The Status of the Department of Labor’s 2016 Overtime Rule

Thursday, September 28, 2017

It appears that the Obama-era white-collar overtime rules may soon be off the books, barring further surprises from the federal courts. In their place, employers can expect a new regulation implementing a salary threshold for the executive, administrative, and professional exemptions under the Fair Labor Standards Act (“FLSA”) somewhere in the neighborhood of $33,000 per year.

The 2016 Final Rule

In May 2016, the U.S. Department of Labor (“DOL” or “Department”) published its “Final Rule” that, among other things, would have:

- more than doubled the minimum salary for these exemptions from $455/week ($23,660/year) to $913/week ($47,476/year);
- increased the total annual compensation required for the highly compensated variant of these exemptions from $100,000 to $134,004; and
- automatically adjusted these levels every three years.

By the DOL’s own estimate, the Final Rule would have immediately rendered 4.2 million previously exempt employees eligible for overtime pay if their employers took no action.

Court Challenges

Twenty-one states and dozens of private business associations filed two separate lawsuits challenging the Final Rule. The state plaintiffs sought a preliminary injunction, while the business associations pursued summary judgment.

Just nine days ahead of the December 1, 2016, effective date of the regulations, Judge Amos Mazzant of the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary injunction barring the DOL from “implementing and enforcing” the key provisions of the Final Rule. The ruling suggested that the Department lacks the authority to require any salary threshold for the exemptions.

The DOL appealed to the U.S. Court of Appeals for the Fifth Circuit, initially taking the position in its opening brief that the Final Rule is valid in all respects. After the change of administrations, the Department filed its reply brief, expressly disavowing the salary level set in the Final Rule, but asking the Fifth Circuit to confirm the DOL’s authority under the FLSA to require some salary threshold.

The Fifth Circuit scheduled oral argument for October 3, 2017.

Meanwhile . . .

In June 2017, a Chipotle employee filed a private class action in federal court in New Jersey alleging that the
company failed to comply with the Final Rule. The theory in the complaint is that because “the Eastern District of Texas did not stay the effective date of the rule or otherwise prevent the Rule from going into effect . . . the Rule went into effect on December 1, 2016.”

In July 2017, the DOL issued a Request for Information (“RFI”) seeking public input on a variety of topics relating to what the appropriate salary threshold(s), if any, would be for the white-collar exemptions, including whether there should be variations based on such factors as employer size, census division, or state. The comment period for the RFI closed on September 25, 2017.

**Summary Judgment and the DOL Withdraws Its Appeal**

On August 31, 2017, Judge Mazzant issued a ruling granting the pending motion for summary judgment, concluding that (i) the Final Rule is contrary to the FLSA and (ii) the Department has the authority to implement a salary threshold, just not one this high.

Five days later, the DOL sought to drop its appeal in the Fifth Circuit in light of the district court’s ruling, which the circuit court dismissed on September 6, 2017.

The DOL may appeal the summary judgment ruling. If it does, the goal would be to delay any final ruling until the Department can issue new overtime regulations, as well as maintain a friendly forum to resolve the issue presented in the Chipotle case, if need be.

The wild card is the lawsuit against Chipotle. Although the case seems unlikely to gain traction, it is possible that the district court or the Third Circuit could breathe new life into the Final Rule through that litigation.

**Takeaways**

Employers that made changes in anticipation of the implementation of the 2016 Final Rule will probably find that their best path forward is to maintain that practice, not least because of the employee relations concerns with changing classifications or pay.

Employers that did not change their practices, or that initially changed practices but then reverted to their prior state after the preliminary injunction, may take some additional encouragement from recent developments, despite the fluidity and continued uncertainty surrounding the Final Rule.

Of course, employers will want to look out for the DOL’s next overtime rule, which is likely coming in the next several months. Based on Secretary of Labor Alexander Acosta’s testimony during his confirmation hearing, the expectation is that the next salary threshold will be “around $33,000,” though the Department may elect to go in a different direction based on the comments received in response to the RFI.

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