

What's Next for the Overtime Rules?

12.06.16 | Linda J. Rosenthal, JD



The new overtime rules that were set to go into effect on December 1, 2016, are a very big deal for all employers, including most nonprofits. As events have unfolded, though, these new rules have been halted – but they still loom on the horizon. All of that may change soon – and no one is sure exactly what will happen. It's another one of the many issues that have been tossed into a big pot of uncertainty arising from November 8th's election.

For many employers who made changes in anticipation of the December 1st effective date, there may be no going back, no matter what happens in Congress, the courts, or the White House.

A Recap of the Overtime Rules Changes

Back in May 2016, the United States Department of Labor announced final overtime regulations that would dramatically increase compensation for many employees nationwide.

These complex rules apply to the business sector as well as to many nonprofits. This package of revised regulations altered the –

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compensation requirements relating to which employees may be treated as exempt under the Fair Labor Standards Act’s (FLSA) overtime and minimum wage requirements under the “white collar” exemptions. Once effective, the minimum salary threshold you would have had to pay in order to characterize an employee performing the requisite work as exempt would have increased from \$455 to \$913 per week, which annualizes to \$47,476 (up from \$23,660 per year). Also, this amount would have been “updated” every three years (meaning that it would have likely increased with each update) with the first update scheduled for January 1, 2020.

Reaction in the charitable community has been mixed. There is support for improving wages and benefits for workers – and this increase is a huge “pay raise” for many employees – but many nonprofits worry about the financial drain from these new compensation obligations. These new rules – *final* regulations, not just proposed ones – were scheduled to begin on December 1, 2016. Business groups have been, predictably, opposed to the new mandate, and they launched one of several judicial and legislative challenges to stop them going into effect or, at least, to delay the effective date. Twenty-one state attorneys general also filed a legal challenge. The combined lawsuits were expedited and on November 22, 2016, a federal district judge in Texas granted a preliminary injunction. It’s important to note that the scope of the temporary injunctive relief is nationwide.

The judge wrote that it was “improper for the USDOL to adopt a salary test that categorically excludes a substantial number of workers who meet the exemptions’ duties-related requirements.”

Recent Events re the Overtime Rules

At that point in late November, the future of these overtime rules was already unsettled because of the election. While, ordinarily, it would have been certain that the Department of Labor would appeal the preliminary injunction, observers wondered if that would happen. Soon there was an answer: On December 2, 2016, the federal government appealed the injunction ruling to the Fifth Circuit, the appellate court having jurisdiction over Texas and surrounding states. Because of the 50-state application of the injunction, there was speculation that the DOL lawyers would “forum-shop” a bit and perhaps select the DC Circuit Court of Appeals, but that has not occurred. In any event, the DOL has requested expedited briefing and oral argument as well as a ruling on the fast-track request by December 8th. If there is expedited consideration, though, the briefing will continue until early February 2017.

Experts Unclear What’s Next

Experts are scrambling to predict what may happen next. There are several possibilities and avenues, particularly because these overtime rules are *final* regulations.

The outcome, one way or the other, will affect most employers, including many nonprofits, around the nation. As the December 1st deadline was approaching, employers were advised to take steps to implement the rules, and some did. There may be legal hurdles to remove these substantial increases in compensation and there will certainly be worker upset if pay increases are revoked.

Here are some of the possibilities:

- Notwithstanding the Obama Administration having authorized an appeal, the new Administration may instruct its own DOL to withdraw support. So far, though, there is no specific indication or “clear signal” regarding a position on the overtime rules.
- In any event, if the appeal continues, and if court overturns the injunction, it’s unclear what the effective date will be. The court “might set a new deadline, might decide that the rules are effective immediately, might direct the lower court to deal with the question of an effective date, or could even determine that the rules should be considered to have been retroactively effective as of December 1.”
- Congress may take action but it’s not entirely clear there is, or will be – in the next Congress – support for fully scrapping the new regulations. “It is worth noting that a series of measures currently sit before Congress hoping to prevent, stall, or alter the rules changes. While some of the proposed legislative changes would scrap or delay implementation, another would introduce more forgiving gradual increases on an annual basis for a several year period. While many were not happy with the USDOL’s proposed rule, there remains a large group of observers, including some in Congress, who believe that the current \$455 per week figure should be increased.”

Conclusion

“It’s anyone’s guess as to what will happen next.” Of course, the “injunction only halts the new rule from becoming law; it does not change current rights and obligations under the underlying federal wage and hour laws. Nonprofit and other employers still must comply with existing federal and state laws regarding fair labor standards, including properly classifying employees as being exempt from or entitled to being paid overtime.”