

Legal-Ease – May 2017 - Updates on Recent Legislation
SHRM Lehigh Valley Legislative Committee

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NEW DEVELOPMENTS IN OVERTIME

Working Families Flexibility Act

On May 2, 2017, the House of Representative passed H.R. 1180, titled the Working Families Flexibility Act of 2017, a bill that, if it becomes law, would let employers in the private sector offer their employees the option of receiving overtime pay in the form of paid time off, or compensatory time, instead of cash wages. The bill would not change employers' obligation to pay non-exempt workers overtime at one and one-half times employees' regular rate for any hours worked over 40. This bill simply would give the flexibility allowed in the public sector to private sector businesses by allowing employers and employees the flexibility to use paid time off, at a rate of one and one-half hours for each hour of overtime worked.

Prior to paying employees in compensatory time, the bill would require that employees agree to accept compensatory time instead of monetary compensation. If either the employer or the employee does not agree to the substitution of compensatory time, then the overtime compensation would need to be in the form of monetary wages. The bill would provide anti-retaliation protections for employees who do not accept compensatory time.

Overtime Final Rule

As you may recall, the Department of Labor ("DOL") published a Final Rule that was set to more than double the salary threshold for white collar employees, taking the threshold from \$23,660 to \$47,476, as of December 1, 2016. On November 22, 2016, United States District Court of the Eastern District of Texas Judge Amos Mazzant issued a nationwide Emergency Preliminary Injunction temporarily stopping the DOL from implementing and enforcing the Final Rule. This decision did not, however, remove the Final Rule from the books, meaning that employers were left in a state of limbo.

On December 1, 2016, the DOL appealed the Texas District Court's decision to the Fifth Circuit Court of Appeals, which is the highest court of appeal, second only to the United States Supreme Court, for federal litigation in Texas. The DOL's appeal, even though placed on an expedited schedule, was not scheduled to be fully briefed until February 7, 2017.

On January 25, 2017, just days after President Trump took office, the DOL filed an unopposed motion for extension of time for the briefing schedule "to allow incoming leadership personnel adequate time to consider the issues". On February 22, 2017, the Fifth Circuit Court

granted the request for an extension giving the DOL until May 1, 2017 to file its brief. A subsequent extension was granted, giving the DOL until June 30, 2017 to file its brief.

Alexander Acosta's confirmation as Secretary of the DOL likely indicates the end of the Final Rule. While he is in favor of some level of increase to the overtime threshold, which was last updated in 2004, Acosta, during confirmation hearings, questioned the DOL's authority to set a salary threshold as high as \$47,476. Based on his opposition to the extent of the Overtime Final Rule's salary increase, Acosta will likely decide to take some action to repeal the Overtime Final Rule.

The DOL may decide to withdraw its Fifth Circuit Court appeal, bringing the case back down to the District Court, potentially resulting in a permanent injunction. While an injunction would stop the DOL from implementing and enforcing the Final Rule, the DOL would need to issue another final rule repealing the overtime Final Rule in order to remove the Final Rule from law.