Alert
2016

Labor & Employment Observer

COZEN O'CONNOR

The Roller Coaster Ride of the New White Collar Regulations

The Fair Labor Standards Act (FLSA) got a lot of attention in 2016, and as we move into 2017, there is significant speculation as to what will happen next.

As most are aware, the FLSA requires employers to pay employees a minimum wage for all hours worked, and overtime for hours worked over 40 in a workweek. The FLSA also provides for an exemption from the minimum wage and overtime requirements for those in an executive, administrative, and professional positions (often referred to as the White Collar Exemptions). To determine whether a position qualifies under the White Collar Exemptions, there are three tests, each of which must be met. First, the position must pay a minimum salary, the employee must be paid on a salary basis, and the position must meet the duties test.

On March 13, 2014, President Obama issued a memorandum directing the Department of Labor (DOL) to "modernize and streamline" the existing White Collar Regulations, and this process has seen more ups and downs than most roller coaster rides. It then took the DOL just shy of 16 months to prepare the proposed changes. On July 6, 2015, the DOL finally published its proposed rule changes to the overtime regulations. The DOL's proposals targeted the salary threshold for employees to be exempt from FLSA overtime requirements, seeking to raise the salary levels for the first time since 2004. As is expected when such a major change in a regulation occurs, the public comment period drew significant interest from many sources, and by the end of the 60-day notice period, the public had submitted more than 270,000 comments to the DOL's proposed changes. During this time, there was great speculation as to whether the DOL would ultimately also change the duties test.

In May 2016, after considering the comments, the DOL released the final form of its regulations. These new regulations were scheduled to take effect on December 1, 2016. The final regulations did not address the duties test but instead raised the salary level from $455 per week (or $23,660 annually) to $913 per week (or $47,476 annually). It also raised the salary level for the highly compensated employee exemption from $100,000 to $134,004 a year. The regulations also provided for automatic updates to the compensation level to occur every three years with the first increase scheduled to take place January 1, 2020. The amount of this increase was shocking because it more than doubled the salary level needed for the exemption.

At that point, employers had approximately six months to audit their positions and determine how to proceed. The toughest issue to deal with were the positions that currently paid less than $40,000 a year. To raise those employees' salaries to meet the new salary threshold would mean a 20 to 50 percent raise — and a tremendous increase in labor budgets. The alternative would be to make these positions non-exempt and retro-fit an hourly rate or salary to take into account the amount of overtime that would be worked. This could also be a tremendous morale issue because many of the employees who would be reclassified as non-exempt might never have been in a position that paid overtime or required that they keep time, and they might view this change as a demotion. As the December 1, 2016, deadline loomed closer, employers completed their audits, adjusted their budgets, and started to communicate the changes to their affected employees.

Meanwhile, employers hoped for some relief. The U.S. House of Representatives passed legislation on September 28, 2016, that would give employers a six-month extension of time — until June 1, 2017 — to comply. While not a complete remedy, the reprieve would have provided some time to come up with additional avenues of challenge. The legislation did not get through the Senate, and if it had, the Obama administration was prepared to veto.

Then two separate lawsuits were filed challenging the regulations. On September 20, 2016, the

Susan N. Eisenberg

Member

seisenberg@cozen.com
Phone: (305) 704-5941
Fax: (305) 704-5955

Related Practice Areas

- Labor & Employment

state of Nevada and 20 other states filed suit against the DOL in the Eastern District of Texas. On the same day, the Plano Chamber of Commerce and more than 50 other business organizations also filed suit challenging the regulation. This was a “Hail Mary” effort that was not expected to do much other than perhaps invalidate the automatic increase. On October 12, 2016, the state plaintiffs moved for emergency preliminary injunctive relief that was not fully briefed until November 15, 2016 (a mere two weeks before the regulations were to go into effect). Almost simultaneously, the Plano Chamber on October 1, 2016, filed an expedited Motion for Summary Judgment. The court consolidated the two cases and on November 16, 2016, heard oral argument on the state plaintiffs’ motion for preliminary injunction.

On November 22, 2016, just eight days before the regulation was to go into effect, the court entered an order enjoining the implementation and enforcement of the regulation nationwide. Judge Amos Mazzant from the U.S. District Court for the Eastern District of Texas effectively blocked the DOL from implementing and enforcing the new overtime regulations as planned on December 1. The injunction meant that **no aspect** of the new regulation could be implemented or enforced.

Once again, employers were thrown into a frenzy and had to think quickly about next steps. Some employers decided not to implement the changes they had planned but rather to wait and see what happens next. Some, who had already budgeted and communicated changes to employees, decided to go ahead with the changes as planned.

While no one has a crystal ball, a review of the Injunction Order does shed some light on the issue Judge Mazzant had with the new regulations. He ruled that the FLSA does not give the DOL any authority to establish a minimum salary level. “With the Final Rule, the Department exceeds its delegated authority and ignores Congress’s intent by raising the minimum salary level such that it supplants the duties test.” While Judge Mazzant stated that Congress did not give DOL authority to utilize a salary-level test, his opinion was careful to disclaim any broad ruling striking down the very concept of a salary-level test, noting in a footnote that the injunction applies only to the final rule’s specific amendment to the salary-level test. Nevertheless, the groundwork has been laid for a future challenge to the DOL enforcing a salary-level test even at the prior $455 per week threshold.

In addition, Judge Mazzant ruled that the DOL lacks the authority to implement the automatic updating mechanism, which was scheduled to increase the minimum salary threshold every three years beginning in January 2020.That portion of the final rule was also preliminarily enjoined.

We cannot lose sight of the fact that the DOL that issued the new regulation was appointed by the Obama administration. This will not be the DOL under the Trump administration after January 20, 2017. One thing we do know is that the Trump administration will not want to implement any regulation that hurts or is perceived to hurt business. Also, the DOL has appealed Judge Mazzant’s Order to the U.S. Court of Appeals for the Fifth Circuit, which granted the DOL’s request for expedited briefing. While the appeal will not be fully briefed until January 31, 2017, the DOL’s brief was due to be filed by December 16, 2017, giving the Obama administration DOL an opportunity to make its position known.

The fate of the new regulation remains to be seen. If the Court of Appeals reverses Judge Mazzant’s Order, then the new regulations could become law; at least until there is a final ruling by Judge Mazzant. The DOL under President Trump could withdraw the appeal and instead revamp the regulation altogether. Also, if the new DOL agrees with Judge Mazzant that Congress only authorized the DOL to further define the duties test, then the DOL might do exactly that. This goes under the old adage, be careful what you wish for. A salary level test is clear and concise: an employee’s salary either meets the test or not. A refined duties test might bring nothing but further litigation. Imagine if the new DOL adopts a rule similar to California law, which provides that to be exempt the employee must perform exempt duties at least 51 percent of the time. That rule would invite litigation with employees who claim that they never spend 51 percent of their time on exempt duties.

At this point, the roller coaster ride is far from over, and anything can happen.