



# This is What You Need to Do in the Wake of the Overtime Injunction

Even if the rule does not go forward, taking the time to review duties and employment status at your company can still benefit you.



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In a surprising turn of events, U.S. District Judge Amos Mazzant, in Sherman, Texas, blocked the new overtime rule just a few days before it was meant to go into effect. The Fair Labor Standards Act rule, which had been scheduled to take effect December 1, would have doubled to \$47,500 the maximum salary a worker can earn and still be eligible for mandatory overtime pay.

While many employers are rejoicing, others are left with questions.

The new regulation itself was confusing, and the injunction has only muddled the waters. Is the rule permanently off the table? What does the block mean for employers and employees? What happens now?

To clear up these questions, I wanted to know how the injunction would impact the employers and how they should respond. So, I consulted several attorneys expert in labor law and an expert in human resource management. Here's what they had to say:

## The future of the rule

While some of these sources said they were hopeful the injunction would put an end to the rule altogether, it's not dead yet.

The Department of Labor can still appeal the injunction to the Fifth U.S. Circuit Court of Appeals, and in that case, the court would decide whether the block would become a permanent one or not. But given the federal judge's decision on the preliminary injunction, there's a pretty good chance that the court that issued the temporary injunction will grant a permanent one, said Ryan A. Glasgow, a partner in the Richmond, Virginia, office of Hunton & Williams LLP.

In addition, as the case continues to be reviewed, the final decision could end up in the hands of the new presidential administration.

"I think it's safe to say that this process, along with any ensuing appeals, will almost certainly be ongoing on January 20, 2017," said Glasgow. "Which means that President-elect Donald Trump and his newly-appointed secretary of labor may have the final say as to whether the Department of Labor will continue to defend the final rule and whether the final rule will be withdrawn or revised."

**Takeaway:** The injunction to the overtime rule isn't permanent -- yet. Its future is still up in the air, and it may take years for the federal courts or the administration to make a final decision.

## How to prepare

Although the injunction went into effect in November, just four days before the overtime rule's launch date, a majority of employers weren't prepared.

In fact, a survey of more than 1,200 U.S. working adults conducted by YouGov and Canvas in October found that only 17 percent confirmed that their employers had informed them of the pending rule. Worse, 54 percent were completely oblivious to the new regulations.

Those unprepared employers may be breathing a sigh of relief at the injunction, but is it too soon to relax? Should employers still take steps to comply with the overtime rule?

"It's very hard to say whether a company that has not implemented the new rules should prepare to do so at some point," said Scott McLaughlin, a labor and employment lawyer based in the Houston, Texas, office of Jackson Walker LLP.

According to McLaughlin, a Republican-controlled government in 2017 could lead to a permanent injunction, but there's always a chance that the rule could still be revised and implemented. And if the rule is eventually implemented, that could spell disaster for unprepared employers. In fact, there's a chance the regulation could be enforced retroactively to December 1, 2016.

**"There is a split between courts in Ohio and New York as to whether companies will be liable for failure to comply while the injunction was in place," said Michael Kantor, an associate with Weiss Serota Helfman Cole & Bierman, in Fort Lauderdale, Florida.**

In other words, no matter when the regulation is eventually enforced, employers may be held responsible for paying overtime to nonexempt employees under the rule starting December 1, 2016 -- as if the injunction had never happened.

What makes that difficult is the tracking issue: 39 percent of U.S. salaried employees surveyed by Kronos in May said they were not required to track and report their time. What's worse, among those employed by organizations that do not require the tracking and reporting of hours worked, 77 percent stated that they had put in work time outside of formal work hours.

That means if the overtime rule is enforced retroactively, these employers will be faced with a huge problem.

**Takeaway:** While the fate of the overtime rule is still unknown, preparation is still key. Time-tracking is the simplest way to be prepared without disrupting employees and dedicating unnecessary resources. Digital tools like TimeClockWizard make it easy for employees to track their work hours each day.

## For employers who have already made changes

Not all employers were unprepared for the rule to be enforced. Many did their due diligence to raise employee salaries above the new threshold or to change the status of exempt employees earning a salary below the new threshold for "nonexempt." What should these employers do in the wake of the injunction?

"If you have already implemented the rule, consider leaving your decisions in place," said Elissa O'Brien, vice president of membership at the Society for Human Resource Management in Washington, D.C. "Each workplace is unique, and employers must consider which approach causes the least disruption for their workplaces."

O'Brien explained that if an employer has already raised exempt employees' salaries to meet the proposed threshold, they should keep those salary raises in place. Glasgow agreed. Employees won't take reductions in pay well, and the increases could help to attract new talent.

But employers need to consider those employees who were moved to non-exempt status, as well.

"Assuming there are no concerns on the duties front, employers should be able to move those employees back to exempt status without a lot of pushback," Glasgow says. "Most, but not all, employees prefer to be exempt anyways."

After all, the Kronos survey found that many employees prefer to work off-the-clock hours -- 63 percent of respondents said they would work outside of work hours even if that move were against company policy.

**Takeaway:** While the decision to reverse any changes made in preparation to the new overtime regulation should be made with the individual culture and employees in mind, it's best to uphold any salary raises. As for employees who were moved to non-exempt status, talk with them to learn if they would rather have the freedom to work off the clock.

## The impact of the injunction

Overall, most employers have viewed the injunction as a positive: They can avoid making major changes in their organizations; and those who were unprepared feel that they're off the hook.

But the block to the rule has business owners like Ellen Hanson, chief operations officer of Walker Sands Communications in Chicago, Ill., feeling that they wasted time and resources. "It's a punch in the gut," Hanson said. "We worked hard to prepare for a new law, and it consumed many cycles that might have been better focused elsewhere."

It's also not just employers Hanson is concerned about -- she said she fears the impact the injunction will have on the economy, as well.

"As a business owner, I was also expecting a bump in the economy from this due to the additional spendable income millions of workers would have," she says. "Now, I'm a bit more concerned about economic growth than I might have been had the regulations gone live as planned."

Despite these concerns, there is a silver lining for employers who spent time and energy preparing for the rule, said Carolyn Richmond, partner at Fox Rothschild LLP in New York City and co-chair of the firm's Labor and Employment department.

"Many employers took this as an opportunity to review whether or not their exempt employees actually met the primary duties requirement," Richmond said. "It is evident that the duties test remains difficult for many employers to implement and understand. Now is as good a time as any to still ensure compliance with the duties test -- regardless of whether the salary level has to rise, too."

**Takeaway:** While the injunction may feel like a waste of time and resources to employers who did prepare, taking the time to review duties and employment status can still have positive impacts throughout the organization, whether the overtime rule is enforced or not.

