

Wage and Hour Division Nominee Clears First Senate Hurdle (Barely), Proposed Salary Increase for Overtime-Exempt Employees Appears Likely

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Last week, Senator Rand Paul (R-Ky.) was absent from the meeting of the Health, Education, Labor and Pensions Committee – and that spelled good news for the Biden Administration’s nominee to head the Wage and Hour Division (WHD) of the Department of Labor, Dr. David Weil. The nomination of Dr. Weil, who previously held the same position under the Obama Administration, had been stuck in committee since the Summer of 2021, with previous votes resulting in ties along party lines. However, with Senator Paul’s absence, Weil squeaked by on an 11-10 vote. His nomination will now go to the full Senate for consideration.

Dr. Weil, who currently is a professor at Brandeis University, has faced considerable opposition from members of the Republican party and the business community, including the U.S. Chamber of Commerce, who believe, among other criticisms, that his views on the independent contractor analysis are antithetical to a successful “gig” economy. Perhaps most notably, Weil was at the helm of the WHD in 2016 when the DOL published a Final Rule that would have more than doubled the minimum salary to qualify for the Executive, Administrative, and Professional overtime exemptions (a.k.a. the “white collar” exemptions), from \$23,660 to \$47,476 per year. That Final Rule was struck down by a Texas federal judge shortly before going into effect and a new Final Rule was issued under the following administration, raising the minimum annual salary to a relatively more modest \$35,568, where it currently stands.

Regardless of whether Dr. Weil receives full Senate approval, it appears that the DOL will seek to increase the current minimum salary for exempt employees. As we previously reported, last summer Secretary of Labor Marty Walsh testified before the House Education and Labor Committee that the DOL is reviewing the current Overtime Final Rule and that he believes the current minimum salary level is “definitely too low.” [New Secretary of Labor Hints at Increased Minimum Salary for Overtime Exemptions](#). Consistent with that statement, in the DOL’s Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions, the Agency stated that the “WHD is reviewing the regulations at 29 C.F.R. § 541, which implement the exemption of bona fide executive, administrative, and professional employees from the Fair Labor Standards Act’s minimum wage and overtime requirements,” with a primary goal of the review to engage in rulemaking to update the salary level requirement. In its

Statement of Regulatory Priorities, the DOL added that “WHD will propose updates to the overtime regulations to ensure that middle class jobs pay middle class wages, extending important overtime pay protections to millions of workers and raising their pay.” The proposed increase may be issued as early as this Spring. It remains to be seen whether such a proposed increase would be of the magnitude that Dr. Weil and the Obama DOL published five years ago and, if so, whether it would face the same flurry of legal challenges.

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