DOL Will Issue New Rule to Set Salary for White Collar Exemptions, But Asks Fifth Circuit to Reverse District Court Order Granting Nationwide Preliminary Injunction

The government has asked the Fifth Circuit Court of Appeals to reverse a Texas District Court Judge who issued a nationwide preliminary injunction blocking the Department of Labor's Final Rule which would have more than doubled the required salary level for the "white collar" overtime exemptions under the Fair Labor Standards Act.

On June 30, 2017, the government argued the district court erred in finding the DOL may not set a minimum salary as a requirement of the exemptions and asked the Fifth Circuit to "reaffirm the Department's statutory authority to establish a salary level test." The district court had held the Final Rule was invalid because Congress intended the exemptions to turn on the duties performed by employees, not the salary level.

The government also stated, however, that the DOL "has decided not to advocate for the specific salary level ($913 per week) set in the final rule at this time" and that it "intends to undertake further rulemaking to determine what the salary level should be." The government thus asked the Court to "address only the threshold legal questions of the Department's statutory authority to set a salary level, without addressing the specific salary level set by the 2016 final rule." It further noted that a proposed rule would not be issued until its authority to set a salary level has been confirmed, but that it will publish a "request for information" seeking public comment that would "aid in the development of a proposal."

The government's latest filing confirms the DOL intends to repeal and replace the Final Rule with a new, trimmed down version, likely setting the required salary level somewhere in the low- to mid-$30,000 range, based on earlier comments from Secretary of Labor Alexander Acosta. That move would undo one of the Obama Administration's signature achievements and unravel more than two years of rulemaking.

Consistent with that plan, as noted in the filing, the DOL had announced it would issue a "Request for Information" seeking comments from the public on the overtime rule, which will be its first step before a new proposed rule is issued. The Request for Information will be published in the Federal Register after it is reviewed by the Office of Management and Budget.

Background Regarding Final Rule

In May 2016, the Department of Labor issued its long-awaited Final Rule more than doubling the required salary for the white collar exemptions (those individuals employed in an executive, administrative, or professional capacity) from $23,660 to $47,476. The Final Rule also raised the required salary level for the "highly compensated" exemption, from $100,000 to $134,004, and established rules for automatic increases to those levels every three years. Issued after more than 270,000 comments were received by the DOL, the Final Rule was set to take effect on December 1, 2016.

Employers, including state governments and non-profits, however, balked after the Final Rule was issued. They argued the drastic increase to the salary level requirements for the exemptions would result in unacceptable increases in labor costs, loss of flexibility in the workplace, or lower wages and benefits to previously non-exempt employees, whose hours now would be reduced to avoid payment of overtime.

Lawsuit Filed Challenging Final Rule

In September 2016, 21 States and various business groups filed lawsuits in the Eastern District of Texas seeking to block the Final Rule, and the State Plaintiffs sought a preliminary injunction barring the DOL from implementing the Final Rule. While employers were gearing up to implement the Final Rule, either reclassifying workers as non-exempt, raising salary levels to satisfy the new requirements, or restructuring jobs to ensure employees did not work more than 40 hours a week, the court in Texas was mulling over the request for an injunction.

On November 22, 2016, days before the effective date of the Final Rule, District Court Judge Amos Mazzant (an Obama appointee) gave the State Plaintiffs what they asked for — a nationwide injunction barring the Department of Labor from implementing or enforcing the Final Rule. In granting the preliminary injunction, the court found that nowhere in the text of the FLSA was any indication that Congress intended the exemptions for white collar workers to include a salary level requirement. The exemptions, the court found, were intended to be dependent on the duties of the employees. The Final Rule essentially created a "de facto salary-only test," making approximately 4.2 million workers eligible for overtime even though their duties might qualify them for the exemption, the court held in granting the injunction.

Government Files Appeal to Fifth Circuit

With the inauguration date of Donald Trump looming, the government quickly appealed to the Fifth Circuit Court of Appeals on December 1, 2016, asking for expedited briefing on the appeal. Following the inauguration of a new administration, however, the government no longer sought an expedited appeal, but instead more time. The government asked for three extensions of time in which to submit its final reply brief in support of the appeal in order to give the new administration time to consider the issues. The delayed nomination of a Secretary of Labor, following the withdrawal of Andrew Puzder from consideration, was cited as a reason for the request for more time.

What's Next?

The Fifth Circuit will schedule oral argument on the appeal. But the filing raises several important questions. For example, if the Fifth Circuit reverses the lower court, does the Final Rule become effective immediately (or effective retroactively to the original effective date), or is there an alternative basis for the district court to continue the injunction?

The brief filed by the government on June 30 noted that the district court had not ruled on whether the Final Rule is unenforceable because it was arbitrary and capricious or "unsupported by the administrative record," which may form the basis to continue the injunction.

Employers faced with this dizzying path of events are justifiably confused. Nonetheless, as it stands now, the preliminary injunction is in place and no new rule has been proposed yet.

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Please contact Jackson Lewis with any questions regarding these developments, compliance, or government relations.

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