to non-exempt status, absent some intervening action by their employers. The Final Overtime Rule also would have allowed non-discretionary bonuses,

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incentive payments, and commissions to satisfy up to 10 percent of the new standard salary level.

Judge Mazzant in the Eastern District of Texas had previously issued a nationwide preliminary injunction blocking enforcement of the Final Overtime Rule, which the DOL has appealed to the U.S. Court of Appeals for the Fifth Circuit. After a change in the administration, including the appointment of Secretary of Labor Alexander Acosta, and a number of extensions granted to the DOL for its consideration of how to proceed with the appeal, the DOL effectively abandoned the salary level test promulgated in the Final Overtime Rule. Instead, the DOL requested in its July 30, 2017 reply brief that the Fifth Circuit address only the threshold legal question of the DOL's authority to set a salary level, without addressing the specific salary level set by the Final Overtime Rule.

In the August 30 Decision and Order striking down the Final Overtime Rule, Judge Mazzant squarely held that the salary level the DOL selected conflicts with the FLSA. Focusing on the substance of the Final Overtime Rule, the Court determined that the statutory language in Section

13(a)(1) of the FLSA establishing the exemptions plainly indicates Congress's intent for employees performing “bona fide executive, administrative, or professional” duties to be exempt from overtime pay. The Court held that because the salary level test in the Final Overtime Rule effectively eliminated the duties test as prescribed by the statute and would categorically exclude certain employees performing in a “bona fide executive or professional capacity” based on salary level alone, the DOL exceeded its authority in promulgating the salary-level test in the Final Overtime Rule. Judge Mazzant's decision







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clarified, however, that while the salary level in the Final Overtime Rule was unlawful, the DOL has the authority to implement a salary-level test, and his ruling undertook no assessment of the general lawfulness of the salary-level test or the DOL's authority to implement such a test.

As a result of Judge Mazzant's ruling, the appeal pending before the Fifth Circuit—which is currently scheduled for oral argument on October 3, 2017—may now be moot. After abandoning its defense of the salary level in its reply brief on appeal, the DOL issued a Request for Information seeking input from the public on the

salary level test in order to aid in its effort to formulate a new proposal to further revise the regulations governing the EAP exemptions. While it is difficult to predict what the DOL will ultimately do, the DOL will likely propose alternative modifications to the EAP exemptions, which could still include an increase to the salary level. Any increase would likely not be as dramatic as the one initially proposed. Secretary of Labor Acosta has expressed opinions that suggest he would support updating the overtime rule to some degree, possibly increasing the salary threshold to mirror inflation, to

approximately \$33,000 per year.

Owners/operators should continue to look for updates on the DOL's actions with respect to the EAP exemptions and salary-level test, and take steps to be prepared to bring themselves into compliance with whatever new rule the DOL issues. **ht**

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