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FEDERAL COURT IN TEXAS SUSPENDS DEPARTMENT OF LABOR'S NEW OVERTIME RULE

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By Tom Geidt

In a rather stunning development, a federal judge in Texas has issued a preliminary injunction, blocking the U.S. Department of Labor ("DOL") from implementing its new overtime rule under the Fair Labor Standards Act, which had been set to take effect this Thursday, December 1, 2016.

The DOL's Final Rule would dramatically increase the minimum salary an employee must earn to be exempt under the FLSA's executive, administrative and professional exemptions, from $23,660 to $47,476 ($913 per week). It would increase the highly compensated employee ("HCE") threshold in the existing overtime regulations from $100,000 to $134,004, thus reducing the number of high-paid employees eligible to be classified as exempt under a more lenient "duties" standard. The new rule also would automatically adjust (increase) these salary thresholds every three years based on a formula drawn from census data reflecting the earnings of full-time salaried workers.

The injunction was issued in a lawsuit filed by 21 states whose employees, although in the public sector, are covered by the FLSA's overtime requirements. The case was consolidated with another lawsuit brought by the U.S. Chamber of Commerce and other business groups challenging the validity of the DOL's overtime rule. The lead case is entitled *State of Nevada v. United States Department of Labor et al.*, Eastern District of Texas, Civ. No. 4:16-CV-00731. Acting on the State plaintiffs' motion for a preliminary injunction, the judge reasoned that the DOL acted outside its statutory authority in enacting the new overtime rule.

By way of background, the FLSA provides that persons employed in a "bona fide executive, administrative, or professional capacity" are exempt from the FLSA's overtime and minimum wage requirements. However, the FLSA does not define these terms. Instead, Congress delegated to the DOL the authority to establish regulations defining the criteria for exempt status. For over 75 years, the DOL has maintained regulations that have contained a "duties" test for exempt status and a minimum salary requirement.

The court in this case concluded that the DOL created, in effect, a *de facto* salary-only test for exempt status that supplanted the duties test, and by doing so acted outside its statutory authority. Under the DOL's rule, according to the court, millions of employees who have been performing duties that, all along, have been considered to be exempt duties would suddenly be non-exempt, not because of any change in their duties but rather solely because their existing salary falls below the new threshold. Congress, the court said, intended these "white collar" exemptions to apply to employees doing actual executive, administrative, and professional *duties*. "If Congress intended the salary requirement to supplant the duties test, then Congress, and not the [DOL], should make that change."

Consequently, the court refused to give deference to the DOL rule. It concluded that the State plaintiffs could suffer irreparable harm if the injunction were not granted, due to the higher costs of administering their programs and services in the face of budget constraints, and that the plaintiffs have a likelihood of prevailing on the merits of the case. The court further decided that its injunctive order should be nationwide in scope – not limited to the 21 states that filed the suit – so that different overtime standards do not exist throughout the country based solely on geography. Its November 22 injunctive order applies to public and private sector employers alike.

The court's preliminary injunction does not mean that the DOL's overtime rule is dead. It merely suspends the new overtime requirements pending the outcome of the underlying lawsuit, which could go on for a few more years or be decided relatively quickly on motions for summary judgment or an emergency appeal. The DOL has announced that it is exploring all of its legal options.

Even if the injunction is overturned or the DOL's new overtime regulations are otherwise upheld, it remains to be seen how the new President will choose to respond to them. The incoming President presumably lacks the authority to unilaterally abolish federal regulations that were duly enacted following the full notice-and-comment process. He could choose, however, to have his new DOL leadership propose new regulations that would replace the overtime rule initiated by the Obama Administration, setting a lower salary threshold or otherwise effectively gutting the earlier regulations.

Employers who have been contemplating salary increases or reclassification of exempt employees in anticipation of the December 1 effective date must now decide whether to hold off on the changes, or possibly even reverse changes that they previously made. Many companies had already implemented, or at least announced, changes by the time the injunction was issued. Decisions on how to proceed should be discussed with legal counsel, due to the potential interplay of contractual, statutory, and employee relations consequences.

Finally, this injunction will not affect the overtime requirements under California law and other state laws. In California, the minimum salary for exempt status under the executive, administrative, and professional exemptions will increase on January 1, 2017, from $41,600 to $43,680, when the State's minimum wage increases from $10.00 to $10.50. Because California's salary test is tied to the minimum wage, the California salary threshold for exempt status will continue to increase incrementally in the coming years as the minimum wage increases.

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If you have any questions about these developments, please feel free to contact us

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