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Status Update on the New Overtime Rules

By Jessica Summers

Earlier this week, the Department of Labor (DOL) issued a Request for Information (RFI) seeking comments regarding the rules that establish which employees can be exempt from the Fair Labor Standards Act (FLSA) minimum wage and overtime pay requirements. This request, combined with the DOL's latest position in the key case challenging the version of the overtime rules that were finalized by the DOL last May, strongly suggest that the new overtime rules will never go into effect but that other changes to the preexisting rules may be forthcoming.

The events that have transpired related to the new overtime rules up to this week's RFI can be summarized as follows:

- In May 2016, the DOL issued long awaited final rules on the FLSA overtime exemptions that were scheduled to go into effect on December 1, 2016. As detailed in our earlier blog, the new rules significantly increased the salary required for white collar (executive, administrative, professional and computing) and highly compensated employees to qualify as exempt from the FLSA's overtime and minimum wage requirements.
- On November 23, 2016 (just a week before the new rules were scheduled to go into effect), a federal district court in Texas issued a nationwide temporary injunction preventing the new rules from going into effect. As explained further in our prior blog, the Judge concluded that the new rules exceeded the DOL's authority because Congress intended the exemptions to be determined based on an employee's duties and the new rules raised the required salary threshold so high it effectively "supplanted the duties test."
- Shortly after the injunction was issued, the DOL appealed the district court's decision to the Fifth Circuit Court of Appeals. However, the Administration changed between the time that the DOL initially appealed and the date that the DOL's next brief in the case was due. The DOL sought, and was granted, multiple extensions as the new Trump Administration scrambled to get a Secretary of Labor in place and determine its position on the issue.
- Finally, on June 30, 2017, the DOL filed a reply brief. In its brief the DOL did not defend the new overtime rule but did argue that the DOL does have the authority to set a salary threshold for the overtime exemptions. In other words, the DOL didn't stand by the high salary thresholds set by the new rules but clearly wanted to make sure it retained the authority to set salary thresholds going forward.

Now, through the RFI, the DOL is seeking comment from the public to help it determine where to go from here. In the RFI, the DOL acknowledges that the salary threshold set by the new rule was too high. The DOL states that it is seeking feedback on how to revise the new rules "including whether the standard salary level set in that rule effectively identifies employees who may be exempt, whether a different salary level would more appropriately identify such employees, the basis for setting a different salary level, and why a different salary level would be more appropriate or effective."

So what does this all mean for employers? The rulemaking process that the DOL would need to engage in to change the new overtime rules can be an arduous and slow moving one. We ultimately expect that the DOL's efforts will result in changes to the preexisting overtime rules. This will likely include some increase to the salary threshold which Secretary of Labor Alexander Acosta has said he supports. However, we certainly do not expect to see increases to the salary thresholds as high as those set by the new overtime rules, and, given that DOL is no longer defending them in court, it is unlikely that the new rules with the higher threshold will ever go into effect.

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