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Department of Labor Overtime Rule and Revised EEO-1 Report Halted

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BACKGROUND

As our firm has reported on recently in our August 2017 School Law FYI, there have been some new developments involving the Department of Labor (DOL) and the regulations related to overtime exemptions under the Fair Labor Standards Act (FLSA). As many employers know, the final regulations that were issued in 2016 would have made a number of changes to the overtime exemptions, including increasing the salary threshold for key exemptions from $455 to $913 per week.

Although these regulations were finalized under President Obama and were to take effect on December 1, 2016, a federal district court judge in Texas issued a temporary injunction in November 2016, effectively preventing the DOL from enforcing these regulations nationwide. *See Nevada et al. v. United States Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). The DOL immediately appealed the temporary injunction to the U.S. Court of Appeals for the Fifth Circuit. The appeal is still pending at the Court of Appeals.

While the appeal was pending, the DOL asked the federal district court to wait to issue its final decision until the appeal of the temporary injunction was decided. The district court denied that request. As a result, with the appeal pending, the district court was working on its final decision on the case. Before the Court of Appeals could issue its decision, the district court judge ruled on August 31, 2017, and invalidated the final regulations issued under President Obama.

FEDERAL DISTRICT COURT DECISION INVALIDATES RULES

In short, the district court ruled against the DOL and granted summary judgment to the opposing parties. The judge held that the updated salary level test in the final regulations was inconsistent with the intent of Congress. Congress gave the DOL the authority to issue regulations that define the meaning of the exemptions. However, by setting such a high salary level for the exemptions (generally $913 per week), the court ruled that DOL overstepped its authority.

The district court did not say that the DOL could not set a salary level to qualify for exempt status. Instead, the decision stated that the 2016 final regulations made overtime status depend predominantly on the minimum salary level, which effectively supplanted any analysis of the employee's job duties. Thus, the DOL's final regulations did not follow Congressional authority and were invalid.

MOTION TO DISMISS APPEAL ON THE PRELIMINARY INJUNCTION

Following the decision by the federal district court, the DOL filed a motion with the U.S. Court of Appeals for the Fifth Circuit, asking the Appeals Court to dismiss the appeal on the temporary injunction. The DOL argued that the appeal is now moot because the district court invalidated the regulations. The Court of Appeals has not yet ruled on this motion, but the DOL noted that the opposing parties were not contesting the motion.

NOW WHAT?

In light of the decision by the district court invalidating the final overtime regulations and the anticipated dismissal of the appeal, the 2016 final regulations that increased the salary levels are invalid. As a result, the regulations as they existed prior to the 2016 final regulations are still in effect and will likely now stay in effect until further rulemaking action by the DOL under the Trump administration. For now, employers can continue to rely on the existing regulations (including the salary level of $455 per week).

The DOL under the Trump administration issued a Request for Information in June 2017, seeking input from the public concerning the regulations related to the exemptions. In seeking public comments, the DOL acknowledged that the salary level in the 2016 final regulations was likely too high. Responses to the Request for Information are due on September 25, 2017. Indications from the new DOL Secretary Alexander Acosta are that the DOL will be looking to raise the salary level for exempt status, but will likely propose a salary level in the mid-$30,000 range rather than the $47,476 that was included in the 2016 regulations.

We will keep you apprised of key changes in this process.

FEDERAL GOVERNMENT HALTS THE USE OF THE REVISED EEO-1 REPORT

All employers with more than 100 employees (excluding local governments, school districts, and institutions of higher education) and most federal contractors with more than 50 employees are required to submit an annual Employer Information Report (commonly known as the EEO-1 Report) to the Equal Employment Opportunity Commission (EEOC).

Boardman & Clark LLP reported in our July 2016 HR Heads Up that the EEOC was planning to issue new requirements for a revised EEO-1 Report, which employers would have been required to submit to the EEOC by March 31, 2018. The Office of Management and Budget (OMB) has now halted these new requirements. The revised EEO-1 Report would have required employers to report summary wage information for employees, organized by job category, in addition to the previously required information on employees' ethnicity, race, and sex. This summary wage information would have included W-2 pay and total hours worked. Employers would not have been required to provide individual salary and total hours information. Rather, the wage information was to be grouped into twelve separate pay bands, with employers reporting the number of employees in each pay band and the total number of hours worked by employees in each pay band, further broken down by ethnicity, race, sex, and job category.

On August 29, 2017, OMB informed the acting chair of the EEOC that OMB was immediately staying the implementation of the revised EEO-1 Report pursuant to the Paperwork Reduction Act. OMB determined that the circumstances related to the EEO-1 data collection have changed, and that the burden estimates provided by the EEOC at the time it submitted the EEO-1 Report for OMB review were materially in error. OMB further explained that it had good cause to stop the collection of the EEO-1 data because the data collection lacked practical utility, was unnecessarily burdensome, and did not adequately protect privacy and confidentiality.

The effect of OMB's action is that the revised EEO-1 Report will not be used for the 2017 reporting cycle. Employers are to use the current EEO-1 Report for the 2017 reporting cycle. Employers must still file the EEO-1 Report by March 31, 2018, collecting data gathered between October 1 and December 31, 2017. It is unknown at this time whether the EEOC will permanently abandon the revised EEO-1 Report or submit additional information to OMB in an effort to authorize the use of the revised EEO-1 Report in the future. However, for 2017 at least, employers will once again be using the current and simpler EEO-1 Report.