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National Preliminary Injunction Blocks New FLSA Salary Test from Taking Effect on December 1, 2016

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A *Fifth Circuit* court issued a national preliminary injunction prohibiting the ***Department of Labor***'s new salary rule for Executive, Administrative, Professional, Outside Sales and Computer Employees from taking effect. The final rule, published on May 23, 2016 would have gone into effect on Dec. 1, 2016. We wrote about this **previously** and at this time, recommend that employers suspend, but not cancel their implementation plans.

The rule mandated that employees falling under the executive, administrative or professional exemptions must earn at least $913 per week ($47,476 annually), which would more than double the currently existing minimum salary level of $455 per week. In ***State of Nevada v. U.S. Dep't of Labor*** , No. 4:16-cv-731 (E.D. Tex. filed November 22, 2016) District Court Judge Amos L. Mazzant III (appointed by President Obama) ruled that the Department of Labor cannot impose the new salary requirement as a condition of exempt status of executive, administrative or professional ("EAP") employees because the plain language of the Fair Labor Standards Act focuses on the *duties* of exempt EAP employees, and not their level of pay.

The U.S. District Court for the Eastern District of Texas implemented a two-step process of evaluating the authority of the DOL to issue the new salary level, based on the Supreme Court's 1984 decision in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 834 (1984). The court stated that under the *Chevron* standard, the court must first assess whether Congressional intent with respect to how exempt employees are to be defined was clear (if it was, a regulation cannot contradict that clear intent). The second step of the *Chevron* standard applies only if the Congressional intent was not clear, in which case the court would defer to the agency's regulation unless it were "arbitrary, capricious, or manifestly contrary to" the FLSA. Slip op. at 9.

Regarding the first step of the Chevron analysis, the court noted that the central section of the FLSA that creates the exemption, Section 213(a)(1), "provides in relevant part, that 'any employee employed in a bona fide executive, administrative, or professional capacity … as such terms are defined and delimited from time to time by the regulations of the [DOL]' shall be exempt from minimum wage and overtime requirements." Slip op. at 9. The court assessed the plain meanings of the words, "executive," "administrative," and "professional," as those terms were understood when

the FLSA was originally passed, and cited the 1933 edition of the Oxford English Dictionary. Slip op. at 10-11. The court did not see a salary reference in those definitions, and noted that the use of the words “bona fide” as a qualifier to the terms “executive, administrative, or professional capacity” applied to the tasks actually performed by those exempt employees. Slip op. at 11. Thus the court concluded that “Congress intended the EAP exemption to depend on an employee’s duties rather than an employee’s salary.” Slip op. at 12.

Over the DOL’s arguments to the contrary, the court held that “nothing in the EAP exemption indicates that Congress intended the Department to define and delimit with respect to a minimum salary level.” Slip op. at 12.

The court at footnote 2 of its decision said it was “not making a general statement on the lawfulness” of the existing salary tests, but “is evaluating only the salary-level test as amended under the Department’s Final Rule.” Slip op. at 12 n.2. While the court made this limitation, surely this court’s ruling will find its way in the defense of the hundreds of FLSA cases currently pending.

As of now, employers need not implement the new salary requirements, or convert exempt employees to non-exempt status on December 1. Surely, emergency appeals will follow, and the 5th U.S. Circuit Court of Appeals may weigh in on the matter soon. At this time, employers may suspend, but should not altogether cancel their December 1 implementation plans.

In his injunction decision, Judge Mazzant also noted that he considered briefs already filed on an expedited motion for summary judgment led by the U.S. Chamber of Commerce. The Court’s Oct. 31, 2016 Order states that if a hearing becomes necessary on that motion, it will be scheduled for Nov. 28, 2016. Odds seem good that his ruling on that motion will be consistent with his injunction decision.

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