BREAKING NEWS: Uncertainty Over New FLSA Overtime Rules Not Quite Over

November 23, 2016

While employers have been implementing or preparing to implement strategies to comply with new Fair Labor Standards Act (FLSA) overtime rules set to take effect December 1, 2016, the legality of those rules has come under fire, resulting in a temporary order preventing the rules from going into effect as planned. Specifically, a U.S. District Court for the Eastern District of Texas has issued a nationwide injunction preventing the new rules from going into effect, leaving employers with nothing certain but uncertainty. Although the injunction order and accompanying opinion focus on the interplay between the FLSA and the rights of the 21 states that brought the action (along with more than 50 business groups), the injunction currently appears to apply to both state governments as well as private industry.

As covered employers should already know, among other things, the new rules expanded overtime eligibility to employees paid less than $913/week (or $47,476 annually for a full-year worker). Under the FLSA, employees who meet both the FLSA salary threshold ***and*** one of the various duties tests can be treated as exempt from overtime (e.g., employees who exceed the salary threshold but do not meet an applicable duties test remain overtime eligible, as do employees who meet a duties test but do not exceed the salary threshold). If the rule was in effect as planned, it would mean most employees who earn less than $913/week, even if they otherwise meet one of the duties tests to exempt them from overtime, were going to become overtime eligible. For a more full discussion of the scope of the rules changes, please see our earlier alert by clicking here. Now, with the injunction, the salary threshold reverts back to $455/week.

For employers who prepared to implement changes to comply with this new rule, this injunction may be a day late and a few dollars short. For instance, if an employer has already staffed up to ensure that its newly overtime eligible workers do not exceed 40 hours or offered raises to employees who met one of the FLSA duties tests to meet the salary threshold, it is not easy or even advisable to reverse course now, especially with so much uncertainty looming. Employers who are trying to plan their next step should understand the injunction is only temporary relief and it may, or may not, be continued by the judge who issued it and, in any event, it will likely be subject to scrutiny by appellate courts. To add to this uncertainty, the change of administration may also influence whether the U.S. Department of Labor seeks to change this rule that has been unpopular with many businesses. The injunction coupled with the change in administration creates a fluid environment that is a challenge for employers because, at any time, this injunction may be lifted, reversed by an appellate court, modified to apply only to state and/or local governments, and/or rendered moot by an administration that withdraws or amends the rule.

In the face of this uncertainty, employers need to (i) be prepared to comply with these rules because they may go into effect at any time; (ii) weigh whether to proceed with planned changes in pay/staffing; (iii) pay attention to compliance with applicable state wage laws, which differ from the federal law and will not automatically change, even if the federal law does; and (iii) follow this issue as it develops.

While we wait for the dust to settle, it is a good time for employers to review their compensation structures for compliance with the FLSA and include with that review an analysis of their overall compliance with wage and hour laws.

To learn more about the information presented in this alert, we invite you to contact Adam Gersh, or any member of Flaster Greenberg's Labor and Employment Practice Group.

ATTORNEYS MENTIONED

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