

OT AFTERMATH: FAQs ON HOW EMPLOYERS SHOULD RESPOND TO OVERTIME RULE DECISION

Insights
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Employers are returning from their Thanksgiving holiday weekend grappling with thorny questions following last week's surprising and momentous court decision preliminarily blocking the Department of Labor's overtime rule from taking effect. Here are some answers to your most pressing questions from our firm's thought leaders on the subject.

WHAT HAPPENED LAST WEEK?

Earlier this year, the U.S. Department of Labor (USDOL) unveiled a package of revised regulations altering the compensation requirements relating to which employees may be treated as exempt from 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.

But on Tuesday, November 22, right before the Thanksgiving holiday, a federal district court judge in Texas granted a preliminary injunction blocking the rule from going into effect just days before the December 1 effective date. In response to a series of legal challenges brought by a group

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of state attorneys general and business associations, Judge Amos Mazzant stated 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. A full summary of his decision can be found [here](#).

WHAT WILL HAPPEN NEXT?

"It's anyone's guess as to what will happen next," says [Caroline Brown](#), a member of the Fisher Phillips [Wage and Hour Law Practice Group](#). The USDOL and the Obama Administration probably believe that they have invested far too much time and effort in developing these regulations to simply let them wither away, so it is likely that the government will appeal the ruling. But it is difficult to predict the outcome of any appeal, especially because it is unclear whether the USDOL will appeal to the 5th Circuit Court of Appeals (overseeing federal courts in Texas) or, given the fact that the injunction was applied on a nationwide basis, whether it will seek relief from another court located in another jurisdiction.

If an appeals court reverses the judge's ruling, says Brown, no one can predict the effective date for the regulations. That 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.

And, of course, the wildcard in all of this speculation is the impending transition to a Trump Administration on January 20, 2017. President-elect Trump has not given a clear signal regarding his position on the overtime rule. "We simply cannot predict how Trump's Administration will view this rule," says Brown.

If he wants to scrap the rule, he could order his new USDOL personnel to drop any appeal that is pending on January 20, which could effectively cement in the injunction blocking the rule from taking effect. But if an appeals court breathes new life into the rule before he takes office, it would not be so easy for him to reverse course. He would probably need to commence a new rulemaking process, subject to notice and comment, if he wanted to set lower thresholds for the salary requirement and eliminate the three-year update. How long

and what form such a process would take, and what could or would be done in the meantime, says Brown, are currently unpredictable.

WHAT IF I ALREADY IMPLEMENTED COMPENSATION CHANGES?

If you have already altered your compensation plans or revised your employees' exemption status in anticipation of the December 1 effective date, there might well be adverse employee-relations implications if you reverse course now. "It could be very dangerous for organizational morale for you to pull the rug out from under your employees and take back the raise they just received, especially right before the holiday season," says [Lori Armstrong Halber](#), a partner in the Fisher Phillips [Wage and Hour Law Practice Group](#).

Furthermore, reversing action already taken could implicate state or local notice requirements that require advance notice before you adjust compensation levels, other wage payment laws, and even the contract law principles (or other common-law doctrines) of other jurisdictions, says Armstrong Halber.

One alternative would be to take no further action until a final decision is reached in the courts, waiting to see what Congress and the incoming administration do. 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. For this reason, "I would not be surprised if there is some increase in the future," warns Armstrong Halber, "but we just can't predict what will happen."

WHAT IF I ALREADY ANNOUNCED CHANGES TO TAKE EFFECT DECEMBER 1?

If you had been waiting until December 1 to implement changes, remember that Tuesday's ruling might not be the last word. As discussed above, a later reversal of the preliminary injunction might restore the December 1 effective date. "If you had already communicated an intention to take particular steps that have not yet been

implemented, you must weigh the advantages and disadvantages of going forward with the plan or putting them on hold for now," says [John Thompson](#), another partner in the Fisher Phillips [Wage and Hour Law Practice Group](#).

Once again, to answer this question, you should consider the employee-relations impact, as well as the potential legal ramifications of electing to follow-through versus announcing that you will hold off for the moment, says Thompson.

WHAT IF I HAVE NOT ANNOUNCED OR IMPLEMENTED CHANGES YET?

While this might seem like the best position in which to be, don't be so sure that you are in the clear if you remain silent and take no action. After all, you still may face similar morale problems among your workers if you do nothing for the time being, especially if they become aware of the court decision and realize they were on the verge of a pay increase. And, of course, as described above, Thompson reminds us that "you might also find yourself playing catch up if an appeals court resurrects the revisions and rules that December 1 is still the effective date."

HOW CAN I BEST STAY UP TO SPEED?

For day-to-day developments, we will track the fate of the overtime rule by providing updates on our [Wage and Hour Law blog](#). For breaking news, we will issue timely Legal Alerts; you can be sure to receive them by clicking this link [subscribing to our legal alert service](#).

If you have any questions, please contact your Fisher Phillips attorney, or any member of our [Wage & Hour Practice Group](#).

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