

Texas Court Grants Nationwide Preliminary Injunction Enjoining Department of Labor from Implementing or Enforcing Regulation Raising Salary Level for White Collar Exemptions

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When two lawsuits were filed in Texas seeking to block the Department of Labor's new overtime rule, which more than doubles the required salary level to qualify for the Fair Labor Standards Act "white collar" exemptions, few predicted the lawsuits would be successful. But the polls were wrong (again). On November 22, 2016, a Texas District Court Judge (an Obama appointee) granted a nationwide preliminary injunction blocking the rule. *Nevada et al. v. U.S. Department of Labor et al.*, No. 4:16-CV-00731. In a stunning victory for the 21 States and various business groups that brought two separate cases challenging the new overtime rule, the U.S. District Court for the Eastern District of Texas – Sherman Division issued a nationwide preliminary injunction enjoining the DOL from implementing and enforcing the Final Rule, which was set to go into in effect on December 1, 2016.

It is another stinging defeat to the Obama Administration, dismantling one of its signature regulatory achievements. On November 16, 2016, a Texas district court judge issued a permanent injunction blocking the DOL's "persuader rule," which required companies to make extensive disclosures regarding efforts to persuade employees not to join a union. And on October 25, 2016, another Texas district court judge issued a nationwide preliminary injunction blocking portions of Fair Pay and Safe Workplaces Final Rule and Guidance ("Fair Pay Rule"), which were set to take effect on October 25, 2016. The Fair Pay Rule would have required certain federal contractors to disclose prior labor violations and invalidated certain arbitration agreements. The latest decision makes a trifecta and is a reminder of the oft-quoted popular saying: "Don't mess with Texas."

Final Rule Would Have More Than Doubled the Required Salary Need to Qualify for the Exemption

President Barack Obama directed the DOL in March of 2014, more than two years ago, to update and modernize the regulations that govern who qualifies for the white collar

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exemptions. In response, the DOL issued a proposed rule on July 6, 2015, and a Final Rule on May 23, 2016, after receiving approximately 300,000 comments.

The Final Rule makes four changes to the white collar exemptions:

- It increases the standard salary level for the white collar exemptions from \$23,660 to \$47,476 — a rate based on the 40th percentile of average salary for full-time workers in the lowest census region. The rate previously had been set at the 20th percentile.
- It increases the required compensation for the exemption applicable to highly compensated employees, raising that level from \$100,000 to \$134,004 — a rate set at the 90th percentile for full-time salaried workers in the United States.
- It provides for automatic increases to the salary levels every three years, instead of requiring separate rulemaking, with rates to be established based on the average salary levels for full-time workers as reported by the Bureau of Labor Statistics.
- It allows employers to use commissions and other non-discretionary incentive pay to satisfy up to 10% of the salary level for the standard white collar exemptions.

Court's Ruling

In granting the preliminary injunction, the court focused on the words of the statute — finding nowhere any indication that Congress intended the exemptions for white collar workers to include a salary level requirement, but rather finding the exemptions dependent on the duties of the employees. The Final Rule essentially created a “de facto salary-only test,” and makes approximately 4.2 million workers eligible for overtime even though their duties might qualify them for the exemption, the court held in granting the injunction.

Under the FLSA, the overtime requirement does not apply to “any employee employed in a bona fide executive, administrative, or professional capacity.” 29 U.S.C. 213(a)(1). The statute itself contains no salary basis or salary level requirement. The salary basis and minimum salary level requirements were added by the Department of Labor through regulations issued shortly after the FLSA was enacted in 1938.

Final Rule Contrary to Congressional Intent and Fails *Chevron* Step 1

The DOL argued the court was required to defer to the DOL's interpretation of the statute and imposition of a salary level requirement because the Congress expressly delegated to the DOL the obligation to “define and delimit” the exemptions “from time to time.” Under the U.S. Supreme Court's seminal decision in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), there is a two-step method for reviewing the validity of regulations. At *Chevron* Step I, the court reviews the statute to determine whether the intent of Congress is clear from the terms of the statute. If it is, “that is the end of the matter” as the court must give effect to the expressed intent of Congress.

The district court held the Final Rule failed at Step 1 of *Chevron* finding the statute is not ambiguous. Because the statute itself does not define the terms “executive,” “administrative,” and “professional,” the court turned to contemporary dictionary definitions of those terms at the time the statute was enacted. “After reading the plain meanings together with the statute, it is clear Congress intended the EAP exemption to apply to employees doing actual executive, administrative, and professional duties. In other words, Congress defined the EAP exemption with regard to duties, which does not including a minimum salary level,” the court held.

In responding to the DOL's argument that Congress delegated to it the obligation to define the exemptions, the court held this delegation permits the DOL to define the types of duties that might qualify an employee for an exemption, but “nothing in the EAP exemption indicates that Congress intended the Department to define and delimit with respect to a minimum salary level.” And the elimination of the exemption based solely on the employee's salary level directly conflicts with Congressional intent, the court held. “With the Final Rule, the Department exceeds its delegated authority and



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ignores Congress's intent by raising the minimum salary level such that it supplants the duties test.”

Final Rule Also Not Entitled to Deference under *Chevron* Step II

The court also found that even if the statute was ambiguous, the Final Rule still would be invalid and not owed deference because it is not based on a permissible construction of the statute. The salary level was originally set low to screen out the obviously nonexempt employees. But by raising the salary level to \$913 per week, the Final Rule creates a “de facto salary-only test.” Congress “did not intend salary to categorically exclude an employee with EAP duties from the exemption,” the court held.

Automatic Updating Unlawful, Too

In issuing the preliminary injunction, the court held the DOL also did not have the authority to implement the automatic updating mechanism, which would have increased the salary level every three years without separate rulemaking.

Nationwide Preliminary Injunction Issued

The court issued a nationwide preliminary injunction, enjoining the DOL from “implementing and enforcing” the regulations. The court rejected the request to limit the injunction only to states that showed irreparable harm. “A nationwide injunction protects both employees and employers from being subject to different EAP exemptions based on location,” the court held, noting that other courts in Texas have recently issued nationwide injunctions. The court further found that there was a likelihood of irreparable harm in absence of the preliminary injunction given the significant cost in complying with the rule and the balance of the hardships favored the State plaintiffs since the injunction delays the regulations implementation and “preserves the status quo.”

Many Employers Have Already Communicated the Change to Employees

For many employers, the preliminary injunction ruling may be too late. Employers have spent months preparing for the changes to the white collar exemptions, identifying workers affected by the Final Rule, determining whether to increase their salaries to comply or reclassify them as hourly workers, and communicating those changes to their employees. In light of the December 1 deadline (which, for most employers, falls within a pay period), employers have already communicated the change to employees. If an employer already has notified an employee of a salary increase effective December 1 or already made the change, it may be too difficult to undo that change or communicate that the change will not be made.

Should Employer Scrap Plans to Reclassify Workers?

For employers who have yet to communicate the change, the ruling may allow a sigh of relief, eliminating the obligation to increase wages for some employees in order to continue to meet the exemption requirements or scrapping plans to reclassify workers from salaried exempt to hourly non-exempt. But employers beware: the preliminary injunction decision will be appealed to the Fifth Circuit Court of Appeals. If the decision is reversed by the Fifth Circuit, and the employer has not been in compliance on the December 1 effective date, a thorny question arises: whether the existence of the preliminary injunction precludes any liability between the December 1, 2016, effective date and the date the Court of Appeals issues its decision.

District courts are grappling with just this question in the context of another DOL regulation that was invalidated by a district court, but later reversed on appeal. That regulation concerned the availability of the companionship exemption to home healthcare workers employed by third parties. A 1975 regulation held they were exempt, but in 2013, the DOL issued a new regulation removing the exemption. In December 2014, the Home Care Association of America sued the DOL in the District Court for the District of Columbia, seeking to enjoin enforcement of the rule, and the district court vacated the rule. But approximately eight months later, the D.C. Circuit Court of Appeals reversed the district court decision. Some employers, relying on the district court's injunction, did not pay overtime. When the D.C. Circuit ruled, reversing the district court's decision, employees sued for overtime for the eight-month period

between the district court's decision and the circuit reversal. One district court in the Southern District of Ohio held the employer is not liable during the period the injunction was in place (*Bangoy v. Total Homecare Solutions, LLC*, No. 15-575 (S.D. Ohio, Dec. 21, 2015)), but a district court in New York held just the opposite, and recently granted a request for an interlocutory appeal to the Second Circuit Court of Appeals. See *Kinkead v. Humana, Inc.*, 2016 U.S. Dist. LEXIS 143000 (D. Conn. Oct. 13, 2016) (certifying for interlocutory appeal question of whether employer can be liable during period home care regulation was invalidated by district court and noting conflict).

What Impact Could the Trump Administration Have on the Final Rule?

Since the DOL first announced its proposed rule, various bills have been introduced in Congress to block the rule entirely, delay its implementation, or stagger the increases over time. But President Obama would veto any of these bills, even if they were passed. But a Trump Administration might view such legislation differently, and President-elect Trump could sign such legislation if it is passed by the next Congress.

If an appeal from the district court's decision is still pending when such legislation is passed, the appeal may become moot, particularly where the legislation invalidates the rule from the proposed effective date.

The Trump Administration also might direct the DOL to abandon the appeal if it is still pending at the presidential inauguration.

The DOL under a Trump Administration also might rescind the Final Rule, but would need to follow the procedures set forth in the Administrative Procedure Act, a much longer and more difficult process.

State Law Considerations

Employers also will have to consider how this ruling affects the white collar exemptions under state law. Some states do not have overtime laws; others incorporate the FLSA; other incorporate the FLSA but with higher salary requirements; and others have their own exemptions and salary levels without reference to the FLSA.

We will continue to follow this case. Please contact the Jackson Lewis attorney with whom you work with questions about the decision and compliance with the Final Rule.

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