

# FLSA “Final” Overtime Rule and other Employee Benefit Developments

*presented by:*  
**Kenneth R. Keller**  
**and J. Scott Dillon**  
**Carruthers & Roth, P.A.**



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## Implementation of Final Rule Enjoined

- On 11/22/2016, in *Nevada et al v. US Dep't of Labor*, US District Court for the Eastern District of Texas issued nationwide stay on implementation of Final Rule
- Court ruled that Dep't of Labor exceeded its authority, which was primarily limited to defining “duties” test
- Court held that increase in “salary” threshold of this magnitude would eclipse “duties” test
- Decision subject to appeal and trial



## FLSA - Final Overtime Rule

- What the Rule would have done
- What the Rule would not do
- Review of White Collar Exemptions
- Options for compliance if Rule implemented



## What the Final Rule Would Have Done

- After December 1, 2016, the salary level required to qualify for an Executive, Administrative, or Professional “White Collar” exemption would have risen from \$455/wk - \$23,660/yr to \$913/wk - \$47,476/yr (40<sup>th</sup> percentile of earnings for full time workers in lowest wage Census Region)
- Level for “Highly Compensated” employees would be raised from \$100,000 to \$134,000/yr
- Levels would be automatically updated every 3 years (2020 would be first)



## What the Rule Would Not Do

- Would only apply to employees who are exempt from overtime requirements of FLSA based on Executive, Administrative, and Professional exemptions
- Would not require that all previously exempt employees be raised to specified level
- Would not qualify all persons making more than specified level as exempt (must still meet “standard duties” and “salary basis” tests)
- Would not apply to doctors, lawyers, teachers and outside sales



## White Collar Exemptions Must Meet 3 Tests

- Employee must be paid on a salary basis (Administrative and Professional Employees can be paid on fee basis)
- Position must qualify under standard duties test for that position – Judge in *Nevada v. DOL* interpreted the Congressional delegation of authority to allow DOL to define these duties
- Salary must meet specified salary level (this is what the Final Rule changed)



## Salary Basis

- Employee regularly receives a predetermined amount of compensation each pay period
- Salary must not be subject to reduction based on quality or quantity of work – if no work available, employer must still pay salary
- Employee must receive salary for any week in which employee performs any work



## Exceptions to Salary Basis – Employer Can Make Deductions For

- Absence for one or more full days for personal reasons other than sickness or disability
- If absent for sickness or disability, if deduction is made in accordance with a bona fide plan and leave allotment has been exhausted
- Offset military, juror or witness pay
- Disciplinary suspension of one or more full days for safety or workplace rule infractions
- Unpaid FMLA leave
- Partial weeks at beginning and end of employment



## Fee Basis

- Administrative and Professional Employees can be paid on a fee basis
- Agreed sum for single job, regardless of time required for completion
- Sum must equate to at least the prevailing salary level requirement for 40 hours (would be  $\$913 \div 40 = \$22.83/\text{hr}$  under Final Rule)
- For example, under Final Rule if task took 25 hours, would qualify if paid at least  $\$570.75$  ( $\$22.83 \times 25$  hours).



## Executive Standard Duties Tests

- Primary duty – managing enterprise or recognized department
- Customarily and regularly direct work of at least two or full time employees or equivalent
- Authority to hire or fire other employees (or suggestions and recommendations must be given particular weight)



## Administrative Standard Duties Test

- Primary duty – performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers
- Also, primary duty must include the exercise of discretion and independent judgment with respect to matters of significance



## Professional Standard Duties Test

- Primary duty must be work that requires advanced knowledge (predominantly intellectual and requiring exercise of discretion and judgment)
- Work must be in a field of science or learning or that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Advanced knowledge must be acquired by a prolonged course of specialized intellectual instruction.



## Salary Level Test

- Under Final Rule, would be \$913/wk, \$47,476/yr
- \$134,004 for Highly Compensated
  - Primary duty - office or non-manual work
  - Customarily and regularly perform at least one of the exempt duties of exempt Executive, Administrative, or Professional



## Options for Compliance

- If employee does not work more than 40 hours per week, overtime not an issue and no change needed
- Distribute workload so limit hours to 40 or less
  - if employee works more than 40 hours in a given week, will have to pay overtime



Under Final Rule, even if employee works more than 40 hours a week, employer could approximate compensation to that previously paid:

- “Reverse Engineer” compensation to an hourly rate that, together with usual hours worked in excess of 40 at 1 ½ that rate, would approximate prior compensation – problematic for employee if employee fails to work pre-determined number of hours.
- For example, an otherwise exempt employee who previously was paid a salary of \$37,000/yr (\$711.54 per week) and worked 45 hours per week could be converted to an hourly rate of \$15 per hour ( $40 \times 15 + 5 \times 22.50 = \$712.50$ ).



- Structure compensation as hourly, but paid as salary including overtime - a fixed salary that includes a sufficient agreed-upon set number of hours of overtime to cover the hours the employee usually works over 40 in a week. Employee would receive same amount each week, unless worked more than the predetermined set number of hours and then would receive overtime for the excess hours at 1 ½ times the agreed upon hourly rate.
- Would require agreement with employee, should be documented in writing.





- Using figures from prior example, hourly rate would be \$15/hour - salary including 5 hours of overtime would be \$712.50/wk, \$37,050/yr
- Wage & hour law only requires payment of at least minimum wage and overtime at 1 ½ times the employee's regular rate for hours in excess of 40
- Law does not prohibit employer for paying full salary even though employee does not work at least 45 hours
- If employee worked more than 45 hours, would need to pay an additional \$22.50 for each hour



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- Distributions from plan or IRA can be rolled over to same IRA, another IRA, or plan that accepts rollovers within 60 days from date distributed. §408(d)(3)(A).
- Amounts not rolled over within 60 days are subject to income tax in year distributed and 10% penalty tax if taxpayer is younger than 59-1/2.
- IRS may waive 60-day requirement if failure to do so would be against equity and good conscience.
- Code specifically lists casualty, disaster, and events beyond reasonable control of taxpayer.



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- Rev. Proc. 2003-16 – Automatic waiver allowed without IRS ruling if:
  - Financial institution receives funds before end of 60-day period.
  - Taxpayer followed procedures for rollover and gave instructions to rollover to IRA.
  - Funds not deposited into IRA solely due to error of financial institution.
  - Funds deposited into IRA within 1 year from date distributed.



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- Rev. Proc. 2003-16 – IRS will issue PLR waiving 60-day requirement for good cause based on facts and circumstances, including:
  - Whether error caused by financial institution.
  - Whether taxpayer didn't complete rollover due to death, disability, hospitalization, incarceration, postal error, or restrictions imposed by foreign country.
  - Whether taxpayer used amount distributed.
  - How much time has passed.



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- Reasons folks have requested waivers:
  - Tax shock – taxpayer did not understand tax consequences. ☹
  - Ignorance of tax law. ☹
  - Advice of others. ☺
  - Using IRA distribution for short-term loan. ☹
  - Forgetfulness. ☹
  - Lack of awareness of IRA distribution. ☺
  - Medical condition of taxpayer or loved one. ☺
  - Error of financial institution. ☺



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- IRS has been lenient in granting waivers. Out of 1,000's requested, only small percentage have denied taxpayers' requests.
- Still, cost of requesting PLR is significant.
  - Cost of preparing application.
  - User fee is \$10,000 per PLR request under Rev. Proc. 2016-47.



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- Rev. Proc. 2016-47 – taxpayer who feels there is good cause for waiver of 60-day period can self-certify the reason to the plan administrator or IRA custodian.
- IRS must not have previously denied waiver request.
- Model certification letter is provided.
- Copy of letter should be kept in taxpayer's tax file.
- Administrator/custodian can accept the late rollover and treat it as rollover upon receiving the certification letter.



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- To use self-certification, taxpayer's inability to complete rollover in 60 days must be due to one of following:
  - Financial institution error
  - Distribution check misplaced and not cashed
  - Distribution deposited in non-qualified account taxpayer thought was IRA
  - Taxpayer's principal residence severely damaged
  - Member of taxpayer's family died
  - Taxpayer or member of family seriously ill



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- Taxpayer was incarcerated
- Restriction imposed by foreign country
- Postal service error
- Distribution made due to IRS levy and levied proceeds returned
- Party making distribution didn't provide timely rollover info despite taxpayer's timely efforts to obtain info.



## 60-Day Rollover Rule: IRS Allows New Self-Certification Method of Correction

- Late rollover must be completed ASAP
  - 30-day safe harbor from time reason for late rollover no longer applies.
- Self-certification is not an IRS waiver, but taxpayer may report rollover as valid. If IRS audits, IRS may confirm if requirements for waiver are met.
- IRS will modify Form 5498 to require that IRA custodian accepting late rollover based on self-certification must report to IRS that rollover accepted late.
- IRS also given ability to waive during audit.



## Dealing with Group Health Insurance in Business Acquisitions

- Employee benefits often are an after-thought in business acquisitions.
- Lots of considerations:
  - Handling of PTO
  - Termination/transfer of 401(k) plan
  - Group insurance structure and transition
  - Continuity of health insurance coverage
  - Needs vary depending on whether deal structured as sale of stock or assets
    - Employees' employment and group plans remain intact with stock sale
    - With sale of all business assets, all plans and employees are technically terminated



## Dealing with Group Health Insurance in Business Acquisitions

- Two traps for unwary (mostly in asset sales) when (1) not all employees are hired by buyer or (2) buyer doesn't maintain similar health plan:
  - NCGS 58-50-40 notice of termination
  - COBRA successor liability



## Dealing with Group Health Insurance in Business Acquisitions

- NCGS 58-40-45
  - Requires employer to give 45 days notice of termination of group health plan.
  - If notice not given, (1) employer commits Class H felony, and (2) employer liable for all medical expenses of employees who would have been covered during 45 day period.
    - COBRA under seller's plan not an option if seller's plan terminated.
    - Eligibility for successor plan not an exception, but rarely a problem if all employees hired and buyer maintains similar or better health plan.
    - Real problem if (1) some employees terminated and/or (2) buyer has no plan or inferior plan.
      - High deductible; loss of supplemental plans; etc.



## Dealing with Group Health Insurance in Business Acquisitions

- COBRA Liability:
  - IRS COBRA Reg. §54.4980B-9 defines "M&A Qualified Beneficiary"
    - Insured receiving COBRA under seller's plan at time of sale.
    - Insured who has COBRA qualifying event as result of sale (i.e., termination).
  - COBRA rights of M&A Qualified Beneficiaries are protected.



## Dealing with Group Health Insurance in Business Acquisitions

- Seller and Buyer can agree to allocate COBRA responsibility.
  - If Seller's plan terminates, Seller may be able to arrange with insurer to provide COBRA to qualified beneficiaries.
- If Seller maintains its plan after the sale, Seller's plan is responsible for providing COBRA to qualified beneficiaries.
- If Seller's plan terminates and Buyer continues Seller's business operations "without interruption or substantial change", Buyer's plan is responsible for providing COBRA to Seller's qualified beneficiaries.
- Penalty for non-compliance is \$100 per day per beneficiary.
- No one wants COBRA beneficiaries – advance planning and negotiation are essential.



## Group Health Plan Form 5500 – The Forgotten Filing

- Form 5500 filing requirement for qualified plans well-known – due by last day of 7<sup>th</sup> month after year-end.
- Annual 5500 filings also apply to certain group welfare plans subject to ERISA, such as health, dental, vision, disability, life insurance, etc.
- Corporate Synergies Group found that out of 74,000 companies required to file Form 5500 for welfare plans, 47% were out of compliance.
- Failure to file penalty is \$2,063 per plan per day.
  - Failure to file for group health, dental, vision, and disability plans = \$2,063 X 4 X 365 per year!





## Group Health Plan Form 5500 – The Forgotten Filing

- As general rule, all group welfare plans subject to ERISA are subject to filing requirement.
- Primary exception is plan that (1) has fewer than 100 participating employees at beginning of year, and (2) is “unfunded, fully insured, or a combination of unfunded and fully insured”.
- “Unfunded” plan pays benefits from general assets.
- Self-insured plan that makes monthly contributions to VEBA or plan administrator’s trust is not unfunded.
- Cafeteria plans are exempt but underlying plans may not be.



## Group Health Plan Form 5500 – The Forgotten Filing

- Each welfare plan is separate plan for filing purposes.
- Health, dental, disability, vision plan = four 5500 filings.
- If employer’s welfare plans combined into one under “wrap document”, single filing requirement applies. This is called a “wrap plan” or “wrapper plan”.



## Group Health Plan Form 5500 – The Forgotten Filing

- DOL Voluntary Delinquent Filer Program:
  - Available if employer has not been notified of failure to file in writing by DOL and files voluntarily under program.
  - For “small plans” (less than 100 participants), penalty is \$10 per day per plan not to exceed lesser of \$750 per year or \$1,500 per plan.
  - For “large plans”, penalty is \$10 per day per plan not to exceed lesser of \$2,000 per year or \$4,000 per plan.



## Group Health Plan Form 5500 – The Forgotten Filing

- In July 2016, IRS and DOL proposed new 5500 requirements.
  - Would be effective for 2019 plan year.
  - Would withdraw small plan exemption and require **all** ERISA plans that provide group health benefits to file Form 5500, regardless of size and even if plan is fully insured or unfunded.
  - Small plans would still be exempt from filing Schedules C, G, and H.
  - Small, fully-insured plans would be required to answer only limited questions on 5500 and Schedule J (i.e., basic participation, coverage, ins. co., and benefit information).



## ACA Penalties from Independent Contractor Mischaracterization

- Employee or independent contractor?? Does employer have right to control the manner and means by which result of work is accomplished?
  - IRS 20 factor test
- §530 safe harbor for employment taxes:
  - 1099 reporting compliance
  - Reasonable basis for independent contractor treatment.
  - Consistently treat worker and similarly situated workers as independent contractors
- ACA regs state §530 only applies to employment tax relief and not ACA penalties.



## ACA Penalties from Independent Contractor Mischaracterization

- ACA Penalties on Large Employers (50 or more full-time employees):
  - If fail to offer group health coverage to at least 95% of full-time employees and one gets premium subsidy on exchange, annual penalty is \$2000 X (# of full-time employees – 30)
  - If coverage offered to 95% but particular employee is not offered “affordable coverage” and receives subsidy, annual penalty is \$3,000 on that employee. Affordability based on % of household income.



## ACA Penalties from Independent Contractor Mischaracterization

- Example:
  - Client has 500 full-time employees who receive affordable health plan coverage. Also engages 50 outside salespersons as independent contractors who are excluded.
  - IRS recharacterizes all 50 contractors as employees, resulting in less than 95% coverage:  $500/(500+50) = 91\%$ .
  - ACA penalty:  $(550-30) \times \$2000 = \$1,040,000/\text{yr}$



## 2016 Self-Directed IRA Horror Stories

- Self-directing IRAs in alternative investments has become big business, but IRS scrutinizes these transactions closely.
  - IRS taxes distributions that aren't properly reinvested via IRA vehicle.
  - Entire IRA becomes taxable in year it engages in prohibited transaction:
    - Direct or indirect transaction between IRA and IRA owner, family member, or controlled entity.
    - Transaction in which IRA owner derives personal benefit.



## 2016 Self-Directed IRA Horror Stories

- Vandenbosch v. Comm’r (TC Memo 2016-29)
  - TP had SEP IRA at Edward Jones. Wanted to lend \$125K to IAHL. Note signed by IAHL to “Vandenbosch SEP IRA”.
  - TP had EJ distribute \$ to TP’s joint acct, then wired to personal acct, then wired to IAHL.
  - Tax Court held distribution taxable to TP under claim of right doctrine (taxation occurs when TP receives \$ under claim of right without restrictions as to disposition).
  - Here, TP had control over and full access to \$.



## 2016 Self-Directed IRA Horror Stories

- McGaugh v Comm’r (TC Memo 2016-28)
  - TP had IRA at Merrill Lynch. Wanted to buy 10,000 shares of FPFC stock in IRA. ML refused to buy stock directly.
  - TP had ML wire \$ directly to FPFC. FPFC issued certificate to “McGaugh IRA fbo Ray McGaugh”. FPFC mailed it to ML more than 60 days after distribution. ML then mailed it to TP (it was returned twice).
  - ML reported \$ as taxable distribution on 1099-R.
  - Tax Court held no taxable distribution occurred, since \$ never passed thru TP’s hands and he acted as conduit or agent for IRA. Court said even if TP did possess certificate, he would not be taxed.
  - 60-day period didn’t matter since this was direct transfer



## 2016 Self-Directed IRA Horror Stories

- Thiessen v. Comm'r (146 T.C. No. 7 (2016))
  - TP rolled over retirement plan \$ to IRA. IRA used \$ to capitalize new C corp owned by IRA named Elsara. TP and wife named as officers and directors. Elsara then bought assets of business.
  - Part of purchase price paid by note from IRA to seller. TP and wife personally guaranteed note.
  - Tax court agreed with IRS that guaranty of note was indirect extension of credit by TP to IRA.
  - IRA deemed distributed in year transaction occurred.





## 2016 Self-Directed IRA Horror Stories

- Kellerman v. Rice (2015 WL 5330862)
  - TP and wife each owned 50% of Panther Mt. LLC. TP had self-directed IRA with Entrust.
  - IRA and Panther entered into partnership agmt – each contributed \$163K of cash and/or property.
  - Property contributed by IRA assisted development of 100 other acres owned by Panther.
  - 2 years later, TP and Panther filed bankruptcy.
  - Bankruptcy court held that prohibited transaction occurred.
  - IRA that engages in PT loses status of tax-exempt IRA.
  - Therefore, IRA assets included in bankruptcy estate.
  - IRA would have been excluded otherwise.



Dear Sir or Madam:

Pursuant to Internal Revenue Service  Revenue Procedure 2016-47, I certify that my contribution of \$ [ENTER AMOUNT] missed the 60-day rollover deadline for the reason(s) listed below under Reasons for Late Contribution. I am making this contribution as soon as practicable after the reason or reasons listed below no longer prevent me from making the contribution. I understand that this certification concerns only the 60-day requirement for a rollover and that, to complete the rollover, I must comply with all other tax law requirements for a valid rollover and with your rollover procedures.

Pursuant to  Revenue Procedure 2016-47, unless you have actual knowledge to the contrary, you may rely on this certification to show that I have satisfied the conditions for a waiver of the 60-day rollover requirement for the amount identified above. You may not rely on this certification in determining whether the contribution satisfies other requirements for a valid rollover.

### Reasons for Late Contribution

I intended to make the rollover within 60 days after receiving the distribution but was unable to do so for the following reason(s) (check all that apply):  An error was committed by the financial institution making the distribution or receiving the contribution.  The distribution was in the form of a check and the check was misplaced and never cashed.

The distribution was deposited into and remained in an account that I mistakenly thought was a retirement plan or IRA.  My principal residence was severely damaged.  One of my family members died.  I or one of my family members was seriously ill.  I was incarcerated.  Restrictions were imposed by a foreign country.  A postal error occurred.  The distribution was made on account of an IRS levy and the proceeds of the levy have been returned to me.  The party making the distribution delayed providing information that the receiving plan or IRA required to complete the rollover despite my reasonable efforts to obtain the information.

### Signature

I declare that the representations made in this document are true and that the IRS has not previously denied a request for a waiver of the 60-day rollover requirement with respect to a rollover of all or part of the distribution to which this contribution relates. I understand that in the event I am audited and the IRS does not grant a waiver for this contribution, I may be

subject to income and excise taxes, interest, and penalties. If the contribution is made to an IRA, I understand you will be required to report the contribution to the IRS. I also understand that I should retain a copy of this signed certification with my tax records.

*Signature:* \_\_\_\_\_

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West's North Carolina General Statutes Annotated Currentness

Chapter 58. Insurance (Refs & Annos)

▣ Article 50. General Accident and Health Insurance Regulations

▣ Part 1. Miscellaneous Provisions

▣ § 58-50-40. Willful failure to pay group insurance premiums; willful termination of a group health plan; notice to persons insured; penalty; restitution; examination of insurance transactions

(a) As used in this section and in G.S. 58-50-45:

- (1) "Group health insurance" means any policy described in G.S. 58-51-75, 58-51-80, or 58-51-90; any group insurance certificate or group subscriber contract issued by a service corporation pursuant to Articles 65 and 66 of this Chapter; any health care plan provided or arranged by a health maintenance organization pursuant to Article 67 of this Chapter; or any multiple employer welfare arrangement as defined in G.S. 58-49-30(a).
- (2) "Group health plan" means a single employer self-insured group health plan as defined in section 607(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1167(1), as amended.
- (3) "Insurance fiduciary" means any person, employer, principal, agent, trustee, or third-party administrator who is responsible for the payment of group health or group life insurance premiums or who is responsible for funding a group health plan.
- (4) "Premiums" includes contributions to a group health plan or to a multiple employer welfare arrangement.

(b) No insurance fiduciary shall:

- (1) Cause the cancellation or nonrenewal of group health or group life insurance and the consequential loss of the coverages of the persons insured by willfully failing to pay such premiums in accordance with the terms of a group health or group life insurance contract; or, in the case of a group health plan to which there are no premiums contributed, terminate the plan by willfully failing to fund the plan; and
- (2) Willfully fail to deliver, at least 45 days before the termination of the group health or group life insurance or group health plan, to all persons covered by the group policy or group health plan a written notice of the insurance fiduciary's intention to stop payment of premiums for the group life or health insurance or the insurance fiduciary's intention to cease funding of a group health plan.

(c) Any insurance fiduciary who violates subsection (b) of this section shall be guilty of a Class H felony.

(d) Repealed by Laws 1991, c. 644, § 37.

(e) Upon conviction under subsection (c) of this section the court shall order the insurance fiduciary to make full restitution to persons insured who incurred expenses that would have been covered by the group health insurance or group health plan or full restitution to beneficiaries of the group life insurance for death benefits that would have

been paid if the coverage had not been terminated.

(f) Insurance fiduciaries subject to this section shall be subject to the provisions of G.S. 58-2-200 with respect only to transactions involving group health or life insurance.

(g) In the notice required by subsection (b) of this section, the insurance fiduciary shall also notify those persons of their rights to health insurance conversion policies under Article 53 of this Chapter and their rights to purchase individual policies under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, as amended, and Article 68 of this Chapter.

(h) In the event of the insolvency of an employer or insurance fiduciary who has violated this section, any person specified in subsection (e) of this section shall have a lien upon the assets of the employer or insurance fiduciary for the expenses or benefits specified in subsection (e) of this section. With respect to personal property within the estate of the insolvent employer or insurance fiduciary, the lien shall have priority over unperfected security interests.

(i) Upon the termination of a group health insurance contract by the insurer, the insurer shall notify every subscriber and certificate holder under the contract of the termination of the contract along with the certification required to be provided under G.S. 58-68-30(e). Upon the termination of a group health insurance contract by the insurance fiduciary, the insurance fiduciary shall notify every subscriber and certificate holder under the contract of the termination of the contract along with the certification required to be provided under G.S. 58-68-30(e).

(j) This section shall not apply to the cessation of individual contributions made by any person covered by a group health or group life insurance policy or group health plan.

#### CREDIT(S)

Added by Laws 1985, c. 507, § 1. Amended by Laws 1989, c. 485, § 51; Laws 1989 (Reg. Sess., 1990), c. 1055, §§ 2, 3, 1; Laws 1991, c. 644, § 37; Laws 1993, c. 539, § 1274, eff. Oct. 1, 1994; Laws 1994 (1st Ex. Sess.), c. 24, § 14(c), eff. March 26, 1994; S.L. 2001-422, § 1, eff. Dec. 1, 2001; S.L. 2006-105, § 1.8, eff. July 13, 2006.

The statutes and Constitution are current through S.L. 2012-1 of the 2011 Regular Session of the General Assembly.

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