

Labor and Employment Law Update: Are the New DOL Regulations DOA?

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The United States Department of Labor (DOL) was poised to roll out its new overtime regulations effective December 1, 2016 when the regulations sustained an unexpected, and perhaps fatal blow by a federal district Court in Texas which issued a nationwide injunction suspending the implementation of the rules on November 22, 2016.

It all began on March 23, 2014 when President Obama issued a memorandum directing the Secretary of Labor to modernize the existing overtime regulations for executive, administrative and professional employees. Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737 (Mar. 13, 2014). These regulations define the requirements for employees to be exempt from the payment of overtime compensation. Each of the three exemptions have slightly different requirements, however common to all three is a salary threshold which must be met in order for an employee to be classified as overtime exempt. See 29 C.F.R. Part 541.

The minimum salary requirement prior to the new regulations was \$455.00 per week, or \$23,660.00 annually. Since most exempt employees earn more than this, the salary requirement posed little concern to employers, and most of the emphasis in litigation and enforcement had been focused on the “duties” requirements-whether employees were performing bona fide executive, administrative and professional duties so as to be exempt from overtime.

Following its rulemaking procedure and after receiving 293,000 comments on the Rule revisions, the DOL published the final version of the rule changes on May 23, 2016. The new rule increased the minimum salary level for exempt employees to \$921.00 per week or \$47,892.00 annually. According to the DOL, the new salary level was based upon the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country, the south. The Department of Labor estimated that with this change, an additional four million Americans would be eligible for overtime. The final rule also established automatic increases to the minimum salary level every three years, the first adjustment to occur on January 1, 2020. Department of Labor, *Final Rule: Overtime* <https://www.dol.gov>.

Many viewed the increase as long overdue. After all, currently only 7 percent of full-time salaried workers enjoy the protections of the Fair Labor Standards Act, compared to 62 percent in 1975. Laurel Brubaker Calkins, *Obama White-Collar Overtime Pay Mandate Blocked by Judge*, <https://www.bloomberg.com>. Nonetheless, the significant minimum salary increase was not well received by employers concerned with their salary budgets. With less than six months notice, employers would be forced to either raise some employees' salaries significantly to the minimum threshold or absorb overtime costs for employees who had previously been exempt from overtime. Neither option was palatable to corporate America, but none of the proposed

challenges to the new rule gained any steam until Judge Amos L. Mazzant of the United States District Court in the Eastern District of Texas gave employer and business interests an early Christmas present by enjoining the DOL from enforcing its new regulations.

The Texas litigation started on September 20, 2016, when twenty-one states, including Ohio, as well as dozens of business groups, filed suit against the Department of Labor and its agents challenging the final rule. *State of Nevada et. al. v. United States Department of Labor et. al.*, N.D. Texas No. 4:16-CV-00731, 2016 WL 6879615 (November 22, 2016.) Pursuant to the Administrative Procedure Act (5 U.S.C. Section 702) federal courts have authority to review administrative regulations. The Court reviewed the DOL's rules under the two-step analysis in *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The Court found that the DOL exceeded its authority in enacting the new rules despite the Fair Labor Standards Act which provides in relevant part "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 minimum wage and overtime requirements." 29 U.S.C. Section 213(a)(1). The Court found the DOL lacked authority to impose a minimum salary requirement for the exempted classifications, although the DOL overtime rules have imposed a salary minimum amount for years.

The plaintiffs also argued that the automatic updating mechanism under the new rule violated the Administrative Procedure Act since it provides for salary level adjustments periodically without new notice and comment periods. The Court did not reach this issue since it found the DOL lacked authority to implement the rule in the first place.

The Court also applied the injunction nationwide-to States that did not even join in the litigation. The Court summarily dismissed arguments that a nationwide injunction would be inappropriate, finding that a nationwide injunction would protect employees and employers from being subject to different exemptions based on location. For authority, the Court cited the decisions of two fellow Texas District Court judges, who issued nationwide bans on other administrative regulations. *Texas v. United States* S.D. Texas No, 7:16-cv-54, 2016 WL 4426495 (August 21, 2016) placing nationwide bans on enforcement of transgender bathroom policies proposed by Department of Education rule, and *Nat'l Fed'n of Indep. Bus et. al. v Perez*, N.D. Texas No. 5:16-cv-66, 2016 WL 3766121 (June 21, 2016) granting a nationwide injunction to bar implementation of the DOL's Advice Exemption Interpretation.

The defendants have filed an interlocutory appeal of the trial court's grant of the motion for a preliminary injunction with the Fifth Circuit Court of Appeals and as of this writing, the briefing in the Court of Appeals is scheduled to conclude in January of 2017. As President Trump takes office, the future of the new regulations is in doubt. Andrew Puzder, selected by Donald Trump to assume the position of Secretary of Labor, could dismiss the appeal and abandon the new rules entirely, or could make modifications more friendly to business and employer interests. In any event, the new regulations touted by the Obama administration as providing a "fair day's pay for a hard day's work" are unlikely to survive in their current form.