

A Look Back and a Look Forward

Q: What were some of the key legal issues that impacted associations in 2016, and do you have any advice for 2017?

A: One of the biggest potential issues that was expected to impact associations in 2016 has been delayed—maybe forever. In May 2016, the Department of Labor (DOL) issued its final rule updating the requirements for paying overtime to eligible workers under the *Fair Labor Standards Act (FLSA)*. While the new rules didn't change two elements of the three-part test to determine who qualifies as an exempt employee (and, therefore, is excluded from the *FLSA*'s minimum wage and overtime requirements), they significantly changed the third element—raising the salary level threshold from \$455 per week (\$23,160 per year) to \$913 per week (\$47,476 per year). Those new thresholds were estimated to increase the number of nonexempt, overtime-eligible employees by 4.2 million. Nearly every trade and professional association would be faced with potentially significant, increased personnel costs and myriad challenges in attempting to manage a slew of corresponding workplace issues.

And they may yet have to. However, on the cusp of the new rules' effective date of December 1, 2016, a federal court judge issued a preliminary injunction on November 22, preventing enforcement. That which was going to be potentially disruptive, remains potentially disruptive. Em-

ployers who made workplace adjustments in anticipation of the December effective date are now faced with the Hobson's choice of either trying to undo those changes or living with changes that may never be required. Further, all employers are faced with the uncertainty of not knowing what might happen to the rules. The DOL has appealed the trial judge's decision to the Fifth Circuit Court of Appeals. That court could affirm or deny the temporary injunction. At trial, the legality of the new overtime rules could be upheld. Complicating the uncertainty is the as-yet-to-be-determined position that the new Trump Administration and its DOL appointees might take going forward.


Interestingly, another potential issue that surfaced in 2016 has also been shelved for now. The U.S. Supreme Court had agreed to hear arguments in an antitrust class action lawsuit in which one of the issues was whether membership and governance rights in a trade association, by themselves, were enough to constitute a conspiracy in the event of anti-competitive conduct. The case was originally dismissed by the U.S. District Court for the District of Columbia but was reinstated by the D.C. Circuit Court of Appeals. The case involves allegations that Visa and MasterCard "member banks used the bank associations to adopt and enforce a supracompetitive pricing regimen for ATM access fees." Having accepted the appeal, the Supreme Court surprised everyone on November 17, 2016, by dismissing the

two related cases it had agreed to hear. The court's action will allow litigation to proceed against Visa and MasterCard. We will simply have to wait and see whether that litigation leads to a potentially new and significant antitrust standard for associations and their members.

Besides dodging new overtime rules and greater antitrust exposure, in 2017, all associations should resolve to:

- Make their Form 990 disclosures as accurate as possible and recognize that the Form can be an opportunity to tell their story and promote themselves.
- Review internal financial and accounting procedures and ensure that appropriate checks and balances are in place to prevent fraud, catch errors, and assure accurate reporting and accountability.
- Review and update conflict of interest policies and make sure that they are being followed. Association members need to be sensitized that having a conflict doesn't mean they've done something wrong, but having an undisclosed conflict is wrong. And the leadership needs to know that failing to properly manage a disclosed conflict can lead to significant problems.
- Confirm that the association is in good standing in its state of incorporation, that it is properly registered to do business in states in which it operates, that its bylaws are up to date, and that its leaders are

following its policies and procedures.

- Have a good records retention policy ... and follow it. Be reminded that the first element of a good records retention policy is a good records creation practice. Think before creating any written record, including emails, which might lead to future problems.
- Review personnel policies and practices, especially in light of the uncertainty created by the new overtime rules.
- Be vigilant in protecting intellectual property rights (including the association's name, logo, mailing list and all copyrightable material). Don't forget to secure appropriate ownership and/or license rights when materials are being created by others—including the association's members. 

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.

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