

ComplianceHR Webinar

Overtime Redux: Here We Go Again!

A DOL Wage & Hour Update



This presentation is for educational purposes only. TriNet provides its clients with HR and best practices guidance. TriNet does not provide legal, tax, or accounting advice.



Lori Brown

CEO, ComplianceHR

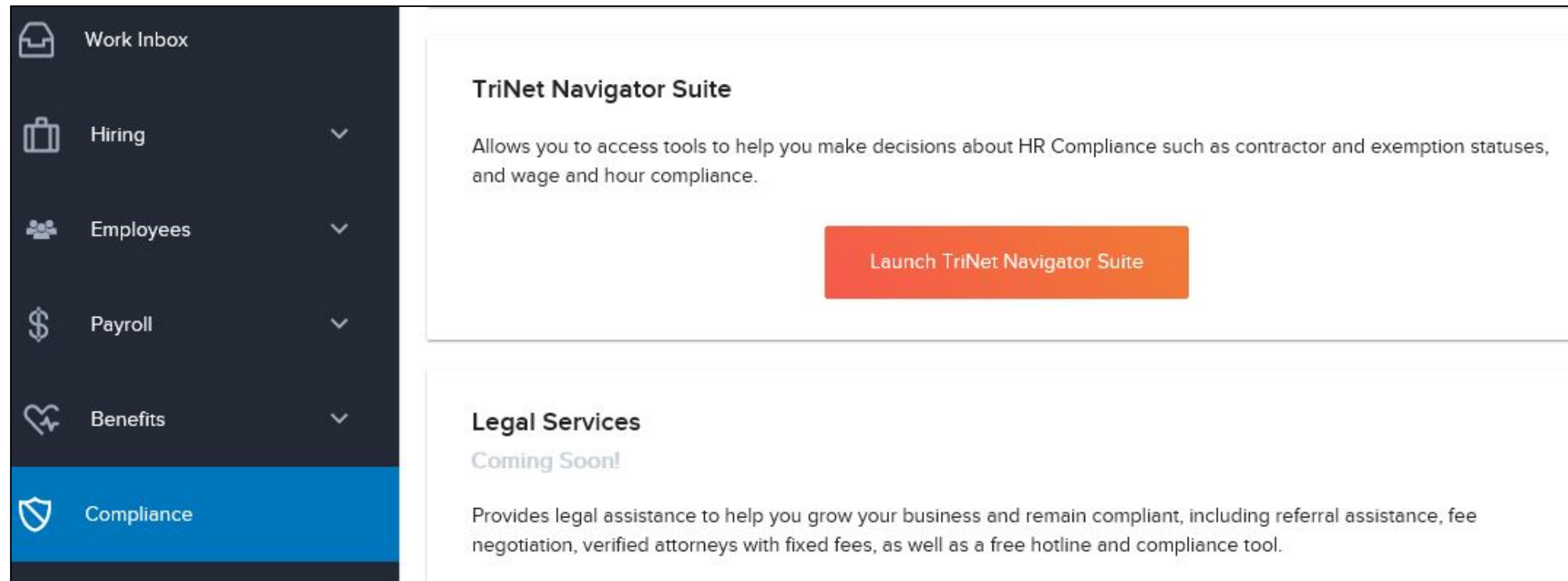
brown@compliancehr.com

[!\[\]\(cbe80b694ebd74fcfe136a095b608235_img.jpg\) @labrown1419](https://twitter.com/labrown1419)

- **Former Littler Shareholder**
- **Former General Counsel/Head of HR of Global Security Organization**
- **Follow Us on Twitter:**
@Compliance_HR

Accessing Your Navigator Suite

Under the Admin View, the TriNet Navigator Suite can be found under the “Compliance” link on the TriNet platform (login.trinet.com)



The screenshot displays the TriNet Navigator Suite interface. On the left is a dark sidebar with a navigation menu. The menu items are: Work Inbox (with a folder icon), Hiring (with a briefcase icon), Employees (with a group of people icon), Payroll (with a dollar sign icon), Benefits (with a heart icon), and Compliance (with a shield icon, highlighted in blue). The main content area on the right is divided into two sections. The top section is titled "TriNet Navigator Suite" and contains the text: "Allows you to access tools to help you make decisions about HR Compliance such as contractor and exemption statuses, and wage and hour compliance." Below this text is an orange button labeled "Launch TriNet Navigator Suite". The bottom section is titled "Legal Services" and includes the text "Coming Soon!" followed by a description: "Provides legal assistance to help you grow your business and remain compliant, including referral assistance, fee negotiation, verified attorneys with fixed fees, as well as a free hotline and compliance tool."

Work Inbox

Hiring

Employees

Payroll

Benefits

Compliance

TriNet Navigator Suite

Allows you to access tools to help you make decisions about HR Compliance such as contractor and exemption statuses, and wage and hour compliance.

[Launch TriNet Navigator Suite](#)


Legal Services

Coming Soon!

Provides legal assistance to help you grow your business and remain compliant, including referral assistance, fee negotiation, verified attorneys with fixed fees, as well as a free hotline and compliance tool.

Accessing Your Navigator Suite

Navigator IC




Independent Contractor Assessment

Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, and a summary of applicable laws

[+ Create New Evaluation](#) [View Evaluations](#)

[▶ IC Agreement](#)

Navigator OT




Exempt Status Assessment

Provides a risk assessment of each applicable exemption, suggestions on how to lower the risk of misclassification, and a summary of the federal and state exemption standards

[+ Create New Review](#) [View Reviews](#)

[▶ Use Leadership Navigator](#) [View Evaluations](#)

Navigator Pay Practices




Wage and Hour Compliance

Delivers comprehensive reports on a federal and state-by-state basis for the most common wage and hour issues

[▶ Find Minimum Wage](#) [▶ Use Rapid Reference](#)

Navigator Onboarding



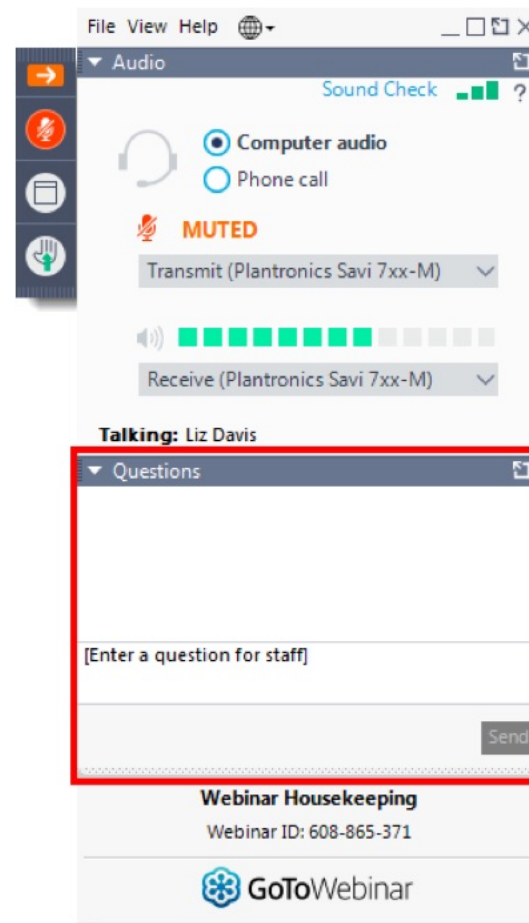
Onboarding Document Production

Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents

[+ Create New Document](#)

Answering Your Questions

Please submit your questions via the text questions pane:



What You'll Receive:

1. Full slide presentation (pdf format)
2. Link to recorded audio presentation



OBJECTIVES FOR TODAY'S SESSION:

- I. The New DOL: Who's Who?
- II. DOL: Compliance & Initiatives
- III. Regulatory Agenda
- IV. Overtime: What to Expect?
- V. Enforcement
- VI. Compliance Now: Navigator OT

Today's Featured Speaker



Tammy McCutchen

VP Strategy, ComplianceHR

tammy@compliancehr.com

 [@TDMcCutchen](https://twitter.com/TDMcCutchen)

- Littler Principal
- Former Administrator, US-DOL, Wage & Hour Division
- A leading authority on federal and state wage and hour laws who now represents and counsels management clients in connection with all types of labor and employment matters
- Regularly serves as a consulting or testifying expert witness in wage-hour collective and class actions

The New DOL?

How to Request an Opinion Letter

Workers

Employers

Are you a Worker? Go to our [Worker Resource Page](#) for information on how to file a complaint.

Are you an Employer? Go to our [Employer Resource Page](#) for links to our regulatory library.

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210




FLSA2018-19


April 12, 2018

Dear Name*:

This letter responds to your request for an opinion regarding employee's 15-minute rest breaks, which are certified by a doctor as necessary due to the employee's serious health condition and are [Family and Medical Leave Act], are compensable or non-compensable under the [Fair Labor Standards Act]." The opinion below is based on the facts as presented. You have represented that you do not seek this opinion. The Wage and Hour Division (WHD) is currently investigating, or for more information, prior to your request.



U.S. Department of Labor
Wage and Hour Division



U.S. Wage and Hour Division

January 5, 2018

FIELD ASSISTANCE BULLETIN No. 2018-2

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS

FROM: Bryan L. Jarrett
Acting Administrator

SUBJECT: Determining Whether Interns at For-Profit Employers Are Employees Under the FLSA

The Fair Labor Standards Act (FLSA) requires "for-profit" employers to pay employees for their work. Interns and students, however, may not be "employees" under the FLSA—in which case

Wage and Hour Division (WHD)

PAID Program

The Wage and Hour Division's (WHD) new nationwide pilot program, the Payroll Audit Independent Determination (PAID) program, facilitates resolution of potential **overtime and minimum wage** violations under the Fair Labor Standards Act (FLSA). The program's primary objectives are to resolve such claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster.

Under the PAID program, employers are encouraged to conduct audits and, if they discover overtime or minimum wage violations, to self-report those violations. Employers may then work in good faith with WHD to correct their mistakes and to quickly provide 100% of the back wages due to their affected employees.



Key Appointees at DOL

Overtime Redux: Here We Go Again!

Compliance **HR**

Secretary of Labor R. Alexander Acosta

- Confirmed April 27, 2017
- Graduate of Harvard College and Law
- Law clerk to Justice Alito (Third Circuit)
- Member, National Labor Relations Board
- Assistant Attorney General, DOJ, Civil Rights Division
- U.S. Attorney General, Southern District of Florida
- Dean, Florida International University Law School



Deputy Secretary Patrick Pizzella

- Nominated June 19, 2017
- Confirmed April 12, 2018
- Served in Reagan, Bush '41, Clinton, Bush '43 and Obama Administrations
- GSA, Education, Federal Housing Finance Board, OPM, DOL and Federal Labor Relations Authority
- DOL Assistant Secretary for Administration and Management, 2001-2009



Solicitor of Labor

Kate O'Scannlain

- Nominated on September 28, 2017
- Confirmed December 21st, 2017
- Partner, Kirkland & Ellis, Washington DC
- University of Notre Dame, for both her undergraduate and law degrees
- Father is Judge O'Scannlain, U.S. Court of Appeals for the Ninth Circuit



Wage & Hour Administrator Cheryl Stanton??

- Nominated on September 2, 2017
- Still awaiting a vote in the full Senate
- Executive Director, South Carolina Department of Employment and Workforce
- White House Counsel, Bush '43 (principal liaison to DOL, EEOC and NLRB)
- University of Chicago Law School
- Clerked for Judge Alito (Third Circuit)



Acting Administrator, Wage and Hour Division

- Deputy Administrator Bryan Jarrett
- Morgan Lewis, Orange County
- Law Clerk, U.S. Court of Appeals for the Eighth Circuit
- J.D., Stanford, B.A., Brigham Young University
- Nominated July 9, 2018 to be Assistant Secretary for Policy



Compliance Assistance

Overtime Redux: Here We Go Again!

Compliance **HR**

Administrator Interpretations

- The 2015 AI on independent contractors and the 2016 AI on joint employment were withdrawn on June 7, 2017
- Will new guidance or regulations follow?



Opinion Letters Are Back!

- Request an opinion letter at www.dol.gov/whd/opinion/

US DEPARTMENT OF LABOR REINSTATES WAGE AND HOUR OPINION LETTERS

WASHINGTON – The U.S. Department of Labor will reinstate the issuance of opinion letters, U.S. Secretary of Labor Alexander Acosta announced today. The action allows the department's Wage and Hour Division to use opinion letters as one of its methods for providing guidance to covered employers and employees.

An opinion letter is an official, written opinion by the Wage and Hour Division of how a particular law applies in specific circumstances presented by an employer, employee or other entity requesting the opinion. The letters were a division practice for more than 70 years until being stopped and replaced by general guidance in 2010.

"Reinstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes," said Secretary Acosta. "The U.S. Department of Labor is committed to helping employers and employees clearly understand their labor responsibilities so employers can concentrate on doing what they do best: growing their businesses and creating jobs."

The division has established a webpage where the public can see if existing agency guidance already addresses their questions or submit a request for an opinion letter. The webpage explains what to include in the request, where to submit the request, and where to review existing guidance. The division will exercise discretion in determining which requests for opinion letters will be responded to, and the appropriate form of guidance to be issued.

WHD News Release: 06/27/2017



How to Request an Opinion Letter

Workers	Employers
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<p>Request an Opinion Letter</p>	

CHR Webinar September 2018

2009 Opinion Letters Reinstated

- Bonus, regular rate of pay
- On-call time
- Salary basis test for exemption
- Exempt status of helicopter pilots, construction supervisors, coaches, client service managers, fraud analysts and more

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210



FLSA2018-17

January 5, 2018

Dear **Name***:

This letter responds to your request that the Wage and Hour Division ("WHD") reissue Opinion Letter FLSA2009-36. On January 16, 2009, then-Acting WHD Administrator Alexander J. Passantino signed the opinion letter as an official statement of WHD policy. On March 2, 2009, however, WHD withdrew the opinion letter "for further consideration" and stated that it would "provide a further response in the near future."

We have further analyzed Opinion Letter FLSA2009-36. From today forward, this letter, which is designated FLSA2018-17 and reproduces below the verbatim text of Opinion Letter FLSA2009-36, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.

I thank you for your inquiry.


A handwritten signature in black ink, appearing to read "B. Jarrett", is located below the text "I thank you for your inquiry.".

Bryan L. Jarrett
Acting Administrator

New Opinion Letters

- Compensability of travel time for employees without normal working hours
- Compensability of frequent rest breaks required by a serious health condition
- Compensability of time spent attending employer-sponsored benefits fairs
- Volunteers in private nonprofits
- Application of the 13(b)(27) motion theater exemption to an establishment that is both a theater and restaurant
- Exemption for commissioned employees of retail and service establishments available for business to business sales

Opinion Letters Searchable

**UNITED STATES
DEPARTMENT OF LABOR**

All DOL WHD

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Wage and Hour Division

SHARE

Was this page helpful?

[DOL Home](#) > [WHD](#) > [Final Rulings and Opinion Letters](#) > [Opinion Letter Search](#) > FLSA Opinion Letters from the Administrator

Wage and Hour Division (WHD)



Fair Labor Standards Act

Year


[2018](#)
[2009](#)
[2008](#)
[2007](#)
[More...](#)

Travel


SEARCH

Most Current Opinion Letter Results.

FLSA2018-18
Compensability of travel time
FLSA 4/12/2018



FLSA2001-11
Travel time in company owned vehicles
FLSA 4/18/2001



Four New Field Assistance Bulletins

- Service advisors at car dealerships
- Tip pooling
- Unpaid interns
- Independent Contractors!



2017 Field Assistance Bulletins

Number	2018 Letter Subject	Date/Format
2018-4	Determining Whether Nurse or Caregiver Registries are Employers of the caregiver	July 13, 2018 (PDF , TEXT)
2018-3	Amendment to FLSA Section 3(m) Included in Consolidated Appropriations Act, 2018	April 6, 2018 (PDF , TEXT)
2018-2	Determining Whether Interns at For-Profit Employers Are Employees Under the FLSA	January 5, 2018 (PDF , TEXT)
2018-1	Nonenforcement Policy with respect to service advisors and the Section 13(b)(10)(A) exemption under the FLSA	January 5, 2018 (PDF , TEXT)

The PAID Program

www.dol.gov/whd/paid

- Resolve FLSA violations by paying 2 years of back wages
 - No third year of back wages
 - No liquidated damages
 - No civil money penalties
 - No plaintiffs' attorneys fees
- Pilot ends in September, but "90% chance" will be extended or made permanent

Wage and Hour Division (WHD)

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How the PAID Program Works



Participating in PAID



Determine Your Eligibility



Review FLSA Compliance Materials



Conduct Your FLSA Self-Audit



Payment of Wages



Contact WHD



New DOL Office of Compliance Initiatives

News Release

U.S. DEPARTMENT OF LABOR ANNOUNCES NEW OFFICE OF COMPLIANCE INITIATIVES TO COMPLEMENT COMPLIANCE OUTREACH

NASHVILLE, TN – U.S. Secretary of Labor Alexander Acosta announced the U.S. Department of Labor's new Office of Compliance Initiatives (OCI) during a speech today at the Voluntary Protection Programs Participants' Association's 2018 Safety+ National Symposium. Coordinated by the Office of the Assistant Secretary for Policy, this cross-agency effort complements the Department's enforcement activities by strengthening and innovating compliance assistance outreach. Part of this initiative is the launch of [worker.gov](#) and [employer.gov](#), two websites with resources to assess compliance with the law.

OCI will promote greater understanding of federal labor laws and regulations, allowing job creators to prevent violations and protect Americans' wages, workplace safety and health, retirement security, and other rights and benefits. As part of its work, OCI will work with the enforcement agencies to refine their metrics to ensure the efficacy of the Department's compliance assistance activities.

"President Trump's Administration is committed to protecting the American worker. Vigorous enforcement and compliance assistance go hand in hand," said Secretary Acosta. "The Office of Compliance Initiatives expands our efforts to promote full compliance with federal labor law."

- Department-wide office
- Announced August 28th
- To strengthening and innovating compliance assistance outreach
- Launched new [employer.gov](#) web site

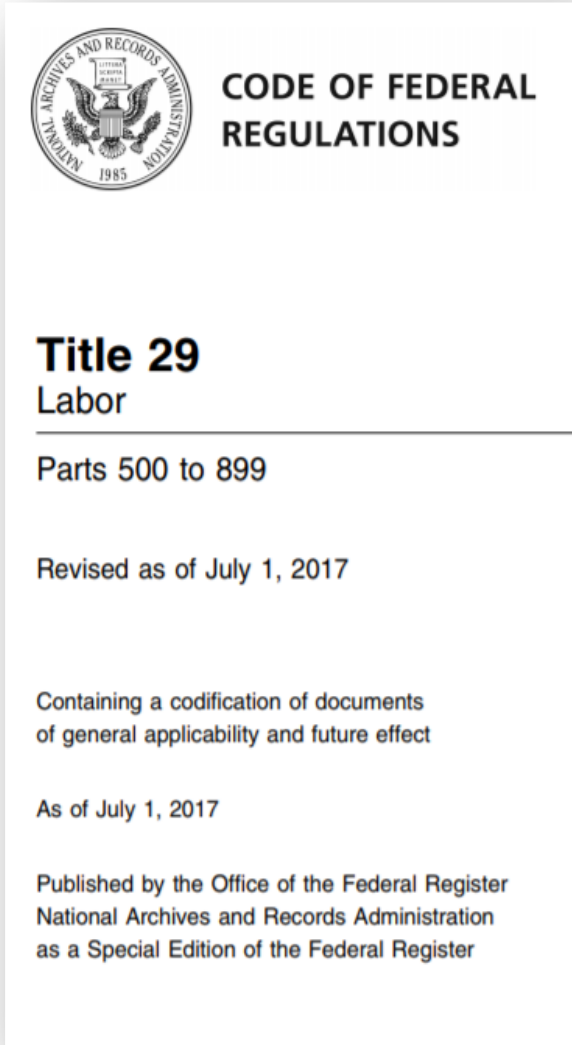
Regulations

Overtime Redux: Here We Go Again!

Compliance **HR**

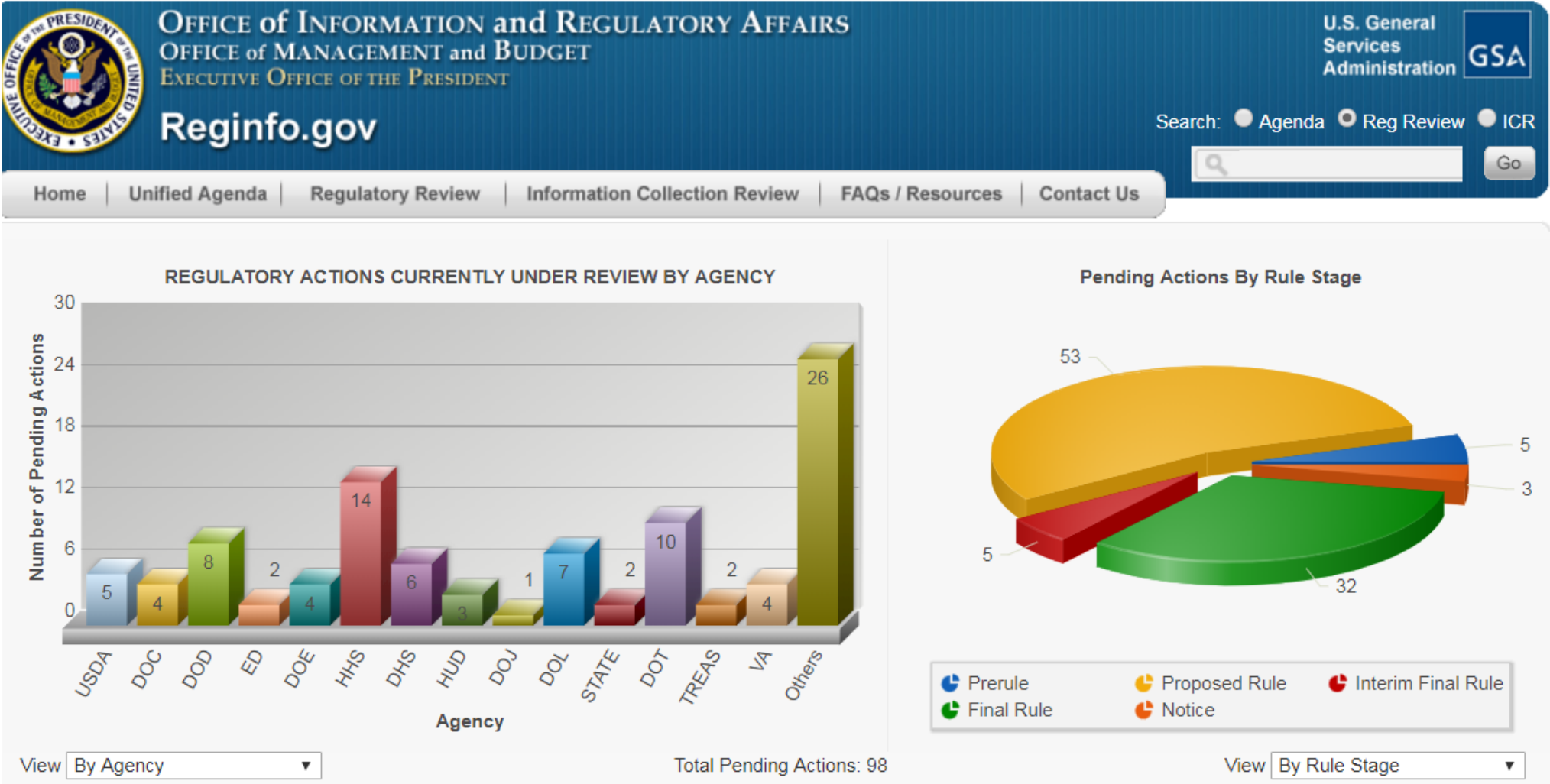
The Regulatory Process

- Review of drafts by the White House Office of Management and Budget (OMB)
- Publication of a Notice of Proposed Rulemaking (NPRM)
- Comment Period
- Publication of a Final Rule



Fall 2018 Regulatory Agenda

- ***NEW*** Joint Employment, NPRM in December 2018
- Child labor HOs, NPRM limited to health care published Sept. 27 with comments due Nov. 26, 2018
- Tip credit regulations, NPRM in October 2018 (delayed from August)
- Regular rate and overtime calculations, NPRM in December 2018 (delayed from September)
- Overtime exemptions, NPRM in March 2019 (delayed from January 2019)



Overtime Regulations

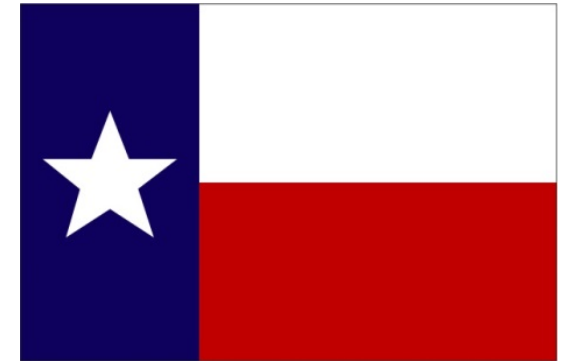


Remember the 2016 Final Rule?

- Minimum salary level was more than doubled from current \$455 per week (\$23,660 annual) to \$913 per week (\$47,476 annual)
- Provided for automatic increases of the salary levels every three years, beginning 2020 to an estimated \$51,000
- Effective December 1, 2016

Overtime Enjoined

- District court granted preliminary injunction, Nov. 2016
- DOL appealed to the Fifth Circuit Court of Appeals, Nov. 2016
- District Court granted summary judgment and a permanent injunction, Aug. 2017
- Fifth Circuit appeal of preliminary injunction dismissed as moot, Sept. 2017
- DOL appealed permanent injunction, Oct. 2017



Overtime – Not Dead Yet

- The Fifth Circuit appeal is still alive
- A week after appealing the permanent injunction, in early November 2017, DOL filed a motion to stay pending the outcome of a new rulemaking

What happens if DOL does not complete the new rulemaking?

- President Trump loses the 2020 election
- Current DOL does not complete a new rulemaking
- New DOL vigorously defends the 2016 final rule
- The Fifth Circuit reverses the injunction
- The \$913 minimum salary level is back
- Retroactivity???



Request for Information

July 2017



- How and to what level should the salary be increased?
- Should DOL automatically increase the salary level and how often?
- Should DOL adopt different salary levels by state, reason, area, exemption?
- Should the salary level and salary basis tests be eliminated?
- Does the 2016 salary level work effectively with the duties tests?
- How did the 2016 Final Rule impact your company? What did your company due to comply?

Little/U.S. Chamber Survey

Littler/U.S. Chamber Survey

	All	Small Business	Nonprofit	South	Healthcare	Retail
Increase salaries	76.4%	53.4%	75.4%	73.5%	64.0%	75.9%
Increase salaries but reduce benefits	7.2%	11.4%	6.9%	9.5%	6.0%	6.0%
Reclassify	77.4%	61.4%	81.5%	79.9%	80.7%	81.9%
Reduce headcount	6.4%	15.9%	4.6%	9.0%	8.0%	4.8%
Raise prices for customers	11.5%	27.3%	3.9%	14.3%	18.7%	22.9%

Littler/U.S. Chamber Survey

	All	Small Business	Nonprofit	South	Healthcare	Retail
Converted to hourly	73.1%	75.9%	81.6%	78.6%	79.6%	75.9%
Effective hourly rate reduced	18.6%	31.5%	11.2%	21.4%	13.9%	41.4%
Hours limited to 40	34.0%	53.7%	44.9%	44.4%	47.2%	24.1%
Bonus or commissions reduced	12.4%	27.8%	8.2%	16.7%	11.1%	17.2%
Flexible work arrangements limited	21.2%	40.9%	21.5%	20.1%	26.7%	19.3%
Limited use of tech outside work hours	29.4%	33.0%	33.0%	29.1%	26.7%	33.7%
Limited travel	15.8%	22.7%	18.5%	12.2%	16.0%	22.9%

Listening Sessions September 2018

- What is the appropriate salary level?
- What is the best methodology to set the salary level?
- What are benefits and costs of an increased salary level?
- How would an increased salary level affect real wages?
- Could an increased salary level reduce litigation costs by reducing uncertainty?
- How and when should DOL update the salary level?

Wage and Hour Division (WHD)

Overtime Rule Listening Sessions

The Wage and Hour Division of the U.S. Department of Labor [has announced](#) that in the upcoming weeks it will hold public listening sessions to gather views on the Part 541 white collar exemption regulations, often referred to as the "Overtime Rule." Issued under the Fair Labor Standards Act, these regulations implement exemptions from overtime pay requirements for executive, administrative, professional, and certain other employees. The Department plans to update the Overtime Rule and is interested in hearing the views and ideas of participants on possible revisions to the regulations.

Sessions will be held in the following cities

September 7, 2018, 10am-12pm
Intercontinental Buckhead Atlanta
3315 Peachtree Rd NE- Trippe Room
Atlanta, GA

September 11, 2018, 10am-12pm
Jackson Federal Building
912 2nd Ave., Auditorium
Seattle, WA

September 13, 2018, 10am-12pm
Holiday Inn Country Club Plaza
One E 45th St, -Ballroom A/B
Kansas City, MO

September 14, 2018, 10am-12pm
Remington Arms Room
DFC- Building 41
Denver, CO

September 24, 2018, 10am-12pm
Rhode Island Convention Center
1 Sabin Street- Room 551A/B
Providence, RI



There is no fee to attend the listening sessions; however, registration is required.

[Session Registration](#)

Listening Sessions September 2018

Business Representatives:

- Acknowledged need for a salary increase
- Most advocated a return to the 2004 methodology
- Some opposed increase related to inflation, others supported
- Emphasized the high costs of compliance
- Discussed how reclassified employees lose workplace flexibility for employees and view the change as a demotion
- Opposed an automatic increase process as failing to consider input from business and not be truly reflective of economic conditions

Listening Sessions September 2018

Worker Advocates

- Accused employers of abusive pay practices
- Advocated defense of and return to the \$47k salary level
- Advocated automatic increases to the salary level tied to the CPI
- Claimed that employees have lost millions in overtime pay since the 2016 Rule was invalidated

Proposed Rule Predictions

- The NPRM will be published in 1Q2019, but probably not by January 2019
- DOL likely will proposed:
 - A return to the 2004 methodology to increase the salary level
 - A salary level between \$33,000 and \$38,000 annually
 - Automatic increases in the salary level every three years
- DOL may propose regional differences in pay





Compliance **HR**

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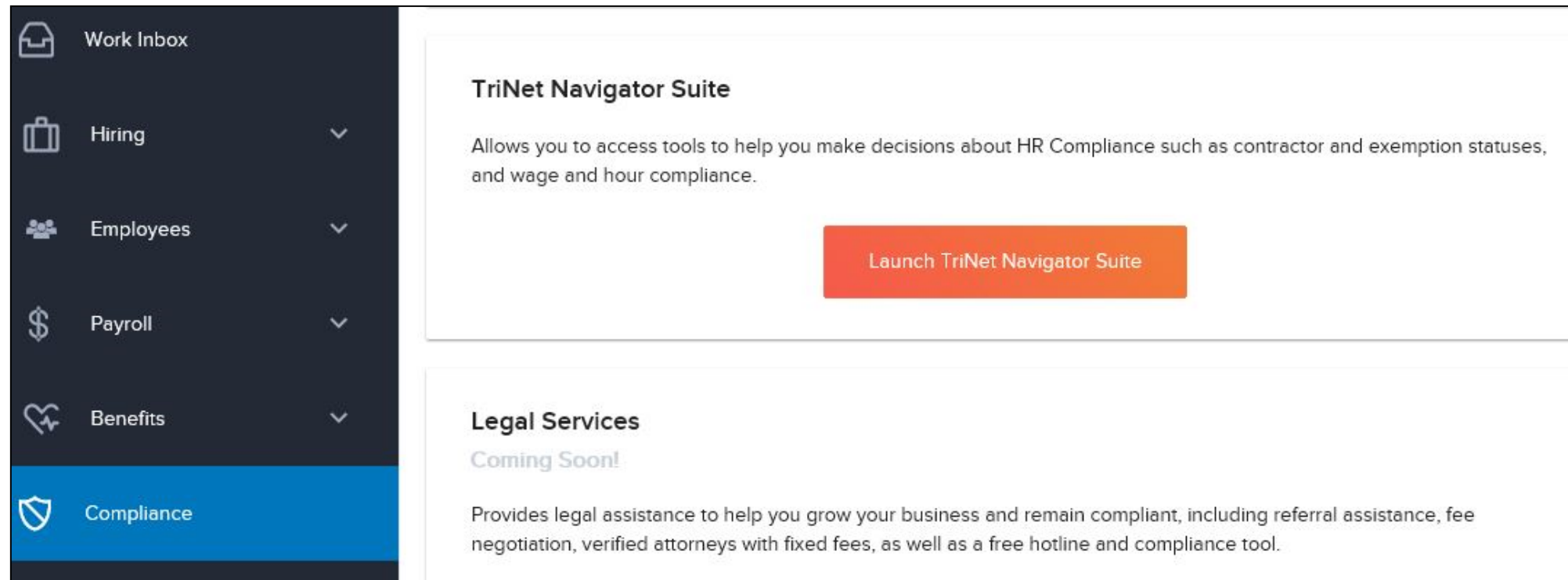
The award-winning joint venture that combines the subject matter expertise of Littler with the revolutionary software of Neota Logic.

The first of its kind suite of intelligent applications delivering expert guidance at internet speed and scale.



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Navigator Onboarding



Onboarding Document Production

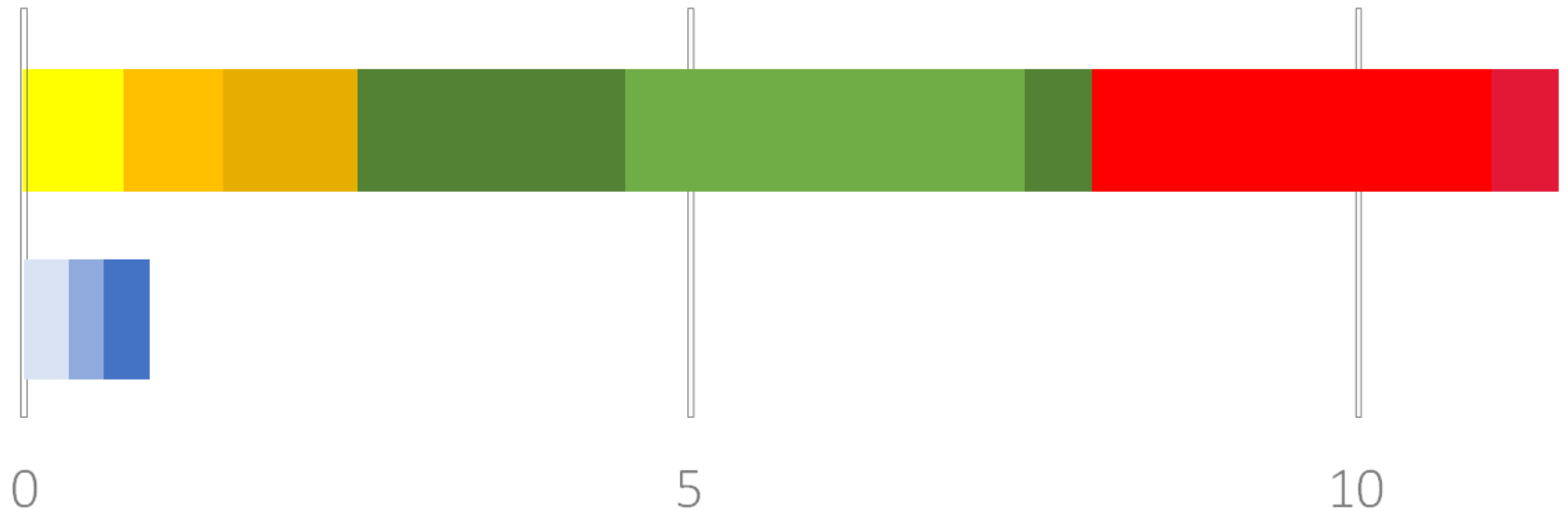
Produces state and federal compliant employment applications, offer letters, and employee non-disclosure documents

[+ Create New Document](#)

Compliance **HR**

Traditional OT Audit
690 Minutes

Navigator OT
20 Minutes



97% Less Time Per Evaluation

Enforcement

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Compliance **HR**

Not Much Has Changed

News

Rubio to Acosta: Labor Dept. Must Halt Obama-Era Enforcement

Posted Feb. 5, 2018, 2:49 PM



- *Sen. Marco Rubio asks labor secretary for update on wage-hour enforcement*
- *Letter raises concerns of misclassification investigations relying on scrapped guidance*



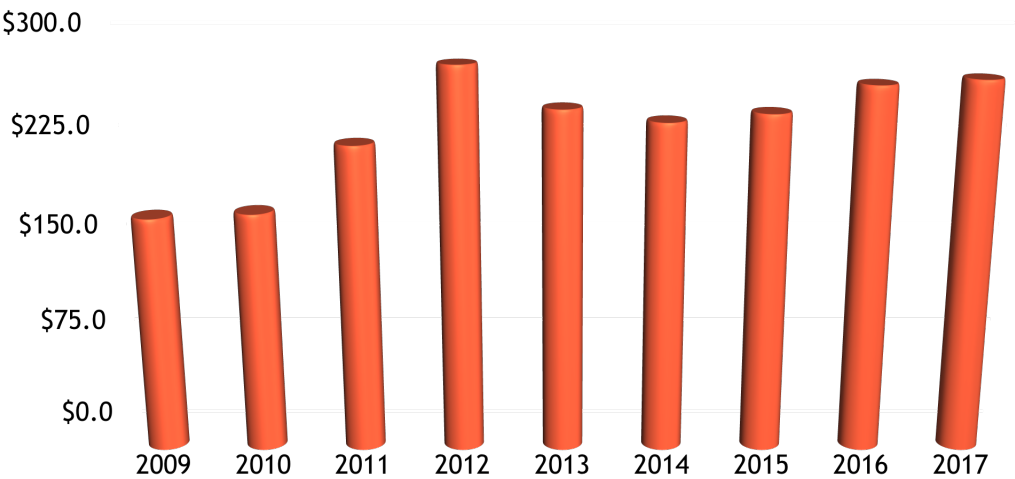
Ben Penn
Reporter



A key Senate ally of the labor secretary is now turning up the pressure on the Labor Department to abandon Obama-era enforcement strategies that the agency has reportedly not reversed.

Back Wages Collected 2017 – Second Highest EVER

Wage & Hour Division Back Wages Collected





US Labor Department 
@USDOL

Following 

.@USDOL's @WHD_DOL recovered \$270 million in back wages for 240,000 workers – the 2nd highest amount ever. #LaborDay

PROTECTING WORKERS WAGES


U.S. Wage and Hour Division

**Recovered \$270 Million in
Back Wages for 240,000 Workers
2nd Highest Amount Ever**

#LaborDay 2018 | dol.gov

1:30 PM - 3 Sep 2018

26 Retweets 35 Likes



 6  26  35 

Your Action Items

- Stay Informed
- Participate in the regulatory process
- **Conduct an exemption review using Navigator OT**
- Prepare your company for an higher salary level



Compliance Made Easy....Why Wait?



Questions?



Thank you!

