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Management Alert

Texas Judge Preliminarily Enjoins New Overtime Exemption Rules Nationwide: What Steps Should Follow?

By Seyfarth's Wage & Hour Litigation Practice Group

Late Tuesday afternoon, Judge Amos Mazzant of the United States District Court for the Eastern District of Texas issued an order enjoining the U.S. Department of Labor's implementation and enforcement of the new overtime exemption rules that were set to go into effect on December 1, 2016. The court granted a motion for preliminary injunction filed by the attorneys general of 22 states, in which the states argued among other things that the new rules were unlawfully promulgated and would be likely to cause irreparable harm to the states that requested the injunction. The court also considered amicus arguments made by various chambers of commerce and trade associations, which filed a companion case asserting similar and separate grounds for overturning the DOL's new rules. Although the court's order leaves some room for confusion on this point, it appears to apply to all public and private sector employers nationwide.

Although an important and exciting step in the right direction, this is not the final word.

First, this is a temporary injunction. It contains strong suggestions of what the court might ultimately do with a final determination regarding whether to invalidate the new rules. It explains various reasons why the rules are unlawful. But, at this time, all of those reasons and the results they might ultimately justify are preliminary.

Second, unlike most pre-judgment orders, an order granting or denying a preliminary injunction is immediately appealable. On appeal, the appellate court applies an abuse of discretion standard. Generally speaking, a court abuses its discretion by (1) committing an error of law, such as applying an incorrect legal standard, (2) basing the preliminary injunction on a clearly erroneous finding of fact, or (3) issuing an injunction that contains an error in form or substance. There are aspects of the court's order that the federal government might argue prove each of these points. But it is fair to say that the Fifth Circuit Court of Appeals, which is the court that would hear the government's appeal, rarely overturns orders granting preliminary injunctions. Within the past several decades, it has done so very few times.

Third, if it does not win reversal of the district court's order in this case, it is conceivable that the government would seek review by the U.S. Supreme Court. Even if the Court of Appeals were to reverse, the States and Associations could petition the Supreme Court for review. Given the current composition of the Court, a 4 - 4 decision would leave the Fifth Circuit's decision intact, leaving open the possibility that other Circuits, when confronted with the issue, could rule differently. That would create a difficult dilemma for employers that operate in multiple states across the country.

Fourth, if the plaintiffs ultimately prevail in securing the court's judgment that the DOL's new rules are unlawful, the federal government will have another opportunity to appeal. With the passage of time necessary for the parties to litigate their respective positions through judgment and then to wind their way through the appellate process, it is hard to predict whether an appeal would actually follow. The new administration, its new Secretary of Labor, and its new Solicitor of Labor

would likely have much to consider by that point. And this sets aside for the moment the possibility that the congress will successfully pass—and the new president will sign—a Congressional Review Act resolution, mooting the need for further litigation at all.

To put it simply, the court's ruling on Tuesday creates a significant amount of uncertainty that is going to last for a while longer. And it begs the enormous question: What should businesses do in reaction to the court's preliminary injunction?

Many businesses are very far along in their plans to comply with the new rules by December 1. Many have already begun their communications with employees whose pay or classification would be impacted because of the new rules. Some have already effected changes impacting those employees. Further, those businesses that had not taken steps to comply have employees who have almost certainly heard about the rules and have assumed they would soon receive raises or become overtime eligible.

In that light, the injunction—though heralded as a positive development for businesses—has the potential to create significant risk and disruption. A careful hand is required. Obviously there is much to consider and much more to do. But here is a deft starting point:

- If changes are about to be made, consider whether they can be postponed while stakeholders decide what further steps should be taken. The decision whether to postpone changes and what further steps to take *must* account for any payroll, timekeeping, and human resources changes are in progress. Can those changes be stalled as well, without unacceptable costs and other business disruptions?
- If communications are set to be distributed to employees who would be impacted by the December 1 rule, postpone them while stakeholders develop their next steps plan.
- If changes have not been made but communications have been distributed or begun, consider whether a revised communication plan can be executed while postponing the changes that have not yet been made. Any revised communications plan should begin with the fundamental explanation that: A federal court in Texas has issued an order that makes it uncertain how the FLSA's overtime pay exemptions apply to employees who would be impacted by the new rules that were to go into effect on December 1. Because of the court's order, those rules will not go into effect as expected. To ensure that it is able to follow the laws that govern how employees are paid under the FLSA, the company has revised its plans and will be reporting back to you soon about how this will impact you.
- If communications have been distributed and changes have been made, *stop and consider carefully* how to proceed. Because this is an extremely positive result achieved by the plaintiffs in Texas, some business may be excited to quickly undo the changes that they made. Caution and care are advisable. Employees who have been reclassified from exempt to nonexempt status or who have received pay raises will have begun to acclimate to their new status and pay. An abrupt change could cause them to seek assistance from a plaintiff's lawyer, and could open a Pandora's Box of potential (hopefully unjustifiable) claims.
- For businesses that have not done anything to prepare for the December 1 rule, keep your eyes and ears open for further developments.

Of course, these are also not the final words on how businesses should adapt their actions to the turbulence that this otherwise positive court ruling could cause. What is important is that business stakeholders consider carefully what their next steps will be and to weigh carefully the costs and benefits of available options. A careful plan will help to avoid further business disruptions, unhappy workforces, and plaintiffs' lawyers.

If you would like further information, please contact your Seyfarth attorney, or anyone in Seyfarth's Wage & Hour Litigation Practice Group.

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