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DOL's Overtime Salary Threshold Increase Is On Hold – Now What?

Insight — 11/23/2016

Many human resource professionals got into the office today not knowing whether to laugh or cry. Most are happy that the Department of Labor's (DOL's) new overtime salary requirement will not go into effect next Thursday, December 1, 2016, due to a federal judge's grant of a nationwide preliminary injunction which prevents the DOL from implementing and enforcing the new rule. (See our alert reporting on the injunction.) Yet, many organizations have already spent countless hours preparing for the new rule to go into effect next week and are wondering what to do now. Let's review where things stand and your best options going forward.

Nationwide Injunction Delays Final Overtime Rule

In September, twenty-one states sued the DOL in federal court in Texas seeking to stop the DOL's final rule that more than doubles the salary threshold for the so-called white collar exemptions and calls for automatic increases every three years. Business groups and industry associations also filed suit in the same Texas court seeking a similar outcome. The state-plaintiffs filed an emergency motion for a preliminary injunction. Shortly thereafter, the business-plaintiffs filed an expedited motion for summary judgment. The two cases were consolidated under Judge Amos L. Mazzant, III.

On November 16, 2016, Judge Mazzant heard oral argument on the state-plaintiffs' emergency preliminary injunction motion. He issued his ruling yesterday, granting the preliminary injunction on a nationwide basis.

To prevail on their preliminary injunction motion, the states needed to show, among other things, that they would have a substantial likelihood of success on the merits of their case. The court ruled that the states met that burden, finding that the plain meaning of the executive, administrative, and professional exemptions in the Fair Labor Standards Act (FLSA) focused only on the duties of such positions, without a minimum salary level. The court stated that although the FLSA delegated authority to the DOL to establish the types of duties that might qualify an employee for these exemptions, it did not authorize the Department to disqualify employees who meet the duties requirements but do not meet the salary level established in the DOL's final rule. The court concluded that the DOL exceeded its delegated authority and ignored Congress's intent by raising the minimum salary level so that it "supplants the duties test."

Anticipating The Next Legal Move

The preliminary injunction is only the first step in this legal challenge to the

DOL's final overtime rule, but it provides a huge blow to the Obama administration's efforts to raise wages for U.S. workers. The DOL could appeal the court's ruling to the Fifth Circuit Court of Appeals, but according to a DOL statement, the agency is still "considering all of [its] legal options." Whether an appeal would be successful is unknown. Absent an appeal, the Texas lawsuits continue, with a permanent resolution still to be decided.

The other factor that may ultimately determine the outcome of the DOL's final rule is the incoming administration of President-elect Trump. The Trump administration may take steps to limit an appeal by the DOL. And no matter what the outcome of the lawsuits, a Republican-led Congress could enact legislation to amend the FLSA and define the white collar exemptions as it may see fit. The bottom line is that there continue to be a lot of unanswered questions and for now, the DOL's salary threshold increases are in limbo.

Practical Options For Handling Exempt/Non-exempt Employees

For many of you, your next steps may be determined by where your organization is in the process of preparing for the new overtime rule. In most cases, we are talking about what to do about those employees who meet the current \$455 per week (\$23,660 per year) salary requirement but are not paid at the higher \$913 per week (\$47,476 per year) salary under the final rule. Here are your best options:

1. **If duties tests are not met:** The duties tests have not changed under the new rule and the court made clear that it believes that Congress intended the white collar exemptions to be based on the duties performed by the exempt employee. Consequently, if you have employees that you are treating as exempt who do not clearly meet the duties tests for an exemption, reclassify them as non-exempt. Salary level will not save exempt status if an employee does not meet the applicable duties test.
2. **If duties tests are met:** For those employees who clearly meet one of the duties tests under the executive, administrative, or professional exemptions, you may hold off on making any salary changes or reclassification of those individuals to non-exempt (or overtime eligible) under the FLSA. Because the future of the rule is uncertain, you ultimately may not have to implement any changes, so you may take a wait-and-see approach.
3. **If you've already promised a raise:** If you have already told exempt employees that they will be receiving a raise to the new salary level, consider going through with the increase in salary. Depending on how much of a raise is at issue, the additional salary may be greatly outweighed by the lowered morale and disgruntlement that may arise should you revoke the raise now, not to mention potential claims by employees for failing to follow-through with a promised salary increase.
4. **If you've already converted employees to non-exempt status:** If you have already told previously exempt employees that they will soon be treated as non-exempt and therefore, entitled to overtime

pay, decide whether they will react positively or negatively to revoking that change now. If those employees value the flexibility of being exempt, despite the lack of overtime pay, you may decide to return them to exempt status (assuming, of course, that they meet the duties tests). If, however, those employees see the potential for overtime pay as a raise, you may decide to go through with reclassifying them as non-exempt.

There are no approaches that will work for every employer, and some employers may take different approaches with different business units, depending on the situation. Consider which option or options will work best for your organization in terms of complying with the existing regulations and causing the least amount of disruption.

If you have any questions on which course to take, please feel free to contact me at MBWiletsky@hollandhart.com , or contact the Holland & Hart attorney with whom you typically work.

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