JANUARY 2017

COMMENTARY

The Fate of the New Overtime Regulations Remains Uncertain

The legal battle over the new overtime regulations under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* ("Final Rule"), continues. In the remaining weeks before President-elect Trump's January 20, 2017, inauguration, the U.S. Department of Labor ("DOL")[1] asked the Fifth Circuit Court of Appeals to salvage its Final Rule. Meanwhile, President-elect Trump's choice for labor secretary—Andrew Puzder, the chief executive of the company that operates fast food companies Carl's Jr. and Hardee's—has been an outspoken critic of the rule, suggesting its eventual demise.

On December 1, 2016, the DOL filed a notice of appeal to overturn the nationwide preliminary injunction blocking implementation and enforcement of certain provisions of the Final Rule. The next day, the DOL asked the Fifth Circuit to expedite the proceedings. On December 8, 2016, the Fifth Circuit granted the DOL's request and issued an expedited briefing schedule, pursuant to which oral argument will be scheduled for the first available sitting after briefing is completed on January 31, 2017. The DOL, represented by counsel from the DOL and the Department of Justice ("DOJ"), filed its opening brief on December 15, 2016.

On the same day the Fifth Circuit ordered expedited review, President-elect Trump officially announced Mr. Puzder as his choice to run the DOL. In May 2016, Mr. Puzder wrote an op-ed in *Forbes* saying the Final Rule "will not deliver as promised" and "will be another barrier to the middle class rather than a springboard." Mr. Puzder further wrote, "This new rule will simply add to the extensive regulatory maze the Obama Administration has imposed on employers, forcing many to offset increased labor expense by cutting costs elsewhere. In practice, this means reduced opportunities, bonuses, benefits, perks and promotions."

In sum, the timing of the incoming Administration and the DOL's appeal to the Fifth Circuit creates a number of possible scenarios and outcomes and, ultimately, uncertainty with respect to the fate of the Final Rule.

Overview of the Final Rule

On March 23, 2014, President Obama issued a memorandum directing the Secretary of Labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional

1 In addition to the DOL, the appellants also include Labor Secretary Thomas Perez; DOL Wage and Hour Division, Wage and Hour Division Assistant Administrator Mary Ziegler; and Wage and Hour Administrator Dr. David Weil.

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employees." In response to the President's memorandum, the DOL published a Notice of Proposed Rulemaking to revise 29 C.F.R. § 541, *et seq.* After receiving nearly 300,000 comments regarding the proposed rule, the DOL published the Final Rule. The Final Rule mandated an increase in the minimum salary level for executive, administrative, and professional employees classified as exempt from the FLSA's overtime protections (i.e., white collar or "EAP" exemptions) from $455 per week to $913 per week, or from $23,660 to $47,476 per year. The new salary level was based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country, which is currently the South. Additionally, the Final Rule established an automatic updating mechanism that adjusts the minimum salary level every three years. Under the Final Rule, the first automatic increase would occur on January 1, 2020. The Final Rule also increased the salary threshold for the highly compensated employee exemption from $100,000 to $134,000.

Final Rule Preliminarily Enjoined on November 22, 2016

On September 20, 2016, 21 states and more than 50 business groups filed two separate lawsuits in the United States District Court for the Eastern District of Texas, seeking to block implementation of the Final Rule. The state plaintiffs, led by Texas and Nevada, moved for emergency preliminary injunctive relief. The business groups, which include the U.S. Chamber of Commerce, moved for expedited summary judgment. Judge Amos L. Mazzant III consolidated the cases and considered the business plaintiffs' summary judgment motion as an amicus brief in support of the preliminary injunction motion.

On November 22, 2016, Judge Mazzant granted the plaintiffs' motion for a preliminary injunction. The order preliminarily enjoins on a nationwide basis the implementation and enforcement of the regulations increasing the salary threshold for the EAP exemptions to $47,476 and the automatic updating mechanism adjusting the salary threshold. Notably, the court did not rule on the plaintiffs' motion for summary judgment, but it told the parties it would do so in due course.

The order does not explicitly discuss the Final Rule's changes to the salary threshold for the highly compensated employee exemption and specifically lists only the following regulations as enjoined from implementation and enforcement: 81 Fed. Reg. 32,391; 29 C.F.R. §§ 541.100, 541.200, 541.204, 541.300, 541.400, 541.600, 541.602, 541.604, 541.605, and 541.607. Because the highly compensated employee exemption (29 C.F.R. § 541.601) is omitted from this list, there is some uncertainty whether the Final Rule increasing the threshold from $100,000 to $134,000 is enjoined. The uncertainty may be resolved if Judge Mazzant rules on the pending summary judgment motion, or perhaps by the Fifth Circuit when it decides the appeal.

Judge Mazzant's Rationale for Granting the Preliminary Injunction

Under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* construing an agency's construction of a statute is a two-step inquiry. First, the court must determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Second, if Congress has not unambiguously expressed its intent regarding the precise question at issue, courts will defer to an agency's reasonable interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Here, the statute at issue, FLSA § 13(a)(1), 29 U.S.C. § 213(a)(1), provides that "any employee employed in a bona fide executive, administrative, or professional capacity … as such terms are defined and delimited from time to time by regulations of the Secretary" shall be exempt from the FLSA's minimum wage and overtime requirements. 29 U.S.C. § 213(a)(1). Judge Mazzant agreed with the plaintiffs that the plain language of Section 13(a)(1) is clear and illustrates Congress's intent. Relying primarily on dictionary definitions of "executive," "administrative," and "professional," the court concluded that these words "relate to a person's performance, conduct, or function without suggesting salary." Thus, according to the court:

> [I]t is clear Congress intended the EAP exemption to apply to employees doing actual executive, administrative, and professional duties…. In other words, Congress defined the EAP exemption with regard to duties, which does not include a minimum salary

level. Therefore, Congress unambiguously expressed its intent for employees doing "bona fide executive, administrative, and professional capacity" duties to be exempt from overtime.

The court also concluded that Congress's delegation to the Secretary of Labor to "define" and "delimit" the white collar exemptions "from time to time" provides the DOL with "significant leeway to establish the types of duties that might qualify an employee for the exemption." But notably, "nothing in the EAP exemption indicates that Congress intended the Department [of Labor] to define and delimit with respect to a minimum salary level."

The court went on to conclude that even if Section 13(a)(1) is ambiguous, the DOL's Final Rule is not entitled to *Chevron* deference under the second step of the analysis because the "significant increase to the salary level creates essentially a de facto salary-only test…. Congress did not intend to categorically exclude an employee with EAP duties from the exemption." *Id.* at 14.

The court also reasoned that because the Final Rule is itself unlawful, the DOL lacks the authority to implement the automatic updating mechanism.

Fifth Circuit Appeal

In its appellate brief filed on December 15, 2016, the DOL argued that Judge Mazzant's preliminary injunction order should be reversed because it rests on an error of law. The DOL claims that since 1938, DOL regulations have relied on both a duties test and a salary-level test to determine whether an employee is subject to the EAP exemption. According to the DOL, the district court's ruling—that under the first step of the *Chevron* analysis, the FLSA "does not grant the [DOL] the authority to utilize a salary-level test"—is foreclosed by *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Circ. 1966), which upheld the DOL's authority to use a salary-level test. The DOL also argued that the district court did not have a basis to overturn the Final Rule's $47,476 minimum salary level under step two of the *Chevron* analysis because the updated salary level is commensurate with the salary levels set by the DOL over the past 75 years. In addition, the DOL argued that the balance of harms and the public interest preclude the preliminary injunction because the harm to employees that results from the preliminary injunction outweighs the cost of compliance.

The 21 state appellees have until January 17, 2017, to file their response brief, and the DOL's reply is due on January 31, 2017. The Fifth Circuit will set oral argument as soon as possible after the briefing is complete, and the three-judge panel is typically announced approximately one week before the argument.

Timing of the Fifth Circuit Appeal and Administration Turnover

President-elect Trump will be inaugurated before the Fifth Circuit hears oral argument regarding the DOL's appeal. Under Federal Rule of Appellate Procedure 42, the DOL can voluntarily dismiss the appeal while it is still pending. Thus, the decision about whether to continue the appeal—and ultimately the future of the Final Rule—will be determined by the Trump Administration. Nonetheless, it will take coordination between the DOL, the Solicitor General's Office, and the DOJ Civil Division to change course.

Timing will be important because the Administration will change while the DOL's appeal is pending. Current Labor Secretary Thomas Perez, Acting Solicitor General Ian Gershengorn, and Attorney General Loretta Lynch will likely tender their resignations effective on January 20, 2017. President-elect Trump's appointees to these positions could be confirmed on inauguration day (or shortly thereafter), if their Senate confirmation hearings are completed before January 20. In addition, new administrations typically send in so-called "beachhead teams"—political appointees who do not require Senate confirmation and can assist in the implementation of the new Administration's priorities (including, potentially, evaluating how to address the pending Fifth Circuit appeal).

Because of this timing, there are several possible paths that the Final Rule could take. On one hand, if the Trump Administration does not withdraw the appeal, the Fifth Circuit would render a decision. On the other hand, even if the Trump Administration withdraws the appeal, there may be further action in the district court because Judge Mazzant's injunction was temporary. For instance, the parties could file a joint

motion for a permanent injunction. Additionally, Congress could take up legislation that squarely addresses the EAP exemption salary levels, or the Trump DOL could initiate the rulemaking process to implement new FLSA regulations.

Considerations in Light of Judge Mazzant's Ruling, the Pending Appeal, and Administration Change

During this period of uncertainty, there are several steps employers can take to prepare for the Final Rule's ultimate outcome. For example, employers that have already reclassified employees or made salary adjustments in anticipation of the Final Rule and communicated those changes to employees need to carefully consider the impact on employee morale if those changes are now retracted. Employers should balance that impact against the cost and operational benefits of retracting the changes, factoring in as well the impact of reinstating the measures should the injunction be vacated.

It is unrealistic to forecast what will happen with the pending appeal in the Trump Administration. While there is a visible path toward the Final Rule's demise, it is still possible that it may become effective, and fairly soon in light of the expedited schedule for the appeal. Employers should be prepared to act quickly in order to bring themselves within compliance in the event the Fifth Circuit reverses the district court's preliminary injunction.

Moreover, if the Fifth Circuit reverses or vacates Judge Mazzant's preliminary injunction, employees may argue that the regulation should be applied retroactively to December 1, 2016. An analogous situation arose when the DOL revised the home health care (i.e., companionship exemption) regulations. Shortly before the regulations' January 1, 2015, effective date, a district court vacated the new regulations on the grounds that the DOL exceeded its authority; however, in late 2015, the D.C. Circuit reversed the district court's decision. The DOL did not seek to enforce the rule for the period between January 1, 2015, and the D.C. Circuit's decision. But plaintiffs nevertheless filed lawsuits, and some courts held that employers could have liability back to the January 1, 2015 effective date. *See Cummins v. Bost, Inc.*, 2:14-CV-02090, 2016 WL 6514103 (W.D. Ark. Nov. 1, 2016); *Kinkead v. Humana, Inc.*, 3:15-cv-01637(JAM), 2016 WL 3950737 (D. Conn. July 19, 2016). *But see Bangoy v. Total Homecare Solutions, LLC*, No. 1:15-CV-573 (S.D. Ohio December 12, 2015) (refusing to enforce the home care regulations during the period of time the vacatur was in effect, holding that when the district court vacated the rule before its effective date it "became a nullity and unenforceable").

Thus, employers should confer with counsel to discuss strategies to mitigate risk in light of a potential retroactive application of the Final Rule. For example, employers that planned to reclassify employees from exempt to non-exempt in order to comply with the Final Rule, but have not yet implemented the status change, should consider whether to track those employees' working hours. While this approach could limit exposure if the Final Rule is applied retroactively, it also may involve cost and operational burden. Therefore, whether employers choose to track hours, and if they do, the precise method they use, will depend on the particular employer and the particular circumstances involved.

Finally, employers that rely on the highly compensated employee exemption should note that Judge Mazzant's order did not identify the new highly compensated exemption salary increase as being enjoined, and there is uncertainty as to this issue. Accordingly, as a risk-mitigating measure, these employers should consider ensuring that the new $134,000 threshold is met with respect to its highly compensated employees, or that these employees otherwise satisfy the requirements of another applicable exemption.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

Joanne R. Bush
Houston
+1.832.239.3782
jrbush@jonesday.com

Lindsay A. Hedrick
Dallas
+1.214.969.2985
lahedrick@jonesday.com

Brian M. Jorgensen
Dallas
+1.214.969.3741
bmjorgensen@jonesday.com

Fred W. Alvarez
Silicon Valley
+1.650.739.3977
falvarez@jonesday.com

Rick Bergstrom
San Diego
+1.858.314.1118
rjbergstrom@jonesday.com

Wendy C. Butler
New York
+1.212.326.7822
wbutler@jonesday.com

Eric S. Dreiband
Washington
+1.202.879.3720
esdreiband@jonesday.com

Craig S. Friedman
Atlanta
+1.404.581.8412
csfriedman@jonesday.com

Michael J. Gray
Chicago
+1.312.269.4096
mjgray@jonesday.com

Brent D. Knight
Chicago
+1.312.269.4290
bdknight@jonesday.com

Matthew W. Lampe
New York
+1.212.326.8338
mwlampe@jonesday.com

Jonathan M. Linas
Chicago
+1.312.269.4245
jlinas@jonesday.com

Elizabeth B. McRee
Chicago
+1.312.269.4374
emcree@jonesday.com

James S. Urban
Pittsburgh
+1.412.394.7906
jsurban@jonesday.com

Stanley Weiner
Cleveland
+1.216.586.7763
sweiner@jonesday.com

Liat Yamini
Los Angeles
+1.213.243.2317
lyamini@jonesday.com

Steven M. Zadravecz
Irvine / Los Angeles
+1.949.553.7508 / +1.213.243.2195
szadravecz@jonesday.com

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