

CLIENT ALERT

DOL Overtime Rule: The Latest . . . And What Now?

September 6, 2017

It's been a busy week in the world of overtime regulation. A district court judge in Texas granted summary judgment to the plaintiffs in a lawsuit seeking to set aside a rule issued last year by the Obama administration that doubled the minimum salary necessary for employers to classify many "white collar" employees as exempt from the overtime requirements of the Fair Labor Standards Act. But that decision is hardly the end of this controversy.

The district court's ruling is a clear victory in the lawsuit brought last year by numerous business groups and 21 state governments. Plaintiffs alleged that the Department of Labor lacked statutory authority to issue the rule, which would have increased the minimum salary to just over \$47,000 per year. In November of last year, that same court issued a preliminary injunction against enforcement of the rule, days before it was scheduled to go into effect. That earlier decision is on appeal to the U.S. Court of Appeals for the Fifth Circuit.

In the immediate wake of last week's decision, on September 5, 2017, the DOL filed an unopposed motion to dismiss that appeal. It seems likely the appellate court will grant that motion. But that might not be the end of the litigation. Because the AFL-CIO intervened, it may decide to appeal the judge's summary judgment ruling.

The principal legal issue presented by the lawsuit is whether the DOL has authority under the FLSA to require such a significant increase in the minimum salary; plaintiffs argue that the size of the increase, and the methodology used to calculate it, were impermissible under the Administrative Procedure Act's arbitrary and capricious standard, in the absence of specific Congressional authority. Some opponents of the rule contend that Congress did not authorize the DOL to regulate the minimum salary at all, relying on statutory language and regulatory history to argue that DOL should be limited to providing guidance to employers on the nature of the work performed by employees to be classified as exempt from the overtime requirements, through the traditional "job duties" test.

Several questions remain after last week's ruling, including the possibility of an appeal. But the most interesting questions involve the positions to be taken by the DOL. In June, DOL filed its long-awaited brief in the Fifth Circuit, arguing that it would abandon the position taken by the Obama administration and would not try to reinstate the new minimum salary rule. That brief did not explicitly argue that the DOL lacks authority to make any increase in the minimum salary requirement. In late July, Labor Secretary Alex Acosta's office issued a public request for information seeking additional information as to whether DOL should reconsider the rule. It was sent to the Office of Management and Budget's Office of Information and Regulatory Review for approval. The request specifically asked for comment on the question of what criteria should be used by DOL in raising the minimum salary. Like last week's district court ruling, this request hedged on the fundamental question of whether DOL has authority to increase the minimum salary. DOL has raised the minimum salary on several occasions over the years (the last time in 2004), but only by relatively modest amounts. Both of these steps seem to acknowledge DOL's historical, institutional view that it does indeed have authority to issue regulations increasing the minimum salary requirement.

Like most things coming out of Washington, this issue has political overtones. The business community widely opposed the DOL rule as unnecessary, ill-considered and counterproductive, arguing, among other things, that it would increase unemployment. Democrats have begun to argue in recent days that a decision by President Trump to abandon the rule would be inconsistent with his claims during the last presidential campaign that he would be a supporter of the working class.

The latest steps taken by the DOL suggest that the department probably will go back to the proverbial drawing board and initiate a new rulemaking proceeding. While the outcome of such proceeding is impossible to predict, one could expect a new regulation that is more closely modeled on the 2004 rule, in which DOL would articulate a new methodology for determining the amount of what would be a comparatively modest increase in the minimum salary. That approach could contribute to making overtime pay eligibility an important issue in many of next year's congressional races.

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