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Department of Labor appeals overtime rule

By Dale A. Hudson and Jeffrey J. League

On October 30, 2017, the U.S. Department of Labor filed an appeal from a Texas federal district court decision by Judge Amos Mazzant, which invalidated the Obama administration's new overtime rules.

FLSA overview

The Fair Labor Standards Act (FLSA) requires that employees be paid equal to or more than the federally mandated minimum wage, and further requires that employees be paid an overtime premium for all time worked in excess of 40 hours in a workweek. However, FLSA exempts from the minimum wage and overtime rules any employees who are employed in a “bona fide executive, administrative[] or professional” capacity, commonly referred to as the “white collar exemptions.” To qualify for the white collar exemptions under Department of Labor (DOL) Regulations, an employee must: (1) perform bona fide executive, administrative or professional duties, as defined in the Regulations; (2) be paid on a salary basis; and (3) be paid a salary not less than the prescribed minimum (currently \$23,660 per year).

Challenges to the Obama administration's overtime rule and current status of the litigation

As reported in previous alerts¹, during the Obama administration, the DOL adopted regulations that would have drastically increased the minimum salary threshold for the white collar exemptions, from \$23,660 to \$47,476 per year. In response to the new DOL regulations, 21 states and 56 business groups filed suit challenging the rule. On November 22, 2016, Judge Mazzant preliminarily enjoined the DOL from implementing the rule. Judge Mazzant's decision not only struck down the increased salary requirement adopted by the Obama administration; the opinion also raised doubt about whether the white collar exemption could include a salary level requirement at all, despite the DOL's longstanding practice of utilizing a salary threshold. Due to this uncertainty, the DOL appealed the ruling. In its appellate brief, the DOL, now operating under

¹ See “[Hold your horses — Texas federal judge blocks DOL's overtime rule](#),” November 23, 2016, and “[Judge invalidates President Obama's overtime rule](#),” September 01, 2017.

the Trump administration, asked the Fifth Circuit to not rule on the merits of the Obama overtime rule, but merely to affirm the DOL's authority to utilize a salary basis test.

While this appeal was pending, on August 31, 2017, Judge Mazzant granted summary judgment against the DOL, invalidating the DOL's overtime rule in its entirety. In his ruling, Judge Mazzant admitted that his prior decision may have created confusion, which he attempted to clear up. Judge Mazzant again held that the DOL did not have authority to "use a salary-level test that will effectively eliminate the duties test," nor could the DOL "categorically exclude those who perform 'bona fide executive, administrative[] or professional capacity' duties based on salary level alone." However, Judge Mazzant conceded that he was bound by Fifth Circuit precedent, which holds that the DOL has authority to implement a minimum salary requirement. To avoid clashing with controlling precedent, Judge Mazzant claimed that he was only addressing the lawfulness of the salary level test adopted by the Obama administration.

On September 5, 2017, the Fifth Circuit dismissed the DOL's appeal of the court's order issuing a preliminary injunction. At the request of all parties, the Fifth Circuit found that the appeal of the preliminary injunction had become moot, as the district court had entered a final judgment in the case.

On October 30, 2017, the Department of Justice, on behalf of the DOL, appealed Judge Mazzant's summary judgment ruling to the Fifth Circuit. The DOL contemporaneously issued a press release stating that it would request that the Fifth Circuit stay the appeal "while the Department of Labor undertakes further rulemaking to determine what the salary level should be." The DOL filed an unopposed motion to stay the case on November 3, 2017, and the Fifth Circuit granted the DOL's motion on November 6, 2017.

What to expect next

The DOL seems to be pursuing this appeal for one reason: to affirm its authority to utilize a salary threshold for FLSA exemptions. To be sure, Judge Mazzant's August 31 opinion did state that he was only ruling on the lawfulness of the Obama administration's rule, and that he was not disputing the DOL's general authority to utilize a salary threshold test. However, some of the broad language in the opinion is hard to reconcile with such a narrow holding. In any event, the DOL apparently believes that Judge Mazzant's opinion casts some doubt on its authority to utilize a salary threshold test.

As noted above, the appeal is now held in abeyance, pending issuance of new regulations by the DOL. The DOL is likely hoping the Fifth Circuit will ultimately dismiss the case as moot, once revised regulations have been issued.

In the meantime, the DOL rulemaking process grinds on. In July 2017, the DOL published a request for information seeking public input on how it should change the Obama administration's rule and received approximately 214,000 comments. While the agency is now reviewing those comments, it has not announced when it will publish a proposal. Thus, employers should not expect a new rule anytime soon. The Secretary of Labor, Alexander Acosta, has publicly stated that he would be open to increasing the minimum salary level to something around \$33,000. Thus it would not be surprising if the DOL ultimately adopts a salary level in that range.

Employers should also remember that they are required to comply with any applicable state and local wage-and-hour laws, and that some states, such as California and New York, impose higher

minimum salary levels. Indeed, state wage-and-hour laws such as California's oftentimes pose additional risks and pitfalls for even the keenest of employers. Employers must therefore be familiar with both federal and state wage-and-hour requirements. For a substantive but succinct summary on California wage-and-hour see "[The Requirements of California Wage and Hour Law: A Primer](#)."²

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