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Judge Blocks Overtime New Rules. So now what?

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The stunning news: The new overtime regulations set to go into effect on December 1, 2016, are now on hold due to a Texas judge's ruling yesterday November 22, 2016, barring implementation nationwide.

How did we get here? So now what do employers do?

In my little corner of the law, overtime has been a central focus—in individual and class action lawsuits and, for over two years, in predicting and then ciphering the new regulations of the Department of Labor ("DOL"). The new rules would have radically changed the wage landscape, making millions more overtime eligible. The deadline for enforcement was December 1, 2016.

Yesterday afternoon, Eastern District of Texas federal judge, Hon. Amos Mazzant, changed that world, entering a nationwide injunction blocking the DOL from implementing its new overtime rules – *the same rules that have been talked about for over two years*. And the decision comes merely eight days before the deadline.

To use a football analogy, employers had about six seconds to go in the game, and the quarterback threw "Hail Mary" pass. Well, he connected….and the employers scored.

The history.

It seems like only yesterday (spring 2014) that President Obama directed Secretary Perez to revamp the executive, administrative, and professional exemptions. In the beginning, it was unclear if the DOL would change the definitions of who is exempt, or if it would change the salary component also required for exemptions. The latter seemed certain; the former, uncertain, though possible.

In the end, the DOL chose only to raise the salary component to $47,476 ($913 weekly), deferring the fundamental definition of who is an "executive," who falls into the "administrative" category, and who can be called a "professional"—for another day. The Department also upped the amount necessary for a person to be called a "highly compensated employee," from a smooth $100,000 to $134,004. These pay numbers were pegged to certain percentiles of national salaries, and, *the kicker*, these numbers would hold for only three years. So, in 2020, for example, the percentiles would be adjusted again based on national numbers, and presumably more folks would slip into the overtime ranks simply due to salary alone.

To put this context, the last change to the salary component was implemented, with many other changes, in 2004, and, before that, in the 1970's. Now we were to have adjustments every three years. It seemed mind-boggling.

Who was affected by the new rules?

The change tended to effect smaller to mid-size employers or those with lower paid employees—those in retail or fast food eateries, for example. For a number of employers the rules were meaningless in a sense, as their exempt workers were already being paid at the $47,476 level or above. But even in higher paid industries—such as in professional services, or

with many in the energy or chemical industry—there are always the employees, usually starting out in supervisory or management roles who are paid less and who would be affected by the rule changes. Also, employers were very concerned about the constant flux of change with every-three-year reviews of who is and who is not exempt, based solely on compensation.

Why did the DOL go in this direction?

I suspect that the DOL chose to go this route as a simple, but effective, way of bringing in a large number of folks into the potential overtime fold (possibly hoping for increased tax revenue). Changing the fundamental definitions of who is an executive, administrative or professional is a lot more complicated and, likely, would have been a bit too much for the system to absorb, along with the expected salary hike. The administration proudly predicted that more than four million more individuals would be subject to overtime with the promulgated salary changes by themselves.

Employer worries.

Not surprisingly, when the rules were announced, there was employer uproar; many predicted a lot of increased costs and reductions in force. The work force was flattening, and there were the emotional issues in explaining to one-time managers that they were no longer "exempt" but were now reduced to non-exempt hourly worker status (again). Importantly, employers had to take a hard look at schedules and personnel and determine how to work with the changes given budget constraints.

It was unclear how much additional overtime would actually be paid under the new rules. There would be some, to be sure, but the number was hotly debated. The biggest issue seemed to be logistics and significant costs of implementation, with record-keeping, adjustments to personnel to avoid overtime costs, and explanations to staff.

There has been panic in the street, and a veritable cottage industry sprung up to provide guidance.

No congressional action materialized.

Congress promised help, but that seemed to be mostly jawboning. A legislative solution was realistically out of the question, no matter how well intentioned some representatives were, because current President Obama would, without any doubt, veto any such measure. This was, after all, one of his cornerstone achievements.

The answer.

The ultimate answer was a lawsuit filed in later September 2016 in east Texas federal court. The case was actually two cases—one by 21 states and another by some private industry groups. The two cases were combined, and, after some initial skirmishes and briefing, and with a deadline of December 1, 2016, looming, Judge Mazzant ruled for the plaintiffs (the employers), granting an injunction, which bars the rules from going into effect.

The court decision.

The judge, who had been appointed by President Obama, surprisingly determined that there was a lack of statutory authority for what the DOL had done. He seemed most perturbed by the automatic three-year rule. Judge Mazzant ruled that there would be irreparable harm if the new rule went into place on December 1, 2016.

Interestingly, the judge seemed to say that the DOL never had the authority to set salaries, only the authority to define the exemptions; he made these findings in the context of deciding that legal "deference" was not to be accorded to the DOL rules in this situation. However, for decades the salary component has been a part of DOL regulations. So that portion of the opinion may raise questions, if an appeal follows.

In any case, the decision is last minute, coming about a week prior to the effective date.

Is an appeal to follow?

As of this morning, the DOL had not announced whether it will appeal or not (the proverbial "looking at options"). An appeal would not be surprising, though it may be a formidable task. I tend to think the injunction will stick given the imminent change in administration and the appellate court construct. The Fifth Circuit is the appellate court, and it is fairly conservative. I also believe that further appeal to the U.S. Supreme Court would not lead to an overturning of the trial court decision. Perhaps, the DOL will wait and try to work out the matter given the President-elect's new administration.

We will have to see. Crystal-balling is not reality. Instead, we will follow what actually happens and keep you up to date on the requirements. Right now the issue is on hold.

Employer action steps? A deep breath.

As the ruling has come so late in the game, employers affected by the expected rules were very likely already getting ready for those changes. For example, in an effort to keep some employees exempt, employers, in limited cases, raised salaries for employees who may have been close to the $47,476 minimum. Reducing those salaries now would be almost impossible, from an emotional standpoint.

Overall what the injunction means is that employers can take a deep breath. No changes are required for the time being. My hope is that, in the coming months, a more balanced approach can be found so that employers can adequately plan for the future.

A prediction.

In the final analysis, I believe that the salary component will be increased, at least some. Is $47,476 correct? Not sure, but there will be some changes. I suspect that the three-year rule will be abandoned, however, because of the unsettling effect it was having in the workplace.

Whatever the changes may be, we will keep watch and work with employers as the matter clarifies in the coming days and months.

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