Preliminary Injunction Blocks DOL Overtime Exemption Rule

Congress passed the Fair Labor Standards Act (FLSA) (29 USC 201 *et seq.*) which, among other things, guarantees a minimum wage for all hours worked during the workweek, as well as a premium of not less than one and one-half times the employee's regular rate for the hours worked over 40 in a workweek. The FLSA contains a number of exemptions to the overtime requirement. In particular, Section 213(a)(1) exempts from the minimum wage and overtime requirements "any employee employed in a *bona fide* executive, administrative, or professional capacity." This exemption is commonly referred to as the "white collar" exemption. Since passage of FLSA, the U.S. Department of Labor (DOL) has undertaken to issue, and from time to time revise, regulations that implement the provisions of the FLSA, including the white collar exemption. Under its current regulations (29 CFR Part 541), the DOL applies a three part test in which each of the tests must be met in order for the exemption to apply to an employee.

- First, the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the predetermined and fixed salary test);
- Second, the amount of the salary paid to an employee must meet a minimum specified amount, which to qualify for the exemption is currently $455 per week (minimum salary test); and
- Third, the employee's job duties must primarily involve executive, administrative or professional duties (duties test).

In March 2014, President Obama signed a Presidential Memorandum directing the DOL to update its regulations defining which white collar workers are protected by FLSA's minimum wage and overtime standards, and which white collar workers are exempt from such protections. In May 2016 the DOL issued a final rule amending the regulatory requirements under the white collar exemption. 81 FR 32391. In general, under the final rule the minimum salary test for exempt employees increases from $455 per week ($23,660 annually) to $921 per week ($47,892 annually). The final rule also

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establishes an automatic updating mechanism that adjusts the minimum salary test threshold every three years. The final rule was to take effect December 1, 2016.

On November 22, 2016, the U.S. District Court for the Eastern District of Texas granted a preliminary injunction blocking the final rule from taking effect. The court has determined that it has the authority to enjoin the final rule on a nationwide basis.

The preliminary injunction is a result of a lawsuit brought by the State of Nevada and 20 other states (State Plaintiffs) challenging the DOL's final rule. *State of Nevada v. United States Department of Labor*, No. 4:16-cv-731 (E.D. Tex. Nov. 22, 2016). In addition, the Plano Chamber of Commerce and over fifty other business organizations also challenged the final rule. *Plano Chamber of Commerce v. Perez*, No. 4:16-cv-732 (E.D. Tex. Sept. 20, 2016). The district court consolidated the two cases. The State Plaintiffs questioned the lawfulness of the final rule, the DOL's authority to promulgate it, and whether the automatic updating mechanism complied with the Administrative Procedures Act (APA) requirements.

In determining whether to grant the injunction, the court turned to Article III of the U.S. Constitution which, in general terms, only allows a federal court to hear a lawsuit if the plaintiff has "standing," which generally means that the plaintiff has suffered some type of injury, giving the plaintiff a sufficient stake in the outcome of the case to ensure that it will be properly litigated. In order to having standing in federal court, the plaintiff must clearly allege facts demonstrating each of three elements: (1) the plaintiff suffered an injury in fact; (2) the injury is fairly traceable to the challenged conduct of the defendant; and (3) the injury is likely to be redressed by a favorable judicial decision. The court in this case found that the plaintiffs had standing under Article III because they faced imminent monetary loss that is traceable to the DOL's final rule. Moreover, the court found that the plaintiffs also would receive redress if the court determined that the final rule is unlawful. Among other things, the State Plaintiffs argued that FLSA's overtime requirements violated the Constitution by regulating the states and coercing them to adopt wage policy choices that adversely affect the states' priorities, budgets and services. They contend that the DOL exceeded congressional authority, arguing that the white collar exemption should be determined based upon the duties and activities actually performed by employees, not merely their salaries.

The court went to great lengths in determining the merits of the case. It agreed that based on the DOL's own estimation – that 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, would automatically become eligible for overtime pay under the final rule without a change to their duties – the salary increase under the final rule is so great that it essentially creates a "de facto salary-only test," dwarfing the importance of the exempt employee's job duties. The court concluded that Congress did not intend salary to categorically exclude an employee with executive, administrative or professional duties from the exemption. In addition, the court noted that because the final rule is unlawful, the DOL also lacks the authority to implement the automatic updating mechanism.

The final rule has been blocked pending further order from the court. Stay tuned.