

# BUSINESS BRIEFS

Legal Developments Affecting Business



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Fourth Quarter 2016

## Did Christmas Come Early? Judge Blocks New Overtime Rule Days Before Implementation

By David Briggs & Randall Sutton

Once in a great while, procrastinators are rewarded. Thanks to a Texas U.S. District Court judge, procrastinators have cause to celebrate. This month, Judge Amos Mazzant issued a preliminary injunction halting a new U.S. Department of Labor (“DOL”) rule that would have required most salaried employees earning less than about \$47,500 per year to receive overtime. As the rule was set to go into effect on December 1, the injunction gives employers at least a temporary reprieve on the new obligations. You can read more about the proposed rule and requirements in our prior article, [When the Oasis Becomes a Mirage](#), by David Briggs, published at this time last year.

### Background on Exempt Status and the New Rule

As many readers of our updates know, all employees must be paid overtime unless they fall within an exemption to the overtime rules. The most common exemption is for white collar employees paid on a salary. In order to qualify for this exemption, the job must satisfy a three part test:

- 1) The employee is paid on a salary;

- 2) That salary cannot be less than the minimum set by the DOL; and
- 3) The position must perform certain exempt duties (managerial, professional, or administrative).

The new rule affected the second part of that test, more than doubling the minimum salary level from \$455/week to \$913/week. The DOL also set automatic escalators in the rule, requiring that the minimum salary level increase every three years. The new rule was predicted to affect over four million workers and cost business groups \$12 billion per year over the next decade.

### The Court's Ruling

Twenty-one states challenged whether the DOL could make such a large increase in the minimum salary level and also require an automatic escalation. In the ruling, Judge Mazzant found that the DOL exceeded its authority. Specifically, the judge said that “Congress defined the . . . exemption with regard to duties, which does not include a minimum salary level.” The ruling went on to say that the rule “creates essentially a de facto salary-only test” excluding employees who actually perform exempt duties. In other words,

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the judge found that until the DOL was granted permission by Congress, it could not raise the minimum salary level as high as it did. This decision challenges a longstanding assumption that the DOL can impose salary requirements as part of the determination of whether an employee is exempt.

### **What Does it Mean?**

The court's decision means that the old rules are still in effect. So, until further notice (and no guarantee on when that will be), the minimum salary level remains \$455/week to qualify for the salary exemption threshold.

For those employers that have waited on announcing that employees would either be reclassified as non-exempt or receive a raise in order to continue to qualify as exempt, you can continue waiting.

Employers that have been proactive and prepared for the new rule by announcing salary increases will likely want to keep those raises in place. While employers are not legally obligated to give employees the promised raise under the wage and hour laws, you don't need a lawyer to tell you that there may be some morale issues going into the holiday season if you reverse course now. If you decide to change an employee's promised raise, you should seek legal advice about whether you can at this point. You should also keep in mind that prior promises of a raise might become contractually binding to the extent that the employee relied on the raise to his or her detriment by not pursuing other job opportunities, making a big purchase or similar behavior.

For employers who planned on reclassifying employees to non-exempt status, the injunction means that employers are not required to reclassify under the wage and hour laws until the litigation plays out. However, you will want to keep abreast of these issues to ensure that you don't fall out of compliance in the future.

### **What Happens Now to the Rule?**

A preliminary injunction does not last forever. For now, the fate of the rule is in limbo. While the DOL feels confident that it can win on appeal, it would be appealing to the Fifth Circuit, which has not been friendly to this administration before.

We all also know that a new administration will be taking over in January and it could decide to drop any appeal filed. If the Trump administration does not pursue an appeal, we would predict that either the DOL (under the new administration) would reevaluate the rule or that Congress would step in to provide guidance or further delay implementation while the rule is reconsidered.

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### **Specifics about DCBS's new Private Construction Lending Exemption to the Licensing Requirements**

By Elayna Zammarelli

Private money lending permits individuals or closely-held companies to lend their own resources to others, whether for investment or some other purpose. Sometimes, the goal of private lending is to finance a contractor to construct residential homes. Many private money lenders, especially those with only a handful of loans outstanding, may believe that they are exempt from the many state and federal statutes, rules and regulations which govern more traditional lenders, such as banks, credit unions, and other financial institutions. However, the scope and reach of the statutes and regulations that govern the lending industry can be surprisingly broad, and often includes individual private lenders. Oregon's Department of Consumer and Business Services ("**DCBS**") recently enacted a new, clarifying rule that specifically permits private lending without the need for licensing for a certain category of construction loans. Prior to this change, legislation following the great recession dramatically reduced private construction lending. The new DCBS rule

provides a narrow and conditional exemption to the licensing requirements for “mortgage loan originators” who lend to general contractors or developers, even when the construction relates to residential real property. The regulation provides much-needed clarity to a complex scheme of lending regulations in Oregon.

The federal government adopted the Secure and Fair Enforcement for Mortgage Licensing (“SAFE”) Act in 2008 with the stated purpose of enhancing consumer protection and reducing fraud. The SAFE Act required all states to enact legislation setting the minimum standards for licensing and registration of state-licensed “mortgage loan originators.” Oregon’s Legislature complied by enacting even more expansive consumer protection statutes, which are regulated and carried out by DCBS. One key feature of these regulations is the licensing requirements for residential mortgage loan originators, bankers and brokers, which carries with it an array of reporting, recordkeeping and continuing learning education requirements as well. Failure to be licensed when required can result in serious fines or penalties.

Two of the more expansive statutes under Oregon law, as compared with federal law, are the definition of the term “mortgage loan originator,” as well as the much broader definition of “residential mortgage loan.” More information on the SAFE Act and Oregon’s legislation can be found in a prior article published earlier this year called [Private Money Loans in Oregon](#), by Erich Paetsch. Important for the focus of this article is that the federal SAFE Act permits a state to enact rules and regulations that exempt certain types of individuals from the licensing requirements, so long as such exemption is allowed under federal law as well. The DCBS recently used this authority to pass a new regulation exempting certain construction lenders from the mortgage loan origination licensing requirements under certain conditions.

The DCBS’s Commercial Construction Lending Exemption became effective on September 9, 2016, and exempts certain commercial

construction lenders from the mortgage loan origination licensing requirements. In order to be exempt under the statute, the rule lists a hefty number of fairly specific conditions, each of which must be satisfied to qualify for the exemption. While a brief discussion of the conditions is helpful to understand the scope of exemption, an important takeaway is that the exemption is very limited to a narrow subset of private lenders. As explained by the legislative rule summary, the exemption is intended only to exempt lenders lending to borrowers who are licensed general contractors, lending for commercial or business purposes to construct residential dwellings, and also requires that lenders refrain from certain prohibited activities outlined in the rule.

There are several conditions which must be satisfied for the exception. First, as prerequisite, the borrower must be using the loaned funds to construct, alter, or develop land on property designed or suitable for residential occupancy. Next, the borrower cannot intend to reside at the residential property after construction. The borrower must also be licensed with Oregon’s Construction Contractors Board as a residential contractor or developer. In addition, the lender is required to make an inquiry into the borrower’s purported use of the loaned funds, and must determine, after considering several required factors, that the loan will not be used for the borrower’s own personal, family or household purposes. The lender may not collect any consumer financial information in connection with the loan. Further, the lender must not advertise its residential lending business, and must comply with all of the reporting and recordkeeping requirements outlined in the rule. Finally, the lender cannot engage in any conduct or activity that is defined as prohibited under the DCBS licensing rule, and cannot engage in fraud.

The construction exemption rule is concerning because it puts the burden of proving compliance with the exemption completely on the private lender. The regulation provides that any person

relying on the construction exemption has the burden of proof to establish the availability of the exemption. The rule provides a “rebuttable presumption” that the lender is a mortgage loan originator required to be licensed if the lender fails to adequately document and maintain records of the transaction. Thus, even if a particular lending relationship would otherwise clearly fit within the exemption, the failure to document and maintain proper records of the transaction could negate the exemption. In this way, the rule imposes a burden even on lenders who safely satisfy the exemption.

In this murky, technical and convoluted realm of statutes, rules and regulations that govern the lending industry as well as private money lenders, a prudent private money lender should carefully consider whether anticipated lending activity will safely fit within an exemption to the mortgage loan origination licensing requirements. If you have questions about whether you qualify for an exemption, please contact one of our Financial Services Industry professionals. We would be happy to help you move beyond the red tape and towards more successful business activity.

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### **Who, What, When, Where and Why? Questions Every Client Should Ask Their Real Estate Attorney at the Initial Meeting**

By Alan Sorem

The attorney-client relationship can be one of the most important relationships in a person’s professional and/or personal life. As a real estate lawyer, I have helped clients fulfill their dreams by launching a new business, acquiring and selling key investment properties, developing land, and buying a dream home. I have also helped clients struggle through some of the most challenging events in their life when real estate transactions do not go as planned or become involved in an unwelcome real estate dispute. Determining whether a real estate lawyer is a right fit for you as a client is an

important decision. Below is a list of questions and comments to consider when deciding whether a real estate attorney is right for you and your needs.

- *What is the lawyer’s experience?* Real estate law is a “big tent” specialty. Many diverse client needs touch and concern real estate. In addition to having an understanding of the substantive law, the attorney must have the practical experience necessary to assist with the clients’ particular matter. For example, I primarily handle real estate transactions including leases and sales, transactions involving real estate development (also known as land use), and resolving real estate disputes. However, if a matter involves a foreclosure action or necessitates litigation, I will work with the partners in my firm’s creditor’s rights group or litigation group to make sure the matter is handled by the attorney with the necessary experience. Thus, the individual attorney’s experience and the experience of his or her partners are relevant to determine if the attorney and firm are a fit for your client needs.
- *How do you want to communicate with your lawyer?* A failure to express one’s communication expectations and needs is a common cause for tension in any relationship. The attorney-client relationship is no different. In your initial client meeting, you and your attorney should have a candid conversation as to how frequently you as the client want to be updated, how available the attorney needs to be for meetings and phone calls, and expectations regarding timely responses to communications. Some matters require moments of near-constant communication, while others are not as time sensitive. In any event, an initial statement as to the availability of both the lawyer and the client should be made at the very beginning of any attorney-client relationship to ensure

productivity and respect.

- *Why do I need a lawyer?* A self-assessment of one's legal service needs is helpful to ensure the proper level of service is requested and provided. Attorneys must be flexible to work with a wide variety of client needs. For some clients, my engagement is limited to providing strategic consulting. For other clients, we will provide all services related to any of the clients' real estate transactions, developments or dispute resolution matters. Early communication as to the scope of the necessary engagement is key for both parties.
- *What should I expect as far as attorney fees?* Attorney fees can be substantial, but generally they must be reasonable for the amount of work provided to the client. Fees are directly impacted by the scope of the engagement and level of opposition present in any given real estate transaction, development project, or dispute. Estimates can often be provided based on assumptions about the nature and scope of work needed. However, any estimate will need to be modified if assumptions regarding the scope of work or the level of opposition change during the course of representation.

While attorneys may be specialists, they are also in the business of providing a high level of customer service to their clients. Your expectations and experiences in dealing with other customer service providers should also serve you well in working with your real estate lawyer.

Please feel free to contact me with any questions at [asorem@sglaw.com](mailto:asorem@sglaw.com).

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### **Your Business Transition – Are you ready to hand over the keys?**

By Douglas Alexander

On a recent visit with my sons, and on the drive home to one son's house, we stopped in his neighborhood to pick up the mail. My six-year old grandson, Hudson, was in the car with us. After getting the mail, he asked if he could sit on his dad's lap and help drive home. I was surprised as this six year old boy did a pretty good job of steering the car around the block and back to the house with his dad's occasional help and frequent prompting. Hudson is not ready to drive yet, and I admit that he is starting to learn pretty early, but when his time comes, he will have the self confidence that comes from having learned with his dad and practicing over the years with appropriate guidance.

This same transition can and should take place in our businesses as leadership and eventually ownership transitions from one generation to the next. It should be a gradual shift as one generation patiently teaches, mentors, and trains those who will one day take over. It occurs over years, not days or months. Those who teach and train need to have patience, and they need to be willing to let the learner make occasional mistakes. Of course, we want to avoid catastrophe, but an occasional fender bender can serve as an important object lesson to the learning driver, just like an occasional mistake made in business teaches future business leaders.

The other part of the process is being willing to eventually let go and hand over the keys to the car. First, we drive the car and bring others along for the ride. Eventually we move to the passenger seat, but keep a steady eye on the road and offer counsel and advice to help the new driver stay on the road and avoid accidents. Then finally comes the day when we hand over the keys and let our new driver take to the road unassisted and unsupervised. That is a tough day for parents, and

it is equally difficult for business leaders.

Recently, I have personally experienced this transition process. After serving as the managing partner of our firm for over 25 years, it was time to hand over the keys. Our managing partner Shannon Martinez is now at the wheel and leading the firm. This has come after a period of us working together, but she is now solidly in the driver's seat. I am occasionally riding along, but I have confidence that she is a qualified and safe driver and will manage us well. She will take us to new exciting destinations. However, I have now learned just how difficult it can be to let go. After leading for so long I have had to learn to be more judicious about expressing my opinions; I need to wait longer for others to speak first, and perhaps even wait so see if my opinion is even requested. That is not always easy; I am adjusting too. I have also had to learn that sometimes the route we will take to our destination may be different than the route I would have chosen. But I am seeing that new ideas and approaches can be refreshing and exciting. Having fresh and new vision can lead to renewed enthusiasm and excitement about the journey itself.

A significant part of my practice has been working with businesses in transition, such as when owners are selling their businesses to outsiders, selling to insiders, or even handing control over to a daughter or son. While intellectually I always understood that it would be a challenge for a business owner and leader to step aside and let somebody else lead, I now have a whole new appreciation for what those challenges are and how it really feels. One thing that has helped me in my transition is, to solely focus my efforts on my legal practice and clients, and help the firm and our business in different ways. This new focus has given me a new purpose and enthusiasm about my role in our firm.

Generally speaking, every business will pass through a transition of one kind or another at some point. Our firm is there to help with the legal issues that such transitions present, but we are

also there to help owners recognize and deal with the emotional challenges that they will face in the process. It is not too soon to begin planning for the next phase of your business and its ownership and leaders. I encourage each of you to begin planning now for how and when your business and you will transition. Begin teaching and mentoring your next generation of leaders. Begin thinking about what your role will become, and what it will take for you to be comfortable and confident handing the keys to the business over to someone else. Trust me, it is much easier when you have confidence in your successor, and that confidence and trust is built over time. My grandson Hudson is ten years away from getting his driver's license, but I am confident that both Hudson and his parents will be ready for him to drive alone when he turns sixteen. Don't wait until you are burnt out, tired, or even sick to prepare both your successor and yourself for the transition. By then, it is probably far too late and your options will be more limited. Now is the time to begin!

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## FIRM ANNOUNCEMENTS AND SEMINARS

On October 13, Saalfeld Griggs proudly joined other community members in sponsoring and filling two tables at the **Family Building Blocks Dream Builder's Luncheon**, held at the Salem Convention Center. The luncheon included a one hour presentation on the work **Family Building Blocks** does for young children.

On October 14, several attorneys of the firm hosted an in house educational presentation for members of **Columbia Trust Company** focusing on Real Estate.

During the month of October, Saalfeld Griggs partnered with our friends at **Columbia Bank** to host a series of seminars for clients. Keep your eyes out for similar seminars in 2017!

Of counsel attorney Paul Sundermier and senior associate attorney Jennifer Paul attended the **Chapter 3 IRWA Symposium** at the Embassy Suites in Portland. Paul was a featured panel speaker of the session titled **“Unusual & Uncommon Variations of the Condemnation Process.”**

On November 4, the Firm’s Dental Industry Team had a booth at the **OHSU Dental School Vendor Fair** in support of the OHSU Chapter of the American Student Dental Association.

Members of the firm’s Dental Industry Team sponsored and attended the **Marion-Polk Dental Society Member Dinner** on November 8.

On November 10, the Dental Industry Team sponsored and attended the **Multnomah County Dental Society New Dentist Dinner & Social** which was held at the Rock Bottom Brewery in Portland.

On November 17, the firm sponsored two tables at the annual **Civil War Dinner & Auction** in support of **Boys & Girls Club**.

Saalfeld Griggs’ Health Law Industry Team sponsored and attended the **Marion-Polk Medical Society New Physician & Physician Assistant Dinner** at the Willamette Heritage Center on November 18.

On December 2, Saalfeld Griggs sponsored the **Boys & Girls Aid Gala of Trees**, benefiting all children served by the Boys & Girls Aid. The event was held at the Salem Convention Center.

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**We would also like to extend a warm welcome to our newest attorney:**

**Margaret Gander-Vo** recently joined our Real Estate & Land Use group. Margaret’s practice is centered on leases, sale agreements, options to purchase, easements, title matters, development agreements, and a variety of land use applications. Margaret is a graduate of Willamette University

College of Law and previously worked at the Oregon Department of Justice and Mentor Graphics Corporation, where she focused on administrative, regulatory, and corporate law.