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New Overtime Rule: What It Means for the Media Industry and the Industry's Response

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Update: On November 22, 2016, U.S. District Judge Amos Mazzant issued a preliminary injunction in Nevada et al. v. U.S. Dep't. of Labor et al., Civil Action No. 4:16-CV-00731, 2016 WL 6879615, in the U.S. District Court for the Eastern District of Texas, blocking the DOL overtime regulation from taking effect on December 1, 2016. Judge Mazzant found that the plaintiffs showed a likelihood of irreparable harm and success on the merits on their claim that the DOL exceeded its authority in establishing the new salary threshold and the automatic updating mechanism. The preliminary injunction will preserve the status quo while the parties await a final decision on the rule's validity. The ruling is [available here](#).

The Department of Labor's (DOL) Final Rule on overtime is set to take effect December 1, 2016, and could qualify many more journalists, photographers, and other creative professionals for overtime pay under the Fair Labor Standards Act (FLSA).¹ The FLSA requires employers to pay employees at least the minimum wage plus overtime pay (time-and-a-half) for every hour worked over 40 in a given week.²

However, there are many exemptions to these requirements, including one for an individual employed in a "creative professional" capacity.³ A creative professional is exempt from the FLSA's minimum wage and overtime requirements so long as he or she (1) earns at least \$455 per week; and (2) has a primary duty of performing work that requires "invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor."⁴ This salary basis, however, is about to increase dramatically. Under the DOL's Final Rule, the minimum salary basis for exempt employees will more than double, pulling many more professionals—those

who earn less than \$913 per week (or \$47,476 per year)—into the nonexempt category and qualifying them for mandatory overtime pay.⁵

Who is a creative professional?

A creative professional is an employee who uses invention, imagination, originality, or talent in his or her daily work. Courts determine whether this exemption applies on a case-by-case basis.⁶ But it is generally safe to say that actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, and novelists are creative professionals.⁷ Music, writing, and the graphic arts are the typical fields of artistic endeavor.⁸ The classification gets trickier when it comes to journalists and reporters.

¹ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (proposed July 6, 2015) (to be codified at 29 C.F.R. pt. 541), [available here](#).

² 29 U.S.C. §§ 206, 207(a)(1)–(2).

³ 29 C.F.R. §§ 541.300(a)(2)(ii), 541.302.

⁴ 29 C.F.R. § 541.302.

⁵ Final Rule, 81 Fed. Reg. 32391, 32405.

⁶ 29 C.F.R. § 541.302(c).

⁷ *Id.*

⁸ 29 C.F.R. § 541.302(b).

The crux of this determination is whether the employee’s “primary duty” is “the performance of work requiring invention, imagination, originality, or talent, as opposed to routine mental, manual, mechanical, or physical work.”⁹ If the work could be reproduced by a person with general manual or intellectual ability or training, the exemption will not apply.¹⁰ For example, a painter who is given only the subject matter of her painting and must use her creative ability to create a final product might be classified as an exempt creative professional.¹¹ On the other hand, the duties of copyists, animators, and photo retouchers probably do not require enough creativity to be exempt.¹²

There are no hard-and-fast rules about which jobs should be classified as exempt creative professionals. However, courts have provided enough guidance to give newspapers, periodicals, and broadcasters a good idea of which journalists and reporters may be classified as exempt. The following principles may also be helpful when looking at other categories of media employees.

- **Collecting and regurgitating facts is not exempt creative work**—Employees of newspapers, magazines, television stations, and other media are generally not exempt if they merely “collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.”¹³ Thus, a newspaper reporter who rewrites press releases or standard recounts of public information by gathering facts on routine events is not exempt.¹⁴ However, a journalist who conducts investigative interviews, analyzes public events, writes editorials or other commentary, or performs on air in radio, television, or other electronic media will likely be exempt.¹⁵
- **Complexity matters**—Newspaper reporters who write about simple and straightforward issues that do not require much analysis are generally not exempt.¹⁶ “This work does not require any special imagination or skill at making a complicated thing seem simple, or at developing an entirely fresh angle on a complicated topic.”¹⁷ On the other hand, a reporter who must spot trends, cover complex political issues, and present them in an artful manner is likely exempt.¹⁸ This work requires the reporter to “cultivate sources, utilize his imagination and other skills in seeking information, and continually develop his finely tuned interviewing skills,” and to “decide what facts need to be gathered, discover sources of information, decide what information to include and exclude, choose interesting and accurate language, decide on context to add, and organize facts in coherent and logical form.”¹⁹
- **Originating story ideas indicates invention and creativity**—For television news reporters and producers, the focus is on originality. A reporter who is assigned stories by a manager and follows a standard format is generally not exempt because his work depends primarily on intelligence, diligence,

⁹ 29 C.F.R. § 541.302(a).

¹⁰ *Id.*

¹¹ 29 C.F.R. § 541.302(c).

¹² *Id.*

¹³ 29 C.F.R. § 541.302(d).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 (3d Cir. 1994) (reporters whose bread and butter work consisted of writing up wedding announcements, school lunch menus, arrests from the police blotter, and other similarly straightforward pieces were not exempt).

¹⁷ *Id.* at 700.

¹⁸ *Sherwood v. Washington Post*, 871 F.Supp. 1471, 1478 (D. D.C. 1994) (reporter whose “task was to act as a ‘translator’ and make the political events in Richmond meaningful to persons living in and around Washington” was properly classified as exempt).

¹⁹ *Id.* at 1473.

and accuracy rather than creativity.²⁰ But a news writer for a national nightly news program who coordinates coverage of news and writes headlines, teasers, transitions, voice-overs, and stories must use invention and originality in his work and is generally exempt.²¹ Similarly, a producer who generates story ideas and then develops, shoots, writes, and edits news stories must use creativity and talent and would likely also qualify as a creative professional.²²

Of course, many journalists perform both exempt and nonexempt work. In such a case, classification turns on the “primary duty” of the journalist—“the principal, main, major, or most important duty that the employee performs.”²³ The primary duty is “what the employee does that is of principal value to the employer, not the collateral tasks that the employee may also perform.”²⁴ Although the primary duty “is often the task that occupies the majority of the employee’s time, it is not always so.”²⁵ A court decides the primary duty of an employee based on the facts in the case and looking at the job as a whole.²⁶ Factors to consider include: the relative importance of the exempt duties as compared to other types of duties; amount of time spent on exempt duties; employee’s relative freedom from direct supervision; and relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.²⁷

This overtime regulation has attracted significant attention because so many currently exempt employees will soon fail to meet the new salary threshold required to be considered exempt. In addition to creative professionals, currently exempt white collar learned professional, executive, administrative, computer, outside sales, and highly compensated employees will also be affected by the changes.²⁸

Media groups object

Recognizing the considerable impact the Final Rule will have on employers, state officials and business groups, including the National Association of Broadcasters (NAB), the National Newspaper Association (NNA), and the Texas Association of Broadcasters (TAB) object to the new rule and hope to stop it from taking effect on December 1st.²⁹ TAB acknowledges that an increase to the salary threshold is needed, but argues that the DOL’s proposed increase is too drastic, does not account for changing economic conditions, and will disproportionately impact certain industries and geographic areas.³⁰ NAB, NNA, and TAB support legislation authored by Senator Lamar Alexander (R-Tennessee), which would implement a more moderate increase of the

²⁰ *Dalheim v. KDFW-TV*, 706 F.Supp. 493, 505 (N.D. Tex. 1988) (reporters who used a standard format in setting out competing viewpoints on each story were not exempt because their work was “not predominantly original and creative because they do not produce analytical, interpretive, or highly individualized reporting.”).

²¹ *Freeman v. Nat’l Broadcasting Co., Inc.*, 80 F.3d 78, 81 (2d Cir. 1996).

²² *Id.*

²³ 29 C.F.R. § 541.700(a).

²⁴ *Truex v. Hearst Communications, Inc.*, 96 F.Supp.2d 652, 657 (S.D. Tex. 2000).

²⁵ *Id.*

²⁶ 29 C.F.R. § 541.700(a).

²⁷ *Id.*

²⁸ 29 C.F.R. §§ 541.100, 541.200, 541.300, 541.400, 541.500.

²⁹ Officials from 21 states have sued the DOL over this rule, hoping to block the regulation from taking effect. The case is styled *Nevada et al. v. U.S. Dep’t. of Labor et al.*, Case No. 1:16-CV-00407, in the U.S. District Court for the Eastern District of Texas. In a separate lawsuit, over 50 business groups have also challenged the new rule. That case is styled *Plano Chamber of Commerce et al. v. Perez*, Case No. 4:16-cv-00732. For more information and a list of the states that have joined in the lawsuit, see [States and Business Groups Sue U.S. Department of Labor Seeking to Block New Overtime Rule](#), THE NAT’L LAW REVIEW (Sept. 23, 2016).

³⁰ TEXAS ASS’N OF BROADCASTERS, [TAB Joins Effort to Fight New Overtime Rules](#) (Oct. 18, 2016).

salary threshold—to \$692 per week (\$36,000 per year)—and exempt certain organizations, including non-profits and universities, from future increases.³¹

States and business groups are not the only ones concerned with the Final Rule's potential impact. In September, the House of Representatives passed H.R. 6094, the Regulatory Relief for Small Businesses, Schools, and Nonprofits Act, which would postpone the effective date of the Final Rule until June 1, 2017.³² The legislation has been introduced in the Senate, but no action has been taken yet.³³ The Executive Office of the President has already made clear that if presented with H.R. 6094, President Obama will veto the bill.³⁴

Next steps

Whether these efforts to postpone or mitigate the effects of the Final Rule succeed, employers must begin to prepare for a higher salary threshold before December 1st. Employers should audit their classification of employees and overtime policies, reclassify employees as necessary, and determine who may soon be entitled to overtime.

The DOL has provided a range of options for employers with employees affected by the new rule. For each affected employee newly entitled to overtime pay, employers may:

- increase the salary of an employee who meets the duties test to the new salary level to retain exempt status
- pay overtime rate for any overtime hours worked
- reduce or eliminate overtime hours
- reduce the amount of pay allocated to base salary and add pay to account for overtime hours, to hold total weekly pay constant; or
- use some combination of these options.

Additional information regarding the Final Rule may be found at the [Department of Labor's Wage and Hour Division website](#).

³¹ *Id.* The text of Senator Alexander's proposed legislation is [available here](#).

³² H.R. 6094, 114th Cong. (2016), [available here](#).

³³ S. 3464, 114th Cong. (2016), [available here](#).

³⁴ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 6094—REGULATORY RELIEF FOR SMALL BUSINESSES, SCHOOLS, AND NONPROFITS ACT (2016), [available here](#).