

Practice Update

The New Salary Regulations: The Saga Continues

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While employers took solace from the November 22 nationwide preliminary injunction which blocked implementation of a controversial rule increasing the salary threshold for employees to be exempt from overtime, the battle is not over. The Department of Labor filed its notice of appeal December 1, the same day the new salary regulations were to take effect.

As discussed in our previous HR Defense blog post, on November 22, 2016, a Texas court enjoined the new rule which would have made an estimated 4 million workers eligible for overtime by increasing the salary threshold for exempt employees to \$47,476, more than double what it had been. The court said that Congress intended the “white collar exemptions” – executive, administrative and professional – to apply to employees doing actual executive, administrative and professional duties, without reference to a minimum salary level. With the new rule, the court said that the DOL “exceeds its delegated authority and “ignores Congress’s intent by raising the minimum salary level such that it supplants the duties test.” Because the court found the final rule unlawful, the court concluded that the DOL was without authority to implement the automatic updating mechanism as well.

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The injunction was issued in a consolidated case that included 21 state plaintiffs who challenged the rule as to state employers, and about 50 business organizations challenging the rule as to private employers. Still pending before the court is the private plaintiffs' motion for summary judgment, which has been fully briefed.

If the injunction is reversed on appeal, will employers be liable for failing to comply with the new rule in the interim? The answer is not crystal clear.

A somewhat similar situation arose not long ago when the DOL issued new regulations set to take effect on January 1, 2015 removing a long-standing exemption from overtime pay for third party providers of home healthcare services. A trial court found the new rule unlawful and vacated it, but in August 2015, an appellate court reversed the trial court's ruling and found the new rule valid. *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015). In that situation, the DOL issued guidance saying that it would not institute enforcement proceedings for violations of the new rule occurring prior to the appellate court reversal. But that did not preclude private plaintiffs from bringing actions on their own, and they did so. Two of three federal district courts that addressed retroactive recovery in that context (the District Court of Connecticut and the Western District Court of Arkansas) ruled that plaintiffs could recover from the date the regulation originally was to take effect, while the third (the Southern District Court of Ohio) said they could not recover retroactively. While we believe the home healthcare workers cases may be procedurally distinguishable, employers should be aware that the issue of retroactivity remains unresolved.

Whether an employer should move forward with planned changes to comply with the new salary regulations will depend on the employer's unique workforce circumstances, including the scope and

extent of changes necessary to comply, the changes already implemented, communications that have gone out and more. Stay tuned and stay in touch with your labor & employment counsel.

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