December 2, 2016

District Court Issues Nationwide Preliminary Injunction Halting Implementation of Department of Labor's New Overtime Rules

On May 18, 2016, the U.S. Department of Labor announced a final rule (the "Final Rule") that revised overtime exemption regulations for certain executive, administrative, and professional employees ("white-collar employees") and other highly compensated employees under the Federal Labor Standards Act (the "FLSA").[1] The Final Rule, among other things, raised the minimum salary level that full-time white-collar employees must earn to be exempt from overtime pay from $455 per week ($23,660 annually) to $913 per week ($47,476 annually).[2] This increase is based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country.[3] In addition, the Final Rule provides a mechanism to automatically adjust the minimum salary and compensation requirements every three years, beginning January 1, 2020.[4] *See* Paul, Weiss Client Memorandum dated May 23, 2016 for further detail regarding the Final Rule.

The Final Rule was set to take effect on December 1, 2016. More than 50 companies and twenty-one states, however, filed lawsuits challenging the new rule in federal court in the Eastern District of Texas.[5] In October 2016, the states moved for an emergency preliminary injunction, which was granted on November 22, 2016. Judge Amos L. Mazzant of the United States District Court for the Eastern District of Texas issued a nationwide injunction blocking the implementation and enforcement of the Department of Labor's new overtime rules, pending further order of the Court.

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1 U.S. Department of Labor, Wage & Hour Div., "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act," *available at* https://www.dol.gov/WHD/overtime/final2016/.

2 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (proposed May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

3 *Id.*

4 *Id.* The other two major areas of change were (1) allowing nondiscretionary bonuses and incentive payments to count towards the minimum salary level for white-collar workers up to 10 percent, and (2) raising the minimum salary for highly compensated employees to be exempt from overtime pay to $134,004. Neither of these areas were addressed by the Court in the decision discussed in this memorandum.

5 *See State of Nevada, et al* v. *United States Department of Labor, et al*, 4:16-CV-00731 (September 20, 2016, E.D. Tex.); *Plano Chamber of Commerce, et al* v. *Thomas E. Perez, et al*, 4:16-cv-00732 (September 20, 2016, E.D. Tex.).

Therefore, for now, companies are not required to implement the new overtime rules.

The Statutory and Regulatory Scheme

Section 213(a)(1) of the FLSA exempts "any employee employed in a *bona fide* executive, administrative, or professional capacity" from both minimum wage and overtime (otherwise known as the "white collar" or "EAP" exemption).[6] The FLSA does not define the phrase "*bona fide* executive, administrative, or professional capacity," but the Department of Labor has been vested with the power to define and delimit its meaning through regulation. The current regulations, which remain in effect pending further order of the Court, require that an employee meet three criteria to qualify for an exemption from the overtime requirements. The criteria are: (1) the employee is paid on a salary basis (the "salary-basis test"); (2) the employee is paid at least the minimum salary established by the regulations, currently $455 per week or $23,600 annually (the "salary-level test"); and (3) the employee performs executive, administrative, or professional duties (the "duties test").[7]

The Legal Challenge and the Decision

In their motion for a preliminary injunction, the states argued that the Final Rule was unlawful and that the Department lacked the authority to promulgate it. The Department contended that Section 213(a)(1) gave it broad authority to interpret the statutory terms and that its construction of the statute should be given deference under *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Court, in granting the states' motion for a preliminary injunction, rejected the Department's position and held that the Department's minimum exempt salary increase from $455 to $913, and the automatic adjustment of the minimum salary and compensation requirements every three years, exceed the Department of Labor's authority. The Court reasoned that it is clear and unambiguous from the plain language of the FLSA that Congress intended that the EAP exemption turn on the duties performed by individuals employed in an executive, administrative, or professional capacity, not on a minimum salary level.[8] The Court also opined that while Section 213(a)(1) does authorize the Department to define and delimit the EAP exemption by establishing the types of duties that might qualify an employee for the exemption, nothing in the language of the statute gives the Department that authority with respect to a minimum salary level.[9] The Court found that the new regulations' significant increase in salary level

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6 29 U.S.C. § 213(a)(1).

7 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (proposed May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

8 *State of Nevada*, at 11.

9 *Id.*, at 12.

would create a *de facto* salary-only test, which, in the Court's view, Congress did not intend.[10] The Court noted that if the new regulations were to become effective, an estimated 4.2 million employees currently not eligible for overtime would automatically become eligible for overtime without any change in duties.[11] In a footnote, the Court explained that it was "not making a general statement on the lawfulness of the salary-level test for the EAP exemption," but rather was "evaluating only the salary-level test as amended under the Department's Final Rule."[12]

The Reaction of the Department of Labor

The Department of Labor has stated that it "strongly disagrees with the decision by the court, which has the effect of delaying a fair day's pay for a long day's work for millions of hardworking Americans. The Department's Overtime Final Rule is the result of a comprehensive, inclusive rule-making process, and we remain confident in the legality of all aspects of the rule. We are currently considering all of our legal options."[13] Given the timing of the injunction and the pending administration change, it is unclear which legal options may be pursued.

Implications of the Decision

For now, employers do not need to comply with the Final Rule by December 1, 2016.

The long term implications of the decision, however, are unknown. The injunction is temporary. The Department of Labor in all likelihood will appeal, and ultimately, the Court may have to decide whether a permanent injunction is appropriate.

Employers who have not yet implemented the overtime changes of the Final Rule have several choices: they may decide to hold off until the fate of the new overtime regulations is finally and definitively decided or they may forge ahead and voluntarily proceed with the changes. If the injunction is lifted, employers may be responsible for retroactive pay during the injunctive period to employees whose status changed. Employers should also be prepared to quickly implement the new changes if the injunction is lifted.

Employers who have already implemented the overtime changes or who have already communicated the changes to their employees should proceed with caution, if they are contemplating reversing course. In

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10 *Id.*, at 14.

11 *Id.*

12 *Id.*, at 12, fn 2.

13 U.S. Department of Labor, Wage & Hour Div., "Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas," *available at* https://www.dol.gov/whd/overtime/final2016/litigation.htm.

making such a decision, employers should keep in mind all applicable state laws. Many states, including, for example, New York and California, provide their own, separate salary thresholds for exemptions from overtime. State law may also require that notice be given to employees when compensation changes are made.

This decision raises many issues for employers to consider. If questions arise, employers should consult with counsel to determine how best to navigate the changing environment and ensure compliance with all obligations.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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