SULLIVAN & CROMWELL LLP

November 29, 2016

# *Nevada* v. *U.S. Department of Labor*: Enforceability of New Overtime Regulations

## Federal Judge Issues Last-Minute Preliminary Injunction Blocking U.S. Department of Labor's New Overtime Regulations

### SUMMARY

On November 22, in *Nevada* v. *U.S. Department of Labor*, the United States District Court for the Eastern District of Texas issued a nationwide preliminary injunction preventing the Department of Labor from enforcing its new overtime rules, which were scheduled to go into effect on December 1. As noted in our prior Client Alert, the new regulations provide that employees earning less than $47,476 per year will not qualify for the white-collar exemption to the minimum-wage and overtime requirements of the Fair Labor Standards Act ("FLSA"), and therefore will be eligible for overtime, irrespective of their job duties. The district court held that the Department likely exceeded its statutory authorization because Congress did not intend categorically to exclude employees with white-collar duties from the exemption based solely on their salary levels. The court therefore enjoined the Department's regulations nationwide, concluding that the costs of compliance with the regulations constituted irreparable harm.

This decision means that employers are not required to pay overtime in accordance with the new federal overtime rules by December 1, but the injunction is only temporary and it is uncertain how long it will remain in effect. The district court still must consider whether to issue a permanent injunction, the current Administration has stated that it strongly disagrees with the decision and is currently considering all of its legal options, and the incoming Administration must decide whether to continue with any appeal filed by the prior Administration. If the preliminary injunction is subsequently lifted, employers could potentially face retroactive liability for failure to pay overtime in accordance with the new regulations. Accordingly, employers must weigh the legal and business risks in not complying with the new Department of Labor overtime regulations and should remain ready to comply quickly with the new regulations to the extent the preliminary injunction is reversed. To the extent that employers elect not to comply with the new overtime

regulations at this time and have already announced or implemented pay changes, they should be mindful of applicable state and local requirements, including those such as in New York State, which independently of the federal government mandates minimum-salary levels as a condition to exemption from overtime for certain employees, and those relating to notices in changes to pay, which may prevent employers from immediately rolling back changes.

## BACKGROUND

Section 213(a)(1) of the FLSA exempts from minimum-wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity,"[1] which is commonly referred to as the "white-collar" exemption. The FLSA authorizes the Secretary of Labor to define and delimit the terms of the exemption.[2] Since the 1940s, the U.S. Department of Labor (the "Department") has included a "salary-level test" as part of its regulations, which requires an employee to be paid at least the minimum-salary level established by the regulations to qualify for the exemption.[3] The salary-level requirements have been updated seven times.[4]

On May 18, 2016, the Department issued new regulations governing the white-collar exemption. Under prior regulations, an employee had to earn more than $23,660 per year to qualify for the white-collar exemption. The new regulations, among other things, raise the salary level to $47,476 annually for a full-year worker, and provide a mechanism to adjust the salary thresholds for overtime-exempt employees every three years.[5] The regulations were scheduled to take effect on December 1, 2016, and were estimated to reclassify about 4.2 million workers as non-exempt.[6]

On September 20, 2016, 21 States and more than 50 business coalitions filed suit in the Eastern District of Texas challenging the Department's regulations.[7] They argued that the Department's salary-level test violates the text of the FLSA, the automatic-updating mechanism violates the Administrative Procedure Act, and the regulations violate the Constitution by requiring States to pay their employees overtime.[8] The States sought a preliminary injunction preventing implementation and enforcement of the regulations, and the district court consolidated both actions.[9]

## NOVEMBER 22 DECISION

In the November 22 decision, Judge Amos Mazzant (who was appointed by President Barack Obama) preliminarily enjoined the Department from "implementing and enforcing" its overtime regulations "on a nationwide basis."[10] The court found that plaintiffs were likely to succeed on the merits because "Congress intended the [white-collar] exemption to apply to employees doing actual executive, administrative, and professional duties[,] . . . which does not include a minimum salary level."[11] The court held that the Department's regulations—which state that "[w]hite collar employees subject to the salary level test earning less than $913 per week will not qualify for the . . . exemption, and therefore will be eligible for overtime, irrespective of their job duties and responsibilities"—"exceed[] its delegated authority

and ignore[] Congress's intent by raising the minimum salary level such that it supplants the duties test."[12] In the court's view, "Congress did not intend salary to categorically exclude an employee with [white-collar] duties from the exemption."[13]

The district court then analyzed the remaining preliminary-injunction factors. It determined that the States "are likely to suffer irreparable harm" from the "cost of complying" with the Department's regulations, which "will impact governmental programs and services."[14] This tipped "the balance of hardships . . . in favor of preliminary injunctive relief."[15] And "the public interest is best served by an injunction" because, even if the regulations are valid, "then an injunction will only delay the regulation's implementation."[16] Finally, the court determined that "[a] nationwide injunction is proper in this case" because "the scope of the alleged irreparable injury extends nationwide."[17]

## IMPLICATIONS

The decision temporarily enjoins the Department's implementation and enforcement of the overtime regulations, and employers therefore need not comply by December 1. Employers, however, must weigh business and legal risks in deciding whether to comply with the enjoined regulations, particularly where the employer already implemented or announced plans to comply with the new overtime rule.

It is not clear how long the preliminary injunction will remain in effect. Once the district court considers the merits more fully, it could decline to issue a permanent injunction. The Department of Labor said it strongly disagreed with the decision, and it is "currently considering all of [its] legal options."[18] Accordingly, the current Administration likely will seek to appeal the district court's ruling. The Trump Administration, however, would have to decide whether to continue with such an appeal or whether to comply with the injunction, and even if the new Administration maintains an appeal, it is uncertain how the United States Court of Appeals for the Fifth Circuit would rule.

There is also legislative uncertainty. The Department's overtime regulations will not be subject to disapproval in 2017 under the Congressional Review Act, but the incoming Congress could legislatively rescind the regulations. The new Administration also could do so by regulation, although that would require a new rulemaking process.

If the new overtime regulations are later upheld, affected employees are likely to bring claims for past overtime and potentially attorneys' fees. In a similar situation last year, an appellate court reversed a district court's decision that enjoined the implementation of the Department's minimum-wage and overtime regulations relating to home health-care workers.[19] Subsequently, several district courts addressed the issue of whether the regulations could be enforced retroactively to their original effective date.[20] The district courts split on that issue, and appeals are pending on whether the home health-care rule can be enforced retroactively. Given this potential litigation risk, employers who elect not to implement the new overtime regulations at this time should consider keeping accurate records of the

hours worked by any employee whose classification would be affected by implementation of the new regulations.

Further, employers should be cautious in undoing any implemented or announced changes in anticipation of the new regulation. As an initial matter, it may be very difficult to rescind any implemented or announced pay increases from an employee-relations perspective. Employers should also ensure that any rollback plans comply with applicable state and local requirements. Certain States have overtime laws, some of which incorporate the FLSA, while others have adopted different salary and exemption requirements.[21] For example, the New York State Department of Labor ("NYDOL") has announced plans to revise its regulations concerning the salary threshold for the executive and administrative exemptions (but not the professional exemption) applicable to most industries, as set forth in the New York State Minimum Wage Act. These proposed regulations are open for public comment until December 3 and, if adopted by the NYDOL, are scheduled to begin taking effect on December 31, 2016.[22] The full text of the proposed regulations is available here. For large employers (defined as those with 11 or more employees) in New York City, the proposed minimum-salary thresholds to qualify for exemption from overtime are $42,900 annually as of December 31, 2016, $50,700 annually as of December 31, 2017, and $58,500 annually as of December 31, 2018.[23] New York employers will need to comply with these regulations regardless of the status of the federal rule. Moreover, certain States have laws governing changes to pay. For example, California "requires that employers provide notice to employees of their rate(s) of pay, . . . and the basis of wage payment . . . , including any applicable rates for overtime . . . within 7 days of a change if the change is not listed on the employee's pay stub for the following pay period."[24]

In sum, although employers need no longer comply with the Department's regulations by December 1, in light of the substantial uncertainty they should be prepared to promptly comply with the new regulations if the preliminary injunction is reversed and be mindful of any applicable state and local requirements in rolling back any already announced or implemented pay changes.

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## ENDNOTES

1 29 U.S.C. § 213(a)(1).

2 *Nevada* v. *U.S. Dep't of Labor*, No. 16-CV-00731, at 1-2, ECF No. 60.

3 *Id.* at 2.

4 Dep't of Labor, Wage & Hour Div., Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391, 32392 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).

5 *Id.* at 32393, 32430.

6 *Id.* at 32399.

7 *Nevada*, No. 16-CV-00731, at 3-4.

8 *Nevada*, No. 16-CV-00731, Complaint at 2-4, ECF No. 1.

9 *Nevada*, No. 16-CV-00731, Op. at 3-4.

10 *Id.* at 19.

11 *Id.* at 11.

12 *Id.* at 12-13 (internal quotation marks omitted).

13 *Id.* at 14.

14 *Id.* at 15-16 (internal quotation marks omitted).

15 *Id.* at 16-17.

16 *Id.* at 17.

17 *Id.* at 18.

18 U.S. Dep't of Labor, Wage & Hour Div., Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas, https://www.dol.gov/WHD/overtime/final2016/.

19 *Home Care Assoc. of Am.* v. *Weil*, 799 F.3d 1084, 1086-87 (D.C. Cir. 2015). According to the Department, it did not begin enforcement of the Home Care Final Rule until thirty days after the appellate court decision. *See* U.S. Dep't of Labor, Wage & Hour Div., U.S. Court of Appeals Unanimously Upheld DOL Rule, Opinion Effective as of Oct. 13, 2015, https://www.dol.gov/whd/homecare/litigation.htm.

20 *Compare Bangoy* v. *Total Homecare Solutions, LLC*, 2015 WL 12672727, at *3 (S.D. Ohio Dec. 21, 2015) ("[P]ermitting Plaintiffs to recover for a violation of the rule while the vacatur was in effect would give the rule an impermissible retroactive effect."), *with Cummings* v. *Bost, Inc.*, 2016 WL 6514103, at *6 (W.D. Ark. Nov. 1, 2016) ("The Court finds it contrary to general principles of fairness to allow Bost to escape liability for nearly a year's worth of overtime wages based on a district court decision that was ultimately deemed to be in error.") (internal quotation marks omitted), *and Kinkead* v. *Humana, Inc.*, 2016 WL 3950737, at *3 (D. Conn. July 19, 2016) (collecting cases).

21 Ten States and the District of Columbia expressly incorporate FLSA regulations into state law. *See* Alaska Stat. Ann. § 23.10.055(c)(1); D.C. Code Ann. § 32-1004(a)(1); 820 Ill. Comp. Stat. Ann. 105/4a(2)(E); Me. Rev. Stat. tit. 26, § 663(3)(K); Md. Code Regs. 09.12.41.01; *id.* 092.12.41.05; *id.* 09.12.41.17; 454 Mass. Code Regs. 27.03(3); Mo. Ann. Stat. § 290.505; N.J. Admin. Code. § 12:56-7.2; N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2; N.C. Gen. Stat. Ann. § 4111.03(D)(3)(d); Ohio Rev. Code Ann. § 4111.03(D)(3)(d). Employers should be mindful that, although these provisions track federal law, States may interpret them in light of the new federal regulations, notwithstanding the preliminary injunction.

**ENDNOTES (CONTINUED)**

[22] *See* Susan Gross Sholinksy, et al., *New York State Department of Labor Proposes New Salary Basis Thresholds for Exempt Employees*, Nat'l L. Rev. (Nov. 22, 2016); Cindy Schmitt Minniti & Mark S. Goldstein, *NY Wage Regulations Could Face Major Changes*, Law360 (Nov. 2, 2016), http://www.law360.com/articles/858709/ny-wage-regulations-could-face-major-changes.

[23] *Id.* The proposed salary thresholds differ by business size and location within New York State.

[24] State of Cal., Dep't of Indus. Relations, Wage Theft Protection Act of 2011 – Notice to Employees: Frequently Asked Questions, http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.

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