

Employment & Labor Issue Alert

Federal Court Puts FLSA Salary Increases on Indefinite Hold

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In a ruling that comes as a huge surprise to most employment law practitioners and employers, late yesterday afternoon a federal judge in Texas granted a nationwide preliminary injunction against the enforcement of the Department of Labor's ("DOL") new salary rules for exempt status under the white-collar exemptions to the Fair Labor Standards Act ("FLSA"). This unexpected ruling occurs barely a week ahead of the December 1st implementation deadline for the new rules.

Legal Background

The court's order stems from two recently filed lawsuits: one by the Attorneys General for 21 states (including Kansas) and the other by a coalition of business advocacy groups. A common argument between the two cases was that DOL exceeded its authority in amending the regulations to increase the minimum salary and adopt a going-forward automatic salary update.

When a court is assessing a challenge to an agency's regulations, it first looks to the underlying statute (here the FLSA) to determine if the agency was acting within its delegated authority. Where a statute's language is clear and unambiguous, the agency has no authority to enact regulations that are contrary to the Congressional intent as expressed in the statute.

The FLSA's white-collar exemptions apply to employees "employed in a bona fide executive, administrative, or professional capacity." The States and business groups argued that the exemption requires only that an employee work in one of the specified bona fide positions. They claimed that the "capacity" of an employee's job is determined by the duties of the position, and not the salary at which it is paid, so the DOL was without authority to impose a minimum salary requirement.

By adopting a minimum salary test that could be determinative as to an employee's exempt status, regardless of the employee's job duties and responsibilities, they contended DOL exceeded its grant of authority to define the exemption. Recognizing that litigation in federal court does not occur quickly and that it would cause hardship to try to unwind the changes after they've gone into effect, the State plaintiffs asked the court to preliminarily enjoin the new regulations. The court agreed, finding a temporary injunction justified.

Decision Surprising

The salary basis and minimum salary requirements for exempt status under the white-collar exemptions date to DOL regulations issued in the 1940's. Since then, Congress has amended the FLSA on multiple occasions, and DOL has also amended its regulations multiple times, including in 2004 when DOL more than doubled the lowest salary in effect at that time to the current \$455 per week level. Over the years the courts, including the federal appellate court over Texas, have consistently enforced the DOL's salary basis requirements. In this case, however, the judge distinguished that authority, finding that it did not address the precise issues at play. Interestingly, while one could reasonably conclude from the court's analysis that the legitimacy of any minimum salary requirement could be in question, the court took care to expressly note that its opinion should not be read in that way.

What Now?

In issuing the preliminary injunction, the court did not conclusively strike down the new salary rules. Rather, it put their enforcement on hold so the parties can litigate the legality of the amendments to final decisions. However, the standard the

court applied to grant the injunction was that the plaintiffs' argument had a "substantial likelihood" of being successful. While the court's order is not a final decision, it is certainly indicative of the judge's view of the issues. Adding a level of uncertainty to how the cases will proceed is the to-be-determined posture of the Trump Administration DOL and the extent to which it will defend the regulations in these cases.

What's clear at this point is that the proposed salary increase to \$913 per week (\$47,476 annual), as well as the provision that would have allowed employers to use non-discretionary bonuses to satisfy some of the salary requirement, are on indefinite hold until the court issues final rulings in these cases. In the meantime, the minimum weekly salary of \$455 (\$23,660 per year) remains in effect, along with the current salary basis and job duties requirements applicable to each position.

How Can Employers Move Forward?

For employers with classification changes planned, but not yet implemented, those changes can be placed on hold, with notice to the employees if they've been announced. To the extent the new rules are revived as these cases progress, a new compliance deadline would be announced. Retroactive enforcement would not occur.

For employers who have already instituted salary or classification changes, you've got a couple of options. You may "undo" the change and convert the employee back to exempt status. That conversion should occur prospectively and in conjunction with the start of a new workweek to avoid any potential overtime issues during the transition. Alternatively, you may decide to leave the employee in the reclassified status. In this regard, it's important to recognize that employers always have the right to treat employees as non-exempt (and pay overtime accordingly), regardless of the employee's job duties or compensation. Employees do not have a "right" to exempt status.

For More Information

If you have questions or want more information, you should contact your labor law counsel. If you do not have regular labor law counsel, the employment attorneys at Foulston Siefkin stand ready to assist and would welcome the opportunity to partner with you to help you meet your business needs in the context of all applicable legal obligations. You may contact **Forrest Rhodes** at frhodes@foulston.com or 316.291.9555, or **Boyd Byers**, Foulston Siefkin's Employment and Labor Practice Group Leader, at bbyers@foulston.com or 316.291.9716. For more information on the firm, please visit our website at www.foulston.com.

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