



SPECIAL FLSA UPDATE EDITION

FEDERAL DISTRICT COURT BLOCKS NEW OVERTIME RULE *Now what do we do?*

As we have previously reported, the Department of Labor ("DOL") issued a new rule under the Fair Labor Standards Act ("FLSA") raising the exempt salary threshold from \$23,660 to \$47,476 (the "Final Rule"). The DOL set the effective date for the Final Rule as December 1, 2016.

States and business groups filed two separate suits challenging the Final Rule on various grounds. In the states' case, captioned *State of Nevada, et al. v. Department of Labor*,¹ the plaintiff states sought an emergency preliminary injunction against enforcement of the Final Rule. Surprisingly, the District Court granted plaintiffs a nationwide injunction against enforcement of the Final Rule on the figurative eve of its implementation.

Because the plaintiffs in *State of Nevada* are states, many of the arguments advanced by the plaintiffs are specific to state governments, having no bearing outside of the Federal-state relationship. However, the central holding of the District Court is broadly applicable.²

As readers of the Fraternal Law Newsletter are aware, the determination of whether an employee is exempt from overtime is (historically) a two-part test. As implemented by DOL, to be exempt an employee must both (i) earn a certain minimum salary (the salary test) and (ii) qualify as an executive, administrative or professional employee (commonly referred to as the duties test or EAP). In *State of Nevada*, the District Court analyzed precisely what authority Congress delegated to DOL to implement such a rule. This analysis began with the implementing legislation.

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 regulations of the Secretary" shall be exempt from minimum wage and overtime requirements. 29 U.S.C. § 213(a)(1). The District Court framed the question as follows: "The precise question at issue here is: What constitutes an

employee employed in an executive, administrative, or professional capacity?" Specifically, the District Court wondered whether such terminology included a salary threshold, **at all** – much less the increased threshold embodied in the Final Rule.

Importantly for our readers, the District Court determined that Congress did not authorize DOL to set any type of salary threshold. The District Court wrote, in pertinent part, as follows:

Section 213(a)(1) authorizes the Department to define and delimit these classifications because an employee's duties can change over time. The plain meaning of "define" is to "state explicitly; to limit; to determine the essential qualities of; to determine the precise significance of; to set forth the meaning or meanings of," and the plain meaning of "delimit" is "to fix or mark the limits of: to demarcate; bound." *Walling v. Yeakley*, 140 F.2d 830, 831 (10th Cir. 1944) (internal quotation marks omitted). While this explicit delegation would give the Department significant leeway to establish the types of duties that might qualify an employee for the exemption, **nothing in the EAP exemption indicates that Congress intended the Department to define and delimit with respect to a minimum salary level.**

Based on this analysis, among other findings, the District Court issued a nationwide injunction against enforcement of the Final Rule.

If sustained on appeal, this is a monumental shift in how FLSA exemption is determined. The immediate effect of the injunction is to block application of the Final Rule to raise the minimum salary threshold to \$47,476. However, under the District Court's rationale, Congress did not delegate authority to DOL to set **any** minimum salary threshold under the EAP exemption test. Accordingly, the now reinstated \$23,660 minimum salary threshold is also likely invalid if chal-

lenged.

TAKEAWAYS

1) ***This decision does not put the DOL out of business.***

It simply shifts the DOL focus from minimum salary to an actual examination of the EAP duties test.

Many employers for many years handled FLSA exemption by simply paying the minimum salary threshold with little regard for what each employee actually did. In other words, employers routinely ignored the duties test.

The practical result of *State of Nevada* resets the salary threshold to \$23,660. However, the actual holding of *State of Nevada* informs that any minimum salary threshold is suspect. Accordingly, the DOL now has nothing to do in this area but look closely at actual employee duties with a focus on whether a particular employee's actual work qualifies her as exempt. The duties test is now paramount.

2) ***Many employers already promised raises or overtime as a result of the Final Rule.***

Walking these promises back could cause significant resentment and morale problems. Other employers have already implemented pay raises or pay structure changes to comply with the Final Rule. Revoking actual changes to the employee-employer relationship could be even more difficult than failing to fulfill promised changes.

Moreover, changing promised or actual pay or pay structure could lead to common-law claims. Depending on state law, employers should be wary of claims for breach of contract, breach of implied promise, estoppel, and promissory estoppel. State employment laws may also provide employees with relief for changes in promised or actual pay. Accordingly, any decision to revert to pay structures existing prior to the issuance of the Final Rule must be made carefully with advice of counsel, and a firm understanding of the business and morale impact such a decision might have.

3) ***House directors*** – we believe that these positions are generally non-exempt. House directors typically do not manage 2 or more other employees (executive), typically would not be considered office workers supporting the business of the house corporation (administrative) and the position does not require advanced education or licensure (professional). Of course, situations may exist where a particular house director may qualify as exempt under the EAP duties test.

Historically, many employers simply paid house directors the minimum threshold and assumed they were exempt. However, now that DOL will likely be looking primarily at the duties test, a test these positions generally do not satisfy, these contracts need to be examined closely. We strongly urge house director employers to consider moving to an hours based contract with on call and overtime provisions.

4) ***Chapter consultants*** – these positions pose significant difficulty in classification. This position straddles the line between exempt and non-exempt based on the duties test. Historically, employers have paid the minimum threshold and classified them exempt without much consideration of the duties test. With implementation of the Final Rule, it became impossible to meet the minimum threshold and employers began looking at making them non-exempt.

Recently, we reviewed a chapter consultant job description that we believe supports a strong argument that the position is exempt. With the invalidation of the Final Rule, this organization will likely continue to pay these consultants as exempt employees and the job description supports that classification.

The job descriptions for chapter consultants are critical to taking advantage of potentially exempt status. To qualify under the EAP test, the descriptions must require that the consultant work in support of the business of the fraternity or sorority, while still having discretion in how to accomplish this work. We believe that a good job description could be viewed as satisfying the administrative exemption test.

There is no controlling guidance on this point. We are trying to guess at what the DOL would decide. Given this uncertainty, paying hourly with overtime is the safest course of action. However, we do believe that one can articulate a good faith argument for exemption.

The concept of good faith is critical in FLSA exemption cases. If an employer misclassifies and underpays an employee under FLSA, it can be liable for (i) back pay, plus (ii) a separate award for liquidated damages equal to the back pay – in other words, a double recovery. If the employer acts in good faith, with reasonable grounds for its actions, it is possible to escape “liquidated damages” under FLSA.

We cannot stress enough that these determinations are fact driven while also heavily reliant on particular job descriptions. Accordingly, all determinations of exemption should be made with

the assistance of counsel.

- 5) **The Final Rule may be resurrected.** DOL will almost certainly appeal this decision to the 5th Circuit Court of Appeals. If the Circuit Court reverses the State of Nevada ruling, it may also find that the Final Rule was effective from the original implementation date, i.e., December 1, 2016. Given this very real possibility, employers may consider requiring that currently exempt workers that would be non-exempt under the Final Rule begin recording their time worked now. At least with that information, the employer could accurately determine what back pay may be owed on an hourly basis and compensate the affected employee properly. Without contemporaneous time records, the employer will have difficulty limiting post-reversal employee claims of time worked.
- 6) **The Trump Factor.** Who knows what the new administration may do. This is a complete unknown.

murky waters, care should be taken to engage counsel, and engage employees to ascertain their expectations. It may be that *State of Nevada* comes a little too late to undo the Final Rule in any practical way. Nevertheless, its holding instructs that we must be vigilant in analyzing exemption under the duties test. Simply paying a specified salary will likely not be enough to assure exemption going forward.

- Sean P. Callan
- Jacklyn D. Olinger

¹ *State of Nevada et al. v. U.S. Department of Labor et al.*, Case No. 1:16-cv-00407, U.S. District Court for the Eastern District of Texas

² Paste URL <http://fraternallaw.com/2016/11/texas-district-court-blocks-overtime-rule/> into your browser to go to Fraternal Law Partners website to see the full opinion.

CONCLUSION

The FLSA exemption waters remain murky – maybe even murkier now. Although *State of Nevada* does give at least temporary relief from application of the Final Rule, the practical effect of the decision remains to be seen. Moreover, employers will also need to keep state law in mind in deciding what option to pursue.

What is clear is that as employers navigate these

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