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## GENERAL MEMORANDUM

November 23, 2016

To: Housing Clients

From: Hobbs, Straus, Dean & Walker, LLP

Re: DOL's Overtime Rule Enjoined Nationwide by Federal Judge; Indian Housing Block Grant Formula Final Rule Published in the Federal Register

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### 1. Department of Labor's Overtime Rule Enjoined Nationwide

On Tuesday, November 22, 2016, Texas U.S. District Judge Amos Mazzant entered a nationwide preliminary injunction blocking the Department of Labor (DOL) from implementing and enforcing a new final overtime rule. The Obama Administration crafted the final rule to amend regulations to expand the definition of salaried employees who are eligible to receive overtime pay. The rule was set to go into effect December 1, 2016. The preliminary injunction preserves the status quo while the court determines the DOL's authority to make the final rule as well as the final rule's validity.

The overtime rules were authorized by the Fair Labor and Standards Act (FLSA), which generally requires that workers who work more than 40 hours in a workweek receive time-and-a-half as overtime pay. There is an exemption from this requirement for "bona fide executive, administrative, or professional" employees. This is generally referred to as the "white-collar" exemption from overtime rules. The changes in the final rule would not apply to employees paid by the hour, independent contractors, or outside sales employees.

Among other changes, the final rule would more than double the minimum amount of salary that is used as one prong of the exemption test for employees in executive, administrative, and professional positions, from a level of \$23,660 per year, to \$47,476 per year. "White collar" employees—even those previously "exempt" from overtime—who make less than this amount would be eligible for overtime.

The rule was challenged by a number of business groups, including the Chamber of Commerce, as well as 21 states, in a suit brought against the DOL in the Eastern District of Texas. Judge Mazzant granted a preliminary injunction delaying the rule's implementation nationwide until he gives further consideration to the arguments made in

the case.<sup>1</sup> The Court has thus enjoined the DOL from implementing the new overtime pay rule on December 1, 2016. Judge Mazzant found the challengers were able to show a likelihood of success in their challenge of the rule as well as irreparable harm if the rule went into effect, and that the DOL failed to show it would be harmed if the rule were delayed.

Though it is not a settled question whether the FLSA applies to tribes, we know that many tribes and tribal organizations follow the overtime rules, and that many tribes and tribal organizations were prepared to make adjustments to their overtime requirements effective December 1.

The FLSA and the overtime rules do not make specific mention of tribes, nor do they explicitly abrogate tribal sovereign immunity. As such, the FLSA is a “statute of general applicability,” and there is an open question as to whether such statutes apply to tribal governments and arms of tribes. Some federal courts have held that the FLSA does not apply to tribes, but for differing reasons ranging from the fact Congress did not waive tribal sovereign immunity to a closer consideration of whether an employee’s work was sufficiently related to tribal self-government. The Seventh and Ninth Circuits have held that the FLSA does not apply if the employee’s work is sufficiently related to tribal self-government. In contrast, the Eleventh Circuit has held that the statute is not enforceable against tribes, finding that Congress did not intend to abrogate tribal sovereign immunity. The Ninth Circuit has held that the FLSA applies to on-reservation businesses owned by individual tribal members.

The final overtime rule does not address tribes or tribal entities, and the DOL declined to provide an exemption or special guidance for tribal employers.

We will continue to monitor the status of the legal challenge to the final overtime rule, and will provide updates when a change occurs.

## 2. Indian Housing Block Grant Allocation Formula Final Rule Published

On November 22, 2016, the Department of Housing and Urban Development (HUD) published in the Federal Register the final rule revising the Indian Housing Block Grant (IHBG) Program allocation formula authorized by section 302 of the Native American Housing Assistance and Self-Determination Act of 1996, as amended (NAHASDA). The new regulation will take effect for the fiscal year 2018 IHBG allocations.

One of the most significant changes will be that the formula data will be drawn from the United States Decennial Census and the (U.S. Census) American Community

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<sup>1</sup> *State of Nevada v. United States Department of Labor*, 4:16-CV-00731 (Nov. 22, 2016). The Opinion and Order are attached for reference.

Survey. The rule, however, also includes adjustments intended to minimize the volatility such change could trigger. Another change is an increase to the minimum grant amount.

A copy of the final rule can be found online via: <https://www.gpo.gov/fdsys/pkg/FR-2016-11-22/pdf/2016-27208.pdf>.

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Please let us know if we may provide additional information or analysis regarding the preliminary injunction of the DOL overtime rule, or regarding the final IHBG Allocation Formula. Inquiries may be directed to:

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