

Déjà Vu All Over Again? DOL Appeals Overtime Rule

Labor & Employment Law Update

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At this time last year, employers across the country were preparing for implementation of the DOL Final Overtime Rule, which would have more than doubled the minimum salary level for exempt employees. At the eleventh hour, employers were granted a reprieve when the Federal District Court for the Eastern District of Texas temporarily halted implementation, which was subsequently made permanent in August of this year.

In the interim, a presidential election occurred. And with the change in administration came uncertainty about what—if any—action the DOL would take regarding the now-defunct overtime regulations. We began to get answers following Alexander Acosta's appointment as Secretary of Labor. Since his confirmation hearing in March Acosta has repeatedly stated that—while the jump to \$47,476 was excessive—the salary level test should be increased to somewhere between \$30,000 and \$35,000.

In July, the DOL followed up on Acosta's comments by issuing a request for information (RFI) regarding the overtime exemptions. The RFI sought responses to eleven sets of questions pertaining to the overtime exemptions, including questions regarding whether annual indexing of the salary test would be appropriate and the impact on the wages of exempt employees caused by the anticipation of the 2016 Final Rule. The comment period ended on September 25, 2017, with the DOL receiving over 200,000 comments.

On October 30, 2017, the DOL filed its appeal of the Texas court's decision to permanently block the overtime rule. That appeal has been stayed while the DOL develops new overtime regulations. To be sure, the DOL is appealing this decision for one reason—to preserve its authority to revise the salary level test. In both its earlier decisions, the District Court repeatedly emphasized that the duties—not salary level—test should control the determination of exempt positions.

In its August 31 decision the Court attempted to clarify, in a footnote, that it was “not making any assessments regarding the general lawfulness of the salary-level test or the Departments authority to implement such a test.” However, the broad language used elsewhere in the opinion, is difficult to square with this narrow holding. In fact, in its appeal of the preliminary injunction—which was later dismissed as moot—the DOL asked the Fifth Circuit Court of Appeals to “address

only the threshold legal question of the Department's statutory authority to set a salary level, without addressing the specific salary level set by the 2016 final rule." We expect the DOL to take a similar stance in the instant appeal.

What's Next

There is nothing employers need to do at this point. The DOL is currently reviewing the comments it received in response to its RFI, after which it will publish a notice of proposed rulemaking. Following that notice there will be a comment period prior to the issuance of any new regulations. Although it could be months—or years—before we see any new regulations, we fully expect that the current salary level will be increased, the only question is by how much. Stayed tuned – we will keep an eye on any action by the DOL and will keep you updated!

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