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## Coates' Canons Blog: Post-Inauguration Update on the Affordable Care Act and the New FLSA Salary Threshold

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Two of the very first actions taken by President Trump after his January 20 inauguration involved issues of great concern to employers: the future of the Affordable Care Act (ACA) and the future of the new U.S. Department of Labor regulation raising the minimum salary required for an employee to be exempt from the overtime requirement of the Fair Labor Standards Act (FLSA). In his first Executive Order the President declared that it is the policy of his administration to seek prompt repeal of the ACA — although the Executive Order itself did not make any changes to the ACA statute or regulations. Later that same day, the President directed federal agency heads to postpone by 60 days the effective date of any new regulations scheduled to take effect — which means that the new FLSA minimum salary overtime regulation will certainly not take effect before March 21, even if the temporary injunction restraining their implementation is lifted. It may, of course, never take effect given the change in administrations in Washington.

### The Executive Order on the Affordable Care Act

President Trump's ACA Executive Order is entitled [\*Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal\*](#). In it, the President declares that it is his administration's policy to seek prompt repeal of the ACA and in the meantime to ensure that the ACA puts no undue economic or regulatory burdens on those affected by it. The President therefore orders the secretaries of all relevant federal agencies to grant waivers, deferments and exemptions from or delay implementation of all provisions of the ACA that would impose a fiscal burden on a state or a cost, fee, tax, penalty or regulatory burden on "individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications." (Noticeably absent from this list are employers, although one might argue that they are purchasers of health insurance and that where self-insured, they are health insurers.) The Executive Order also directs secretaries of the agencies to use whatever authority and discretion they have to provide greater flexibility to the states.

### What Does It Mean for Employers?

Not much. Aside from reiterating the President's campaign promise to repeal the ACA, the Executive Order does not repeal the statute or amend the ACA regulations. All the President has done for the moment is encourage the federal agencies who enforce the ACA to make exceptions where permitted by the statute and regulations. *The IRS cannot, for example, suspend the information reporting on Forms 1094 and 1095 that are required by the employer mandate provisions of the ACA. The IRS cannot suspend the penalties for failure to comply with the employer mandate.* For all practical purposes, the President's Executive Order makes no change for employers. They must continue to do what they have been doing for the past two years: tracking employee hours and eligibility for health insurance, offering health insurance, and filling out those aggravating forms!

Recent comments by officials in the new administration and by the Republican congressional majority suggest that there will be no repeal of the ACA until they have developed a replacement. Employers take note: you may be reporting at this time next year, as well. For assistance in complying with the employer mandate and with Form 1094 and 1095 reporting ( [now due March 2](#) ), you may want to consult my PDF publication, *A Guide to the Affordable Care Act for Local Government Employers*, available [here](#).

### The Regulatory Freeze and the New Overtime Regulation



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It is common for incoming presidents to order a temporary freeze on federal regulatory actions. This allows the new president and his appointees time to review those regulations that have not yet become final and to assess whether they wish those regulations to become final or to be revised or abandoned. To this end, President Trump has by [memorandum](#) directed the heads of federal agencies temporarily to postpone for 60 days the effective date of any regulation that have been published in the Federal Register in its final form but has not yet taken effect. The U.S. Department of Labor's new overtime rule, raising the minimum salary that an employee must earn to be exempt from premium overtime pay from \$455 per week to \$913 per week, falls into this category. To learn more about the new overtime rule, see [here](#) and [here](#).

The new minimum salary threshold was set to go into effect on December 1, 2016. But less than two weeks before that date, a federal judge in Texas issued a nationwide preliminary injunction prohibiting DOL from implementing and enforcing the new rule. The Obama DOL appealed the issuance of the injunction to the Fifth Circuit Court of Appeals, seeking to have the new salary threshold go into effect. The appeals court is expected to hear the appeal in early February (the deadline for the parties to submit their briefs to the court is January 31). But now even if DOL wins the appeal, the regulation will be subject to the regulatory freeze and cannot become effective before March 21.

Of course, it may never go into effect. Many expect the Trump DOL to abandon the appeal before the Fifth Circuit schedules a date for the hearing. For local government employers, the prudent course of action is – as with the ACA – to sit tight, observe the current law and regulations, and . . . wait.

## Links

- [www.whitehouse.gov/the-press-office/2017/01/20/executive-order-minimizing-economic-burden-patient-protection-and](http://www.whitehouse.gov/the-press-office/2017/01/20/executive-order-minimizing-economic-burden-patient-protection-and)
- [www.irs.gov/pub/irs-drop/n-16-70.pdf](http://www.irs.gov/pub/irs-drop/n-16-70.pdf)
- [www.sog.unc.edu/publications/books/pdf-download-item-guide-affordable-care-act-local-government-employers](http://www.sog.unc.edu/publications/books/pdf-download-item-guide-affordable-care-act-local-government-employers)
- [www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies](http://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies)