NOW + NEXT

EMPLOYMENT LAW ALERT | NIXON PEABODY LLP

NOVEMBER 23, 2016

Hold your horses — Texas federal judge blocks DOL's overtime rule

By Stephen J. Jones, Todd R. Shinaman and Kimberly K. Harding

In a surprising turn-of-events, United States District Court Judge Amos L. Mazzant (an appointee of President Obama), Eastern District of Texas, issued a nationwide preliminary injunction yesterday, halting implementation of the U.S. Department of Labor's (DOL) new overtime pay rule. Accordingly, the DOL's rule that would have increased the minimum salary threshold for employees to be exempt pursuant to the "white-collar" exemptions of the Fair Labor Standards Act (FLSA) likely will not go into effect on December 1, 2016, as originally scheduled.

The DOL had issued regulations earlier this year requiring an increase in the minimum salary threshold for executive, administrative and professional employees from $455 per week ($23,660 annually) to $921 per week ($47,476 annually) and providing for an automatic updating mechanism that would adjust the minimum salary level to comport with the 40th percentile of weekly earnings of salaried workers in the lowest wage region of the country every three years. The DOL also increased the minimum salary threshold for "highly compensated employees" from $100,000 to $134,004 annually.

Twenty-one states filed suit against the DOL and Labor Secretary Thomas E. Perez seeking a nationwide injunction preventing implementation of the rule changes. Ultimately, the court held that the DOL's interpretation of the exemptions should not be accorded administrative deference because it was contrary to the statutory text of the FLSA and congressional intent.

In finding the rule likely is unlawful, the Texas court relied on the fact that "Congress defined the [executive, administrative and professional] (EAP) exemption with regard to duties," and did not include a minimum salary level. Because the DOL's interpretation required employees to meet a "de facto salary-only test," ostensibly without regard to their duties, the court concluded that the DOL supplanted the duties test required by the statute and therefore exceeded its delegated authority.

Although the court noted that it was "not making a general statement on the lawfulness of the salary-level test for the EAP exemption" (and that it was "evaluating only the salary-level test as amended under the [DOL's] Final Rule)," its decision seemed to do just that. We anticipate that the DOL will attempt to seek immediate interlocutory appeal to the Fifth Circuit Court of Appeals.

However, absent the issuance of a stay or an expedited decision on appeal overturning the injunction between now and December 1, the court's permanent injunction will delay, if not permanently derail, the implementation of the DOL's changes.

Employers who have already announced or implemented salary increases, or reclassified employees as nonexempt, in anticipation of the rule change should assess the relative cost and disruption of changing their plans at this juncture. Indeed, there is nothing unlawful about salary increases or reclassification, even in the absence of the rule's implementation. These changes simply are now permissible, rather than required. Included in any assessment of whether to change plans, however, should be a consideration of whether some of the employees they intended to, or did, reclassify pursuant to the rule change, are borderline or fail to meet the duties test. If so, going forward with the intended changes may be the wisest course of action.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

— Stephen J. Jones, 585-263-1386, **sjones@nixonpeabody.com**

— Todd R. Shinaman, 585-263-1265, **tshinaman@nixonpeabody.com**

— Kimberly K. Harding, 585-263-1037, **kharding@nixonpeabody.com**