

Time for a Change? From Overtime Regulations to Class and Collective Actions

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FLSA UPDATE

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FLSA LITIGATION

- Number of wage and hour claims decreased in 2016 for the first time in 15 years
 - Still 2nd highest number of claims ever filed
 - Settlement value has nearly tripled over the last two years
- The decrease is not expected to last
 - With heightened media attention, claims will very likely rise to new all-time highs
 - Heightened media attention will result from:
 - Overtime Battle
 - Trump Administration
 - Class Action Waiver Supreme Court Battle
 - Comp time legislation

WHITE COLLAR EXEMPTION RULE UPDATE

- The new rule was set to take effect December 1, 2016. Would have doubled the salary threshold for exempt employees to \$913/week or \$47,476 per year.
- In September, 21 states, including Michigan, challenged the rule in the Eastern District of Texas. On November 22, 2016, Judge Amos Mazzant, III, an appointee of President Obama, issued a **nationwide injunction** to stop the new rule
- “The court determines that the state plaintiffs have satisfied all prerequisites for a preliminary injunction.” “The state plaintiffs have established a prima facie case that the Department’s salary level under the final rule and the automatic updating mechanism are without statutory authority.”
- The court found that the three major white collar or “EAP” overtime exemptions – positions of a bona fide executive, administrative, and professional capacity – must be decided based on a duties test, and not the amended salary test

WHITE COLLAR EXEMPTION RULE UPDATE

- On December 1, 2016, the DOL (still under the Obama Administration) filed an appeal with the 5th Circuit. The 5th Circuit expedited the briefing schedule with the final reply brief due January 31, 2017.
- Under the new Administration, the DOL sought an extension until March 2, 2017. After Secretary of Labor nominee Puzder withdrew his nomination, the DOL filed an unopposed motion seeking a second extension until May 1st “to allow incoming leadership personnel adequate time to consider the issues.”
- On April 19, 2017, the 5th Circuit granted the DOL a third extension, again based upon an unopposed motion, giving it until June 30, 2017 to file its reply brief
- Why? The nominee to be Secretary of Labor, now Alexander Acosta had not yet been confirmed, leaving the future of the regulation in doubt.

WHITE COLLAR EXEMPTION RULE UPDATE

- While Secretary of Labor nominee Andrew Puzder was an open critic of the rule, Secretary of Labor Acosta has yet to comment on his position, but he has the authority to direct the DOL to withdraw its appeal
- The Texas AFL-CIO filed a motion with the Court to join the case so it could take over if the DOL drops its defense, as it fears the Trump Administration may not defend the new rule. The Court has yet to rule on the motion.
- Also pending is Plaintiff's summary judgment motion which, if granted, would permanently invalidate the rule
- **Question:** If Judge Mazzant is right, and the new DOL rule is without statutory authority, is any salary level test permissible? In other words, can existing level of \$455/week or \$23,660 annually still be enforced? Time will tell...

ARE EMPLOYERS AT RISK? MAYBE...

- If Secretary Acosta does not order the DOL to drop its appeal and the 5th Circuit overturns the injunction, thus reinstating the higher salary test, employers could be at risk if they have failed to comply:
 - For example, in-home caregiver exemption regulations that were to take effect on January 1, 2015 were vacated by a federal court just days before they were to become effective
 - Eight months later, the District of Columbia reversed, meaning the regulations did not appear to be in effect for about 10 months
 - Since then, at least five private FLSA collective action lawsuits have been filed against employers who did not pay overtime during that 10-month period. In two cases, the courts ruled that the employer did not have to pay overtime while the regulations were vacated. But in three cases, the courts ruled that the appeals decision retroactively nullified the district court's decision, meaning that the regulations had effectively been "in place all along."

FLSA UNDER THE TRUMP ADMINISTRATION

- Alexander Acosta
 - Nominated by Trump on February 16, 2017; confirmed April 27, 2017
 - The first Hispanic member of Trump's cabinet
 - Served as the Dean of the Florida International University College of Law; appointed by GWB to the National Labor Relations Board; served as Assistant Attorney General for Civil Rights and federal prosecutor for the Southern District of Florida
 - Few public comments on wage & hour or other similar topics
 - Will likely advance the traditional GOP Agenda
 - However, in the past has been a friend to both employees and employers, and has spoken out against Trump's agenda

FLSA UNDER THE TRUMP ADMINISTRATION

- Independent Contractor: Administrator's Interpretation 2015-1
 - States economic realities test should be applied when determining employment status
 - Narrows classification of independent contractors; most workers are employees
 - Employers hopeful AI-2015-1 will be repealed or replaced by the new Secretary
 - Employers will still be liable for compliance with state laws and existing case-law

FLSA UNDER THE TRUMP ADMINISTRATION

- Department of Labor Budget
 - On March 16, 2017, Trump issued his budget plan, which would cut the DOL budget by \$2.5 billion, scaling back funding by 21%
 - On April 30, 2017, Congress reached a deal that reduced Trump's proposed DOL budget cut to a cut of \$83 million
 - Budget Unchanged from FY 2016 for:
 - Wage and Hour Division; NLRB; OSHA; Bureau of Labor Statistics
 - Budget Cut for:
 - Office of Labor-Management Standards (-\$2.4M); Office of Federal Contract Compliance Programs (-\$1M); Mine Safety and Health Administration (-\$2M)
 - Budget Increase for:
 - Office of Workers' Compensation Programs (+\$2M); Veterans' Employment and Training (+\$1M); Office of Inspector General (+\$1.4M)

FLSA UNDER THE TRUMP ADMINISTRATION

- Department of Labor Budget
 - Experts predicted the Trump administration would make large cuts to the DOL's enforcement agencies, but so far the administration has been unsuccessful in doing so
 - If the Trump administration succeeds in cutting DOL enforcement agency budgets, the DOL would be left with limited enforcement resources. Thus, the DOL would have to limit the cases they bring and increase the cases they settle.
 - Plaintiff's attorneys would likely pick up the slack, however
 - The Trump administration also seeks to cut funding to independent agencies. If successful, this will mean less assistance to low income workers with litigation
 - Rulemaking efforts will also likely be scaled back regardless of budget

FLSA UNDER THE TRUMP ADMINISTRATION

- Paid Sick Leave
 - On September 7, 2015, President Obama signed an Executive Order establishing paid sick leave for employees of federal contractors
 - Federal contractors are required to provide employees with up to seven days of paid sick leave each year (including for family care and absences resulting from domestic violence, sexual assault, and stalking)
 - It was originally expected that President Trump would revise or repeal this Executive Order
 - To-date, there has been no indication that he intends to do so

LEGISLATIVE UPDATE

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COMPENSATORY TIME LEGISLATION

- On April 26, 2017, a house committee approved a bill that would allow employers to offer employees comp time (i.e. PTO) in lieu of overtime pay
 - The bill, introduced by Rep. Martha Roby (R-Ala.), would amend the FLSA to allow employers and workers to voluntarily agree to 1.5 hours of compensatory time for every hour of overtime worked, up to 160 hours of leave
 - Time off must be approved by the employer
 - By January 31st of each calendar year, the employer must provide monetary compensation to the employee for any comp time that was not used by December 31st of the preceding year
 - Employee must have worked at least 1,000 hours for the employer during the 12-months preceding the date of the comp time agreement or receipt of compensatory time off

COMPENSATORY TIME LEGISLATION

- Next Steps
 - The bill will wind its way through the House and Senate
 - If it lands on President Trump's desk, he is expected to sign it (depending on its final form)

CASE LAW UPDATE

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CLASS ACTION WAIVERS

- D.R. Horton (2012)
 - NLRB held that arbitration agreements that require employees to waive their right to participate in class actions violate the NLRA
 - Logisticare Solutions, Inc. (2016). – Illegality of class action waivers applicable to employment agreements too
- Federal Arbitration Act
 - Class Action Waivers are legal
- Circuit Court Split
 - Seventh Circuit was first to agree with the Board in May 2016 decision. Ninth Circuit was the second in August 2016.
- Next Step: Supreme Court

OTHER RECENT CASES

- *Saleem v. Corp. Trans. Grp., Ltd*
 - A New York federal court ruled that drivers of “black cars” who have franchise agreements with dispatch companies are independent contractors
 - (1) the drivers set their own scheduled, (2) the drivers were free to decide whether to affiliate with one or multiple dispatchers, (3) the drivers were free to develop their own business
 - This is an “economic reality” test
- The plaintiff’s FLSA claims were therefore dismissed
- Petition for certiorari is pending in the Supreme Court
- In the meantime, if employers provide these benefits to non-exempt employees, they may want to reevaluate the regular pay rate or decide to eliminate the benefits altogether

OTHER RECENT CASES

- *Dindinger v. Allsteel, Inc.*
 - Former employees of a furniture maker filed a lawsuit alleging that the employer paid female employees less than males
 - In its defense, the employer pointed to the fact that the DOL's Office of Federal Contract Compliance Programs ("OFCCP") had performed an audit of its pay data in 2012 and found no discrimination
 - The federal court (8th Circuit) held that the OFCCP audit results were inadmissible because they would be unfairly prejudicial
 - The court affirmed an award of \$204,000 for the employees and \$270,000 in attorney fees

OTHER RECENT CASES

- *San Gabriel v. Flores*
 - Plaintiff police officers claimed they were underpaid for overtime hours because the City excluded from the regular rate cash payments made to them in lieu of benefits. Specifically, the payments were for officers who chose to opt-out of receiving medical benefits and the cash payments were included in their regular paycheck.
 - The 9th Circuit found that cash-in-lieu of benefits payments should be considered compensation and included in the regular rate of pay, even though it is not technically tied to the hours worked. This is inconsistent with other circuit decisions.
 - Petition for certiorari is pending in the Supreme Court
 - In the meantime, if employers provide these benefits to non-exempt employees, they may want to reevaluate the regular pay rate or decide to eliminate the benefits altogether

OTHER RECENT CASES

- *Gloucester County School Board v. G.G.*
 - Background: G.G., a transgender boy, sought to use the boys' restroom at his high school. Although he had the approval of the school administration, the local school board passed a policy banning him from the boys' room. G.G. alleged the school discriminated against him in violation of Title IX and the Equal Protection Clause.
 - An opinion letter from the Office for Civil Rights interpreted a Title IX regulation as requiring schools to treat transgender students consistent with their gender identity. G.G. and the United States as Amicus Curiae asked the court to give the OCR's interpretation deference pursuant to *Auer v. Robbins* (the "Auer Doctrine"), which requires an agency's interpretation of its own ambiguous regulation to be given controlling weight unless it is plainly erroneous or inconsistent.
 - The 4th Circuit agreed, and concluded that the OCR's interpretation of its own regulation was entitled to deference

OTHER RECENT CASES

- *Gloucester County School Board v. G.G.*
 - On February 22, 2017, the Trump Administration issued a Dear Colleague letter which withdrew the statements of policy and guidance on gender identity issued under the Obama Administration
 - On March 6, 2017, the Supreme Court vacated the judgment and remanded the case to the 4th Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017
 - Effect on W&H – *Auer* Doctrine frequently comes into play in W&H cases, where cases are often resolved based on opinion letters, the Field Operations Handbook, and other administrative sources
 - The SC's remand means the *Auer* Doctrine will remain unchanged, subjecting employers to uncertainty and changes in law with each new Administration

OTHER RECENT CASES

- *U.S. v. Zhou*
 - The DOL's Wage and Hour division conducted an investigation and determined that restaurant workers were owed \$93,000 in overtime wages
 - The restaurant's owner signed and submitted a document to the DOL indicating that he had paid the overdue wages to the employees
 - It was discovered that the owner lied. He issued checks to the workers, but encouraged them not to cash the checks. When some workers did cash their checks, the owner demanded that they pay him kickbacks.
 - The owner pleaded guilty to concealing a material fact from a government agency and was sentenced to six months in a halfway house and six months of house arrest

QUESTIONS?



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THANK YOU

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