



Department of Labor Seeks Appeal of Nationwide Injunction Blocking New Overtime Rule

IN MAY 2016, we reported on the long-anticipated U.S. Department of Labor (DOL) revised rules regarding overtime which were to be effective December 1, 2016 (DOL Final Rule). [Click HERE](#) to see our May 2016 Employment Law *Trending Now*.

On November 22, 2016, a Texas federal district court judge entered a nationwide injunction blocking the implementation of the controversial DOL Final Rule that would significantly increase the salary basis necessary to classify employees as exempt from being paid overtime from \$23,660 to \$47,476 per year. On December 1, 2016, the DOL and the other defendants filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit.

The plaintiffs, 21 states (all but one led by Republican governors), filed a complaint in September 2016 claiming that the DOL Final Rule is unlawful and the DOL lacked authority to promulgate the new rule. The plaintiffs then asked the court for an injunction to stop the enforcement of the DOL Final Rule pending the outcome of the litigation. The court agreed and enjoined the DOL from implementing the Final Rule.

For the injunction request the plaintiffs argued, among other things, that the DOL did not have the authority to define the FLSA “white collar” exemption to overtime in terms

of a minimum salary level that ignores the long standing duties criteria originally established by Congress. In ordering the injunction, Judge Amos Mazzant concluded that the states were likely to succeed in their challenge to the regulations and that those states would be irreparably harmed if the Final Rule went into effect. [Click HERE](#) for a copy of the court’s decision.

Judge Mazzant, appointed to the court by President Obama, noted that the DOL Final Rule is in direct conflict with Congress’s intent, writing, “the Final Rule states that ‘[w]hite collar employees subject to the salary level test earning less than \$913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime irrespective of their job duties. With the Final Rule, the Department exceeds its delegated authority and ignores Congress’s intent by raising the minimum salary level such that it supplants the duties test.’” Judge Mazzant further stated that “If Congress intended the salary requirement to supplant the duties test, then Congress and not the department should make that change.”

The court’s decision blocking the DOL Final Rule came just 10 days before the enforcement deadline, leaving little time for employers nationwide to adjust their new compliance plans, workforce structures and payroll processes that most likely were in

progress for months. And the court's decision provided no guidance on what employers should or should not do in this interim period.

The DOL immediately issued a statement strongly disagreeing with the court's opinion, stating "We remain confident in the legality of all aspects of the rule. We are currently considering all of our legal options." On December 1, 2016, the DOL and the other defendants filed a notice of appeal. However, that appeal process could take weeks, if not months, and it's unlikely that any decision from the appellate court would be made until, at the earliest, sometime in the first quarter of 2017.

There also could be congressional action in 2017. Several bills were previously introduced to block the Final Rule; all failed, and would surely have faced veto under the Obama administration. Future bills may have a better chance of success now that Republicans control both houses of Congress. It is even possible that under the incoming Trump administration, the DOL could be directed to drop any pending appeals and/or simply take the position that the Final Rule will not go into effect. However, President-elect Donald Trump has not weighed in on this either during the campaign or the transition process.

Even so, given the delay caused by the injunction, there is a greater probability that

Congress or the incoming administration will have to address the DOL Final Rule before it goes into effect.

What should employers do during this period of uncertainty? Many employers have spent considerable time, money and effort to comply with the DOL Final Rule. Decisions have been made by employers, and perhaps already communicated and implemented, to raise salaries, convert salaried employees to hourly wages, limit overtime and layoff personnel to cut costs. And unwinding these preparations and communicating the changes to employees may raise other employment-related issues, as well as impacting employee morale. However, at this time it is very much a wait-and-see approach as the litigation and other surrounding circumstances unfold.

As always though, you should contact an experienced employment attorney in making any decisions on how to proceed in this interim period. We will continue to monitor the status of the DOL Final Rule and related litigation to provide further updates as they develop.

If you would like to review this issue further, please contact the author, Cheryl Tama Oblander, at ctama@aqdqlaw.com or the Aronberg Goldgehn attorney with whom you normally work.