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Invalidation Of DOL Overtime Rule Leaves Employers In Limbo

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Just in time for Labor Day, Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas issued an opinion and order on Aug. 31, 2017, which invalidates a controversial overtime rule published by the U.S. Department of Labor on May 23, 2016.[1] That rule would have increased the salary requirement for the so-called "EAP" or "white collar" exemptions for executive, administrative and professional employees under the Fair Labor Standards Act from $455 per week to $913 per week, thereby excluding approximately 4.2 million currently exempt salaried workers from the exemptions. This significant change was promoted by the Obama administration as a means of raising the incomes of many low- to middle-income Americans while "modernizing and streamlining" the overtime rule.

The rule was almost immediately challenged in court by a number of state governments and, in a separate action, by a group of business interests led by the Plano (Texas) Chamber of Commerce. These cases were consolidated in the action before Judge Mazzant, who issued a preliminary injunction days before the rule was scheduled to take effect on Dec. 1, 2016. The Department of Labor appealed the injunction ruling to the Fifth Circuit but the appeal was stalled as the incoming Trump administration struggled with what position to take regarding the rule. The injunction and pending appeal created some degree of relief but some confusion for employers who wrestled with whether to change employees' status from exempt to nonexempt or greatly increase some employees' salaries in order to preserve their exempt status.

The recent opinion and order is a definitive statement that the rule was invalid but still leaves questions for employers. Judge Mazzant found that the significant increase in the salary test effectively eliminated Congress' unambiguous intent of creating exemptions for executives, administrative employees and professionals based on the employees' duties rather than a specific salary level. Congress granted the Department of Labor broad authority to "define and delimit" the scope of the exemptions, but not on a salary level alone, Judge Mazzant ruled. Relying on the two-part test for analyzing administrative action under the U.S. Supreme Court's Chevron decision[2], the judge found that the Department of Labor's rule exceeded the agency's authority by (1) not following the explicit instruction from Congress, and (2) promulgating a rule that was not permissible even if Congress' instructions had not been precise.

Some of the language in the opinion calls into question the very idea of having any salary test as part of the exemption. Because Congress did not originally suggest any salary component to the exemption, the salary test is purely a creation of the Department of Labor. Judge Mazzant acknowledged, however, that a salary test had been a part of the exemptions since 1940 and had been previously approved by other courts, including the Fifth Circuit.[3] Therefore, he did not suggest the salary test should be eliminated altogether. Instead, he held open the concept that some salary test was appropriate and, quoting from his ruling on the injunction, stated that if the rule had merely raised the salary level based on inflation rather than almost doubling the existing level, “we would not be here today.”

The recent decision creates some confusion regarding the status of the case. With the appeal of the injunction still active, the court of appeals may be asked to rule on the propriety of the injunction without regard to this final order, but that seems unlikely. In all likelihood, the appeal will be considered moot and dismissed. Regarding the final order, it could be appealed by the Department of Labor, but that too seems unlikely. It is more likely that the department, acting on the direction of the Trump administration, will not seek any further appeal but will go back to the drawing board on an update of the salary test.

Where Does This Leave Employers?

While Judge Mazzant’s decision is almost certainly the end of the Obama administration’s efforts to update the EAP exemptions with a significant increase in the minimum salary requirement, the issue is far from resolved. It seems very likely the Department of Labor under direction from the Trump administration will take another shot at updating the exemption requirements. Some commentators have suggested that a more modest increase from the current level of $23,660 annually to somewhere around $30,000 would likely be accepted without challenge. Others have suggested that along with a salary increase, the department should better define the “duties test” of the exemptions to ensure that employees covered by the exemptions, regardless of salary level, are indeed primarily engaged in executive, high-level administrative or professional duties.

Unfortunately for employers eager to settle any uncertainty over the exemption issue, any revised final rule is probably many months off. Under former President Barack Obama, the Department of Labor took over two years from the president’s initial directive to update the exemptions to publish a final rule. In the meantime, almost 300,000 public comments were received, emphasizing the degree of concern over the issue. While it is hoped the new administration could move things along a little faster, promulgating a new final rule will not be easy or fast.

When the final rule was first published, some employers rushed to comply with the rule by either raising salaries to meet the new level, making some formerly exempt employees nonexempt (and thus entitled to overtime pay), or some combination of both. For those employers who already made these adjustments, it probably does not make sense to try to unscramble that egg. Whatever changes were made should satisfy any adjustments required by a future rule. For other employers who took a “wait and see” approach, they can breathe a small sigh of relief that their courage, or procrastination, was rewarded. Now, those employers who chose to wait and do nothing, (likely the vast majority of employers), can take this new period of reset to evaluate their overall treatment of employees under the exemption, not only with regard to salary but also job titles and job duties. This could be done in conjunction with a comprehensive wage and hour audit to uncover any issues of noncompliance as well as to get ready for the foreseeable adjustments in the rules regarding the EAP exemptions.

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[1] State of Nevada, et al. v. U.S. Department of Labor, et al., 4:16-CV-731 (ED TX).

[2] Chevron, USA Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984).

[3] Wirtz v. Mississippi Publishers Corp., 364 F.2d 603 (5th Cir. 1966).