

Alert | Labor & Employment



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Court Invalidates DOL Overtime Rule, Holds Increased Salary Test is Contrary to Congressional Intent and Exceeds DOL Authority

On Nov. 22, 2016, a Texas federal court stayed implementation of the U.S. Department of Labor’s (DOL) rule amendment which would have roughly doubled the minimum salary threshold for many employees to be considered exempt from federal overtime requirements under the Fair Labor Standards Act (FLSA). On Aug. 31, 2017, the same court declared that the DOL’s rule amendment “is invalid” as a matter of law, reasoning that the DOL exceeded its authority by adopting “a salary-level test that will effectively eliminate the duties test” that Congress established in the FLSA.

The court’s ruling adds another layer of complexity to the uncertainty that employers have confronted since May 23, 2016, when the DOL published its rule amendment. Nonetheless, there are a handful of key “take-aways” that employers should consider as they weigh their options:

- For the time being, the law remains what it has been since 2004. To qualify for the FLSA’s “bona fide executive, administrative, or professional capacity” (EAP) exemption, an employee must: (i) be paid on a salary basis; (ii) receive a salary of at least \$23,660 annually; and (iii) in fact perform executive, administrative, or professional capacity duties as defined in the current regulations, which have been in effect since 2004.
- Although it is now highly unlikely the DOL’s rule amendment will become effective as written, it is similarly unlikely the court’s invalidation of that amendment will be the last word. Following the November 2016 stay, the DOL asked the Fifth Circuit Court of Appeals to reaffirm its authority to set at least some minimum salary test, arguing the stay order suggested it had no such authority. In

its Aug. 31 opinion, the court acknowledged that the DOL “has the authority to implement a salary-level test” – the court reasoned only that the DOL had exceeded that authority by adopting “a salary-level test [of \$47,476 annually] that will effectively eliminate the duties test” required under the FLSA. What impact that more narrow ruling may have on the DOL’s current appeal, or on its decision whether to appeal the Aug. 31 ruling, is not yet clear.

- Separately, even before the court’s Aug. 31 ruling, the DOL under the Trump Administration already announced its intention to walk back its rule amendment. On July 26, 2017, the DOL released a Request for Information (RFI) seeking public comments on a set of questions that suggest the DOL is considering several regulatory possibilities, including (i) calculating the salary threshold differently based on factors such as exemption category, geographical area, employer size and/or industry; (ii) establishing a new minimum salary level at some point between the current \$23,660 minimum and the \$47,476 level the court has now declared invalid; or (iii) eliminating the minimum salary requirement entirely and determining exemption status solely based upon the duties an employee performs. The comment period is currently set to close in late September, and what the DOL may propose thereafter is uncertain. However, the RFI does not in itself begin the formal rule-making process that would be required to rescind or adjust the now-invalidated rule amendment.
- Remember, neither the rule amendment nor the court’s opinion invalidating it impacts the traditional “duties” tests, but only the “salary-level” test. For the many employers who conducted audits and reclassified employees based upon their duties, those decisions should likely not be impacted. For those who may have reclassified employees based on the \$47,476 salary-level test in anticipation of the rule amendment, however, those decisions may be reconsidered. Of course, human resources and communications will likely want to address situations where employers may have already promised (or even implemented) either raises or reclassifications.
- As always, employers are wise to review employees’ job descriptions and actual duties. The duties test is far more fertile ground for FLSA misclassification claims, and employers can help avoid potential exposure by ensuring that only those employees who meet the duties test are classified as EAP exempt.

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