Employment Law Daily Alerts, WAGE-HOUR—EXEMPTIONS—E.D. Tex.: Federal judge blocks DOL overtime rule, (Nov. 23, 2016)

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In a crucial blow to the Obama administration's labor and employment legacy, a federal district court in Texas has granted an emergency motion for a preliminary injunction barring the Department of Labor from enforcing its revised overtime rule, scheduled to take effect December 1, pending resolution of a consolidated legal challenge (*State of Nevada v. U.S. Department of Labor*, November 22, 2016, Mazzant, A.).

The final rule was poised to double the salary level required for employees to be deemed exempt from overtime under the FLSA pursuant to the DOL's executive, administrative, and professional ("white collar") exemption. However, a coalition of more than 50 business groups and a separate effort by 21 states combined to sue to invalidate the regulation, seeking expedited consideration and emergency injunctive relief. The court, ruling on the state plaintiffs' injunction request, found they demonstrated a substantial likelihood of success on the merits, as well as the prospect of irreparable harm. A nationwide preliminary injunction preserved the status quo while the court ponders whether the DOL had authority to promulgate the final rule and whether the rule itself was legally viable.

Salary—or duties? The rule's new salary level of $47,476 (up from the current floor of $23,660) was based upon the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country (currently the South), and it would have rendered 4.2 million formerly exempt workers now overtime-eligible—with no evident change in the duties they perform. In promulgating the latest iteration of the regulation, the DOL was quite deliberate in not tinkering with the vexing "duties" provisions. The thinking was, if the salary level were set sufficiently high, more employees would be exempt, without *first* having to scrutinize whether they performed duties that were executive, administrative, or professional in nature. Ultimately, though, that may well prove the DOL's downfall, as the plaintiffs argued convincingly that Congress intended to exempt employees based on the duties they perform—*not* the salary they earn.

Automatic update. The DOL added a new provision to its white-collar rule: an automatic updating mechanism, which would adjust the salary floor every three years. The court brushed off the DOL's contention that any challenge to this provision was not yet ripe for review. Nonetheless, since it found the final rule was likely unlawful already, the court said it didn't need to tackle the legality of this particular provision.

The FLSA applied. In attacking the final rule, the states first argued that imposing the FLSA's overtime requirements on the states at all coerced them "to adopt wage policy choices" that unduly impact their priorities, budgets, and services, as well as their independence to set employee pay as they see fit—an unconstitutional infringement, in that the Tenth Amendment limited Congress' power to apply the FLSA's minimum wage and overtime protections to the states. However, the district court looked to the Supreme Court's 1985 holding in *Garcia v. San Antonio Metropolitan Transit Authority*, which held that the Commerce Clause empowered Congress to apply the FLSA's minimum wage and overtime requirements to state and local employees. While this precedent has taken its licks, the case was controlling absent an express statement from the High Court overruling it, the court noted.

***Chevron* deference did not.** According to the state plaintiffs, the language of the white-collar exemption was unambiguous. It defined precisely what types of employees Congress intended to exclude from the reach of the FLSA's overtime provisions and established clear considerations for evaluating those employees. Consequently, step 1 of the *Chevron* analysis applied: The DOL must give effect to that express intent.

Bona fide executive, administrative, or professional. The court rejected the DOL's contention that Congress did not define the terms "bona fide executive, administrative, or professional capacity" as set forth in Section 213(a)(1) of the Act, at issue here. While the terms are laden now with legal meaning, the court looked to their plain meaning at the time Congress first enacted the statute and concluded they simply referred to employees

who performed actual executive, administrative, and professional duties—*without regard* to their salary level. For good measure, the court noted, Congress had thrown in the phrase "bona fide," which it construed as another telltale sign that Congress meant for the exemption to turn on the specific duties one actually performs.

Duties control. The DOL urged that the exemption was intended to include a "status" component as well. But the court was not convinced that the inclusion of this term in the statute meant to impose a salary requirement for the exemption to apply. "The plain meanings of the terms in Section 213(a)(1), as well as Supreme Court precedent, affirms the Court's conclusion that Congress intended the EAP exemption to depend on an employee's duties rather than an employee's salary," wrote the court.

Moreover, while Congress gave the DOL considerable leeway to "define and delimit" the types of duties that would qualify as executive, administrative, or professional, nothing in the statutory language endowed the agency with authority "to define and delimit with respect to a minimum salary level." Yet in a footnote, the judge remarked: "The Court is not making a general statement on the lawfulness of the salary-level test for the EAP exemption. The Court is evaluating only the salary-level test as amended under the Department's Final Rule." At any rate, the DOL ran counter to the intent of Congress when it asserted in its final rule that "'[w]hite collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, irrespective of their job duties and responsibilities.'"

Salary level cannot supplant duties. By raising the salary level to such an extent that it supplants the duties test, the DOL exceeded its authority and ignored Congressional intent. As such, the rule could not clear even the *Chevron* step 1 hurdle and was unlawful. As such, there was no need to consider step 2: Whether the DOL's interpretation of the FLSA amounted to a "permissible construction of the statute" and thus was entitled to deference. But even if the statute were ambiguous, the court said, the final rule would not be entitled to *Chevron* step 2 deference. The salary level was purposefully set low, simply in order to screen out those employees who were "obviously nonexempt" so as to render a duties analysis unnecessary as to those workers. But the DOL had impermissibly turned that on its head by creating what essentially amounted to "a de facto salary-only test." This would not withstand *Chevron* scrutiny at either step.

Irreparable harm. The court was satisfied that the state plaintiffs demonstrated irreparable injury absent a preliminary injunction barring the DOL from implementing its rule. The plaintiffs submitted declarations from state officials who contended it would cost millions of dollars in the first year alone to comply with the rule provisions, not to mention the impact on critical government programs and services. For example, more than 50 percent of employees working in the Kansas Department for Children and Families and the Kansas Department of Corrections would be affected by the final rule. The state agencies would be unable to increase salaries to comply, they attested, so the detrimental effect on government services would be palpable.

Moreover, the plaintiffs convinced the court that a judicial remedy would not be able to undo the damage if the state plaintiffs ultimately prevail in their challenge. And, because the DOL could not articulate any countervailing harm resulting from delaying the rule pending a resolution of the case, the balance of hardships weighed in the plaintiffs' favor. As for the public interest, the states won this point too. Although the DOL insisted that blocking the rule would deny additional pay for those who are misclassified, the state cited the harms to the public resulting from increased state budgets, including layoffs and a disruption in critical public services.

DOL responds. "We strongly disagree with the decision by the court, which has the effect of delaying a fair day's pay for a long day's work for millions of hardworking Americans," the Labor Department asserted in a prepared statement. "The department's overtime rule is the result of a comprehensive, inclusive rulemaking process, and we remain confident in the legality of all aspects of the rule."

The agency said it was currently mulling its legal options.

Experts weigh in. In a conversation with Employment Law Daily, Jeffrey W. Brecher, Principal and Practice Group Leader of Jackson Lewis' Wage and Hour practice, confirmed the emerging view that the district court is likely to make the preliminary injunction permanent, given that the judge's legal rationale is unlikely to change. He also believed that the language of the opinion means that it applies to both the states and private employers, even though almost all of the reasoning is directed to arguments made by the "State Plaintiffs."

Brecher also noted that while many attorneys initially suspected that the case for enjoining the DOL's rule was less likely, at oral argument the judge signaled it was "a much closer question than earlier predicted." He pointed out that the district court took a textualist approach based on the statutory language—taking a page out of the late Justice Scalia's playbook—and considered the terms based on their plain dictionary meaning to find that "Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level."

Does this mean that the court was suggesting there could be no minimum salary test? The DOL added the salary basis and minimum salary level requirements through regulations issued shortly after the FLSA's enactment in 1938, Brecher noted. In a footnote, the court emphasized that it "is not making a general statement on the lawfulness of the salary-level test for the EAP exemption. The Court is evaluating only the salary-level test as amended under the Department's Final Rule." Harmonizing the opinion's reliance solely on the duties with the footnote, Brecher suggested that the judge saw the DOL's salary level requirement as so high that it de facto wiped out any consideration of duties for a broad range of employees.

Employer impacts. How will employers respond? And how should they? Brecher noted that employers may fall into three broad groups: those who have already *implemented* changes in advance of the rule's stated December 1, 2016, effective date; those who have *communicated*, but have not yet implemented, changes; and those who have done neither. As to the first group, Brecher suggested they might be unlikely to rescind those changes because of the employee relations perspective and the time and resources required to un-ring that bell. And there is a possibility, although it looks somewhat remote, that a DOL appeal could be successful. Reclassifying individual managers, though, who are unhappy with the loss of exempt status, could of course happen on a case-by-case basis.

As to the second group, which had communicated but had not yet implemented any changes, Brecher also thought some of the changes would be easier to rescind than others: for example, it might be difficult to rescind salary increases already announced. However, for individual managers who were reclassified but their compensation remained relatively neutral, it might be possible to take their classification back to exempt. And as for those employers that took a wait-and-see approach, doubtless they will still continue to delay doing anything.

New administration. Finally, Brecher offered some insights into the impact of the upcoming change in administration. The DOL will undoubtedly appeal to the Fifth Circuit, known to be a conservative court. Could an appeal be heard and decided before January 20, when President Trump takes office? If the Fifth Circuit does not act in an expedited fashion—and would it have any incentive to do so?—the incoming administration could either pass legislation, some of which has already been introduced, to nullify or modify the DOL rule, which would make any appeal moot, or the administration could simply choose to abandon the appeal.

The cases are Nos. 4:16-CV-00731 and 4:16-cv-732.

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