Injunction of the DOL's Overtime Rule and Its Appeal

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January 2017

Is the Department of Labor (DOL) overtime rule now dead? Will the overtime rule be modified to a more modest version? Much uncertainty remains regarding the recently announced overtime rule in both the legal and the political sphere.

The Legal Landscape

In a ruling announced on Nov. 22, just days before a Dec. 1 effective date, U.S. District Judge Amos L. Mazzant of the Eastern District of Texas halted nationwide the effectiveness of the new regulations. These regulations would have more than doubled the salary level required to be paid by employers to those employees who are classified as exempt from receiving overtime pay.

The DOL has appealed the ruling, and the court has granted the DOL's request for the appeal to be heard on an expedited basis. However, the appeal will not be "ripe for decision" until after a new Trump Administration and a new Congress take office.

The Current Political Landscape

Trump has appointed a known opponent of the new overtime rule to be Secretary of Labor. Some Congressional Republicans are planning an attempt to revoke the new regulations in the new Congress through use of the Congressional Review Act.

The legal and political landscape has created uncertainty, and many employers wonder what to expect. A more detailed analysis is herein, but several strategies are being explored on both fronts, either to halt the rule in its entirety, or to modify its dramatic increase of the salary level to a more modest "phased-in" approach.

In the interim, it appears those employers who already had announced and *implemented* changes in salaries or classifications did not attempt to reverse those changes despite the Nov. 22 ruling. Those employers who had not yet implemented any changes, even if already announced, have tended to postpone the announced changes pending further developments in the case or pending further guidance from a Trump-Administration DOL.

The DOL Rule-Making And Its Impact

As most readers know, the Fair Labor Standards Act (FLSA) requires employers to pay employees at least the minimum wage for all hours worked and additional pay (an overtime premium) of 1.5 times the employee's "regular rate" of pay for all hours worked by the employee in excess of 40 hours in a workweek. The FLSA exempts certain employees from these requirements due to their status as an executive, administrative, or professional (EAP) employee. The FLSA authorizes DOL to "define and delimit" these exemptions.

In 2014, President Obama directed the DOL to update and modernize these exemptions. *See http://bit.ly/2hwAx2j.* At the time, and for many years prior, the DOL had used three tests to determine whether an employee was exempt under the EAP classifications:

1. Whether the employee was paid "on a salaried basis" ("the salary basis test");
2. Whether the employee was paid a sufficiently high salary that was no less than a DOL-determined level ("the salary level test"); and,
3. 3. Whether the employee actually engaged in certain job duties that qualified for the applicable exemption ("the job duties test").

Two years after President Obama's directive, the DOL issued a final rule that significantly increased the "salary level test." The final rule more than doubled the salary level test, increasing it from $455 per week to $913 per week (or $47,476 annually); increased the salary level of the highly compensated employee (HCE) exemption from $100,000 to $134,004; and established an automatic update to these salary levels every three years based upon certain criteria, namely: 1) Standard salary level would be increased every three

years based on the 40th percentile of earnings of all full-time salaried workers in the lowest-wage Census Region; and 2) The HCE threshold would be increased every three years based on the 90th percentile of full-time salaried workers nationally.

The new DOL rules were scheduled to have taken effect Dec. 1, 2016. After the announcement but before implementation, employers across the country began evaluating the impact of the new rules on their labor costs. The analysis involved a complex audit process, and for some — especially small businesses and nonprofits — the new rule created an existential budget crisis. Employers had to determine whether employees previously classified as exempt should have their salaries increased to the new level in order to preserve their exempt status, or, in the alternative, whether employees should be re-classified as non-exempt. Labor costs were not the only concern. Savvy employers knew that re-classification would impact morale, as persons previously labeled as exempt would be re-classified as non-exempt and face a sense of loss in prestige for their jobs; those employees also would be required to track their hours worked, for some, a cumbersome and demeaning process. Details as seemingly minor as off-duty access to email and other company systems might be impacted.

Some praised the final rules, claiming that the DOL's actions would help the middle class and would extend the right to overtime pay to approximately 4.2 million workers who previously had been classified as exempt. Others were critical, noting that the new overtime rules would have unintended consequences of job loss, especially among entry-level manager jobs where young workers often enter the job market. In addition, the burden on private-sector employers was projected to be $1.5 billion each year, with the DOL estimating the average annualized direct employer costs to be $295.1 million, in addition to the expected annual transfer of $1.2 billion of income from employers to employees as a result of the rule. Further, costs to state and local governments were expected to be $115.1 million in the first year alone.

The Lawsuit and Its Ruling

Twenty-one states filed a federal lawsuit in Texas against the DOL, challenging the final rule. Over 50 businesses filed suit as well. The two lawsuits were consolidated into one proceeding. The plaintiffs argued that the DOL had exceeded its authority in announcing the new salary level.

The plaintiffs asked the court to enter a preliminary injunction designed to stop the allegedly unlawful rule from taking effect during the pendency of the lawsuits. In their request, the plaintiffs argued that the DOL exceeded its authority because the new salary level was increased to such a degree that the tests for the EAP exemptions had become, in essence, a salary level test only.

On Nov. 22, in a ruling few expected, Obama-appointee Judge Amos L. Mazzant ruled that the plaintiffs had a substantial likelihood of prevailing on their argument that the DOL had exceeded its authority. Judge Mazzant ordered a halt to implementation of the new salary level, at least temporarily, until the court could consider more fully whether the regulations were properly authorized.

More specifically, Judge Mazzant found improper the DOL's application of a minimum salary level when the plain meanings of "executive," "administrative," and "professional" read together with the statute, made it clear that "Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level." By increasing the salary threshold so significantly, the DOL has created "essentially a de facto salary-only test." In direct conflict with Congress' intent, explained the court, the DOL's final rule requires employers to extend overtime pay to any employee, regardless of his/her job duties, whose pay is below the heightened salary level. "[T]he Department exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it supplants the duties test."

The district court also noted that the minimum salary level originally established in regulations years ago "was purposefully set low" to exclude those workers who were clearly nonexempt. The court's injunction does not address the lawfulness of a salary-level test in general, but specifically enjoins the application of the DOL's increased salary-level test in its final rule as exceeding the agency's delegated authority.

The DOL issued a statement "strongly disagreeing" with the district court and has appealed the ruling to the U.S. Court of Appeals for the Fifth Circuit. The circuit court has granted the DOL's request to expedite the appeal. However, even on the expedited schedule, the case will not be "ripe" for consideration until after the new administration and new Congress take office.

What Can We Expect?

As employers wait and see what will happen, a few significant questions emerge:

1. **Does the ruling mean the new salary level will never go into effect?** No. The legal ruling only halts the effectiveness of the new salary level pending further action by the court or pending what occurs on appeal. It remains possible the new salary level could go into effect in the future. However, the ruling does provide the new administration with an opportunity to stop, or modify, the new salary level. The legal landscape has provided significant opportunity for change through the political landscape.
2. **Will the Trump Administration and the new Congress kill the DOL salary level rule?** Perhaps. There are prominent sig-

nals that the DOL salary level test, as currently announced, will not take effect. President-Elect Trump has appointed Andrew Puzder as Labor Secretary. Puzder is a known critic of the new overtime regulations as bad for business and bad for those workers they were designed to help. In the pending lawsuit, the Trump Administration could drop the appeal, or attempt to "settle."

Dropping the appeal, or settling, likely would result in a permanent injunction. The DOL could then conduct new rule-making to implement a new salary level at a more modest level — a "phase-in" that some in Congress on both sides of the aisle proposed in legislation months ago; or, the new DOL could decide to take no further action to increase the current salary level of $455 per week.

Congressional Republicans could use the Congressional Review Act to pass a joint resolution in the new Congress to kill the overtime regulations, since the regulations were announced toward the end of the prior congressional session. This option, which is rarely used, prevents the DOL from issuing substantially similar regulations, making it questionable whether the DOL could raise the salary level at all. More interestingly, however, the court's ruling raises a significant legal question as to whether a salary level of any amount is authorized by statute. If that ruling is made permanent as noted above, that legal question persists.

Employers Response

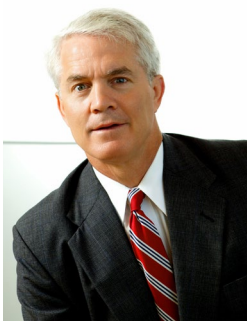
Of those employers that had already implemented salary increases and/or reclassifications in accordance with the new salary level, most kept those actions in place. Those employers recognized that it would be more disruptive to attempt to "undo" the salaries or reclassifications, regardless of whether the new regulations ultimately are implemented.

Of those employers that had only announced changes but had not yet implemented them, there was a "mixed bag." Some employers did not wish to renege on the announced plans, especially salary increases; but often, those employers explained to their employees that they might not get another "raise" in calendar year 2017 in light of the December 2016 increase. Other employers did postpone the announced salary increases due to strong concerns about increased labor costs, especially smaller employers and non-profits.

In addition, those employers who faced significant morale issues with the planned reclassifications (i.e., employees upset at "loss of prestige" or having to track hours), used the opportunity to postpone any reclassifications given the morale issue. Other employers tended to proceed with the announced changes.

Is There Anything Further An Employer Should Do Now?

No, assuming the employer did some analysis around the previously announced Dec. 1 effective date. Other than whatever audit the employer did at that time, there are no other "proactive" steps to take. However, given the nature the nature of the EAP exemptions, regular audits — especially of those jobs "near the edges" — is a wise practice.



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