DOL Files Reply Brief: Now What for Employers?

By

Paul M. Finamore, Esquire
Niles, Barton & Wilmer, LLP
410-783-6349

On June 30, 2017, the Department of Labor (DOL) filed its long-awaited reply brief in *State of Nevada et al. v. U.S. Department of Labor*, No. 16-41606 (5th Cir.), the appeal regarding the overtime regulations that has been pending in the Fifth Circuit since before President Trump's inauguration. The reply brief provides insight into DOL's position on the regulations following the inauguration, a position that was in question until the reply brief was filed. As a result, employers now have a clear picture of DOL's position on its ability to promulgate regulations, but remain unclear as to what the salary level will be in the future.

Background

DOL issued final regulations in May of 2016 that changed the salary level from $455 per week to $913 per week, more than doubling the prior threshold amount to qualify as an exempt executive, administrative and professional employees (EAP). The regulations were scheduled to take effect on December 1, 2016, which provided employers with time to address and implement the regulations. While employers scrambled to determine how to implement them and whether to raise salaries to allow employees to continue to qualify for the EAP exemption, on November 22, 2016, U.S. District Judge Mazzant from the Eastern District of Texas issued a nationwide preliminary injunction that precluded DOL from implementing or enforcing the final regulations in *State of Nevada v. U.S. Department of Labor*, No. 4:16-CV-00731 (E.D. TX 2016).

In evaluating the extent of DOL's authority to define or delimit the exemptions, Judge Mazzant noted that the Congressional delegation of authority to DOL was limited by the plain meaning of the statute and by Congressional intent that the EAP exemptions under the Fair Labor Standards Act ("FLSA") be focused on the bona fide duties that an employee actually performs. Judge Mazzant held DOL exceeded its authority and ignored the Congressional intent by attempting to limit the EAP exemptions, not based on any bona fide duties, but rather by supplanting the duties test and replacing it with a minimum salary requirement that would automatically determine an employee's eligibility for overtime without regard to the employee's actual job duties or responsibilities.

DOL filed its appeal on December 1, 2016, initially requesting expedited briefing the following day along with a request for ruling from the Fifth Circuit by December 8, 2016. While the Fifth Circuit did not agree to decide the case by December 8, 2016, it did agree to expedite the appeal, scheduling oral argument on January 31, 2017, only 11 days after the inauguration. However, following the inauguration, the Department of Labor filed three motions requesting extensions to

file its reply brief so that incoming leadership would have sufficient time to consider the issues presented in the appeal. As a result of the third motion, the brief was due on June 30, 2017.

The Department of Labor's Reply Brief

In its brief, DOL argued that the court erred in issuing a nationwide preliminary injunction when it held that DOL exceeded its regulatory authority. DOL noted that it had more than a 75-year history of issuing regulations to define the EAP exemption. Relying on both Fifth Circuit and Supreme Court holdings, DOL argued that its regulatory activity is supported by the text, purpose and history of the EAP exemptions and is consistent with Congress' delegation of broad authority to "define and delimit" the exemption. It seeks to have the Fifth Circuit confirm its authority.

However, DOL chose not to request review of the actual salary level. Noting that Judge Mazzant's holding, which addressed the threshold legal issue of DOL's authority, did not reach whether the salary level of $913 per week was arbitrary or capricious or whether it was supported by the rulemaking record, DOL nonetheless chose to forgo argument on this topic, advising the court that it "has decided not to advocate for the specific salary level ($913 per week) set in the final rule at this time and intends to undertake further rulemaking to determine what the salary level should be." By doing so, DOL has left the salary level open for further discussion.

This position is not altogether surprising in that Labor Secretary Acosta has testified that he questioned the need for the salary level to increase to $913 per week, but did not question the need for an increase from $455 per week. He has suggested that a salary level in the low $30,000 range would be more appropriate. If successful in its appeal regarding its rulemaking authority, it seems clear that DOL will move to increase the salary level without otherwise addressing the duties test in the FLSA. By doing so, it will likely take swift action after the request for information process to promulgate new regulations increasing the salary level, likely at or near the level suggested by Secretary Acosta.

Employer Takeaways

For many employers, employee salaries have already been increased to conform to the salary test in the final rule. It will be difficult under such circumstances to reduce those employee's salaries, even though DOL chose not to defend its $913 level per week, without alienating employees. For those employers that chose not to implement the new salary level pending appeal, the risk of failing to do so appears to be diminished or eliminated. However, it seems clear that a higher salary level is simply a question of time based on DOL's reply brief. If successful on appeal, employers should anticipate swift action by DOL to increase the salary level by a few hundred dollars per week. In the meantime, employers that did not implement the $913 per week salary level should review their existing EAP employees to determine how to implement the changes that are certain in the future.