Employers thrown curve on new overtime rule

Description

If you shared with friends and family around your Thanksgiving table reasons to be grateful this year, here's one you probably left out: the fact that you aren't a management-side employment attorney.

If you are such a lawyer, you would have spent the past several months getting your clients ready to comply with substantial, looming changes to the overtime regulations under the Fair Labor Standards Act, which were set to take effect Dec. 1. Then, just as you were getting ready to celebrate the holiday, you would have had a Texas federal judge say, in essence, "Just kidding!"

Most notably, the Department of Labor had proposed making an estimated 4.2 million people, including 84,000 in Massachusetts, newly eligible for overtime pay by more than doubling, from $455 a week ($23,660 annually) to $921 a week ($47,892), the minimum salary level for a white-collar employee to be exempt from the overtime requirement.

After the DOL released its final revised regulations in May, most employers got to work developing their response plans, generally either reclassifying formerly exempt employees as non-exempt or handing out pay raises to enable employees to keep their exempt status.

Ancillary tasks included adapting payroll systems and offering training for employees and managers new to having to track their hours.

Technically, employers are now free to scrap those plans, at least temporarily. But whether that's the best idea is just one of the topics that have phones ringing off the hook at law firms across the country.

What the decision says

On Sept. 20, 21 states, most in the South and Midwest, sued the DOL and its agents, citing the burden of implementing the final rule with their employees. They moved for emergency preliminary injunctive relief on Oct. 12.

That suit would be consolidated with a similar challenge by more than 50 business organizations, whose summary judgment motion was considered as an amicus brief in support of the states' request for an injunction.

While local attorneys agree that the granting of the injunction was a stunning, unexpected development, they also generally concur that U.S. District Court Judge Amos L. Mazzant's 20-page decision is carefully reasoned and makes some logical sense.

To reach his decision, Mazzant conducted a two-step Chevron analysis of the DOL's construction of 29 U.S.C. §213(a)(1), finding that the revisions to the regulation failed both prongs.

First, despite the DOL's argument to the contrary, Mazzant found that Congress had "spoken to the precise question at issue," namely, "What constitutes an employee employed in an executive, administrative, or professional capacity?"

If that matter had been left ambiguous, the DOL, through its authorization to promulgate regulations, might have been able to follow through on plans to make millions of employees newly eligible for overtime and also ensure that the threshold would keep pace with inflation by indexing it to the 40th percentile of weekly full-time earnings in the lowest-wage region in the country.

However, the plaintiff states argued — and Mazzant agreed — that, through the plain language of the executive, administrative or professional exemption, Congress "directly and unambiguously spoke about the type of employees that must be exempt from overtime," making the employee's duties, rather than his or her salary, the key consideration.

While it is true that the DOL had periodically adjusted the minimum salary threshold, most recently in 2004, Mazzant viewed this drastic change as a different animal, which supplanted the time-honored "duties test" with one based on salary.

"If Congress intended the salary requirement to supplant the duties test, then Congress, and not the department, should make that change," he wrote.

The new final rule fared no better on the second prong of the Chevron analysis, which considers whether an ambiguous rule is "based on a permissible construction of the statute."

Mazzant answered that question in the negative.

Mazzant noted that the DOL had admitted that it could not create an evaluation "based on salary alone," but then had created a de facto salary-only test with the significant increase of the threshold, which ran contrary to Congress' intent.

Mazzant also found that the states had satisfied the other criteria to obtain a preliminary injunction, showing a "likelihood of irreparable harm" with the cost of compliance and its trickle-down effect on other governmental programs and services.

As a representative example, Mazzant chose Kansas, where more than 50 percent of the employees in the Department of Children and Families and the Department of Corrections would have been affected by the final rule. With no ability to offer those employees pay raises, a "detrimental effect on government services that benefit the public" was unavoidable, according to Mazzant.

Balancing the hardships also weighed in the plaintiff states' favor, given that the DOL had "not articulated any harm they will suffer from delaying implementation of the Final Rule."

Mazzant also concluded that the public interest was best served by an injunction.

While the DOL argued that the injunction should be "limited to states that showed evidence of irreparable harm," Mazzant decided a nationwide injunction was appropriate, given "the scope of the alleged irreparable injury."

Chances on appeal slim

While it is possible that either Mazzant or an appellate court might undo the preliminary injunction, it is "highly likely the new regulations and salary level may never become mandatory," said Daniel S. Field, a partner at Boston's Morgan, Brown & Joy and former chief of the Fair Labor Division at the Attorney General's Office.

"Conventional wisdom is that the new rules will die in some way, shape or form," agreed Michael A. Gamboli, a partner in the Providence, Rhode Island, office of Partridge, Snow & Hahn.

Not only does Mazzant now have before him a motion for summary judgment that would make the injunction permanent, but "the Trump administration is not expected to want its DOL to fight this battle," Gamboli said.

What happens before Jan. 20 is a bit murkier. As of press time, the Obama administration had not announced whether it would appeal to the 5th Circuit to try to salvage a rule more than two years in the making. The editorial page of the Los Angeles Times has encouraged such a move, despite the fact that the 5th Circuit is "considered the nation's most conservative federal appellate court."

Gamboli thinks the DOL has a fairly compelling argument, given that the salary threshold has been raised several times since the 1940s, even surviving challenges in the 5th Circuit. The argument would be, “Why is this time any different?” he said.

But given the long odds before the 5th Circuit, attorneys expect that the DOL will just live with the lower overtime threshold while perhaps bringing renewed vigor to its audits of businesses that may be misclassifying some of their employees under the duties test.

“If [the DOL] is looking at someone making $40,000, it will likely be thinking, ‘This person is almost automatically non-exempt in our view, so let’s pay close attention to the duties,’” Gamboli said.

The advice

Given the current uncertain environment, attorneys agreed that there is no one-size-fits-all set of advice.

“The biggest challenge for our clients is what to do with what’s been done already in a relatively short period,” said Field’s colleague, Tracy T. Boland.

As a general rule, Boland said, already-announced changes should perhaps be implemented, lest there be an employee mutiny. But employers can probably hold back on those that were still being developed behind the scenes.

Gamboli said he initially has been working with clients to pinpoint exactly how many people are affected by the no-longer-forthcoming change.

“Let’s make sure we understand what we are fighting over here,” he said.

He would then move on to assess whether the employer is confident that the affected employees pass the duties test.

The forthcoming rule change prompted most businesses to give a hard look at that question, attorneys said. If misclassified employees were uncovered, Mazzant’s decision will provide no cover, and now may be the perfect time to reclassify an employee as non-exempt, Gamboli suggested.

“If you are probably breaking the law, this is a way to fix it without admitting you are fixing it,” Gamboli said.

If, on the other hand, employees clearly do meet the duties test, the calculus is more complicated.

While the expense administratively and financially of reclassifying employees as non-exempt or granting raises may justify holding off on such moves, there are other considerations.

“There is a cachet to being salaried,” said Boston lawyer Denise I. Murphy of Rubin & Rudman.

Employees who were set to lose that status may have resented it, even if punching a clock potentially meant more money through overtime pay.

However, some employees — particularly those expecting raises — “will feel like the rug is being pulled out from under them,” Gamboli said.

That promise of a raise should probably be kept, attorneys agreed.

“Employee good will is worth a lot more to your business than a few thousand dollars a person,” he said.

Boston University is an example of one employer to reach that decision, announcing that it planned to follow through and give raises to about 175 workers who were promised them before Mazzant's ruling, according to a story in BU Today.

Communication is key, said Joanna S. Bowers of Verrill Dana. If an employer can live with either keeping an employee on salary or making them overtime-eligible, it may be worth discussing "how to move forward together," she said.

The Boston lawyer said she also is advising clients to follow through with having employees who would have been newly eligible for overtime to track their work hours, just in case the injunction is reversed and the rule is implemented retroactively.

Employers also have to assess the "switch risk," said Gamboli, envisioning a workforce with 100 managers, all passing the duties test, making between $40,000 and $70,000. Employers need to avoid evolving to a situation in which a $45,000-a-year, overtime-eligible manager is working next to a $50,000-a-year exempt one.

"By treating, say, half your managers as hourly, you are risking losing that exemption for all of your managers," he said.

But the bottom line is that employers must "be ready for anything," Gamboli said.

"The injunction could be reversed. The Trump administration might want to make some FLSA amendments for political reasons. Who knows?" he said.

Gamboli also could not rule out that an individual state legislature could amend its overtime law to be more "employee friendly" than the FLSA, perhaps even adopting the now-thwarted salary threshold, given that the FLSA is a "floor, not a ceiling." But he added that he had yet to hear a state legislator openly mull such a proposal.

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