LABOR AND EMPLOYMENT

EMPLOYERS HAVE SOMETHING TO BE THANKFUL FOR AS JUDGE HALTS DECEMBER 1ST EFFECTIVE DATE OF DOL FLSA FINAL RULE: HERE IS WHAT EMPLOYERS NEED TO KNOW AND DO NOW

by Sara H. Jodka

In the last six months, nearly every business was sent into panic mode and forced to quickly adjust to the Department of Labor's (DOL) Fair Labor Standards Act (FLSA) Final Rule that was set to take effect December 1, 2016.

The Final Rule was significant as it required many exempt employees' earning between $23,660 and $47,475 to be raised to $47,476, at a minimum. This impacted various positions ranging from managerial positions, accounting, payroll, human resources, and many more.

What happened to the December 1, 2016 Effective Date?

On Tuesday, November 22, 2016, a federal judge issued a nationwide injunction halting the implementation of the Final Rule. This means that employers really do have something to be thankful for this Thanksgiving and can breathe a short sigh of relief because December 1, 2016 is no longer anything they have to be concerned about.

What happens to the Final Rule now? Do employers have to worry about it?

The Final Rule was challenged in two lawsuits and on numerous issues. The way the judge chose to decide the case and grant the nationwide preliminary injunction was the best result for employers as it essentially gutted the Final Rule and said it went against the FLSA itself. The alternative would have been to allow the Final Rule to go forward, but implement the salary change through a phase-in process.

Here is what can happen next:

Option 1: The DOL can appeal the injunction to the Fifth Circuit, which will not likely issue an opinion until 2017. If the Fifth Circuit reverses, the injunction would be lifted, and the case would return to the judge that granted the preliminary injunction to be fully litigated. This flows into Option 2.

Option 2: The DOL can choose not to appeal, and the case would be litigated before the judge who granted the preliminary injunction. Given that the judge already granted a preliminary injunction and determined that there was substantial likelihood that the plaintiffs who challenged the Final Rule would succeed on the merits, it is likely that the judge would grant a permanent injunction.

Option 3: A lame-duck Congress could come up with a compromise bill for President Obama's signature. While the Final Rule had support from both sides on the aisle, it is unclear whether the two sides would be able to get a compromised bill to President Obama before the expiration of his term.

Option 4: The issue remains and President Elect Trump addresses it after his confirmation. Given President Elect Trump's pro-business background, it is unlikely that he, or the Republican House or Senate would allow this initiative, which has been seen as bad for business.

For employers that have made reorganization plans, now what?

Here is where we really get into what employers need to know. There are two camps: (1) employers that already implemented their workforces to comply with the Final Rule; and (2) employers that were set to comply between now and December 1, 2016. Most of the changes employers implemented or were getting ready to implement were some combination of: (1) converting salaried employees to hourly; (2) converting salaried employees to salaried/non-exempt; (3) raising exempt employees' salaries; (4) limiting overtime opportunities; (5) hiring more part-time employees; and (d) layoffs and other business-related cutbacks.

Regardless of what camp an employer falls into, all employers fall into the "we spent a lot of money to figure this out, upset a lot of employees in changing their pay/classification, and now we did not have to do any of that!" camp. While the standby line has always been, "that's the cost of doing business," employers will need to balance the cost savings of a do-over for employees whose salaries were raised and those employees whose morale was lowered when they went from salaried to hourly or were set to be.

For employers that already made changes to their workforce, the key question is whether it makes sense to return to the pre-reorganization structure. Going back may confuse employees, frustrate employees, and re-open now-corrected FLSA misclassification issues that were resolved during the reorganization. Employers are free to do what they want, but to the extent they decide to revert to the old structure, they should be sure to think about doing the following:

- Properly provide employees with notice of any change in pay.
- Review audit materials and FLSA misclassification issues that were uncovered and resolved during the reorganization. Any reversion should stop short of including these positions or changes that were resolved because the employer would expose itself to FLSA misclassification violations. This means that a partial reversion is the answer; i.e., some positions revert back to pre-reorganization days and some do not.
- Do not forget about the emotional impact on employees who were given a raise that may be rescinded and those that were excited about the possibility of overtime that will not be eligible.

These are also the key concerns for employers on the cusp of implementing changes. The same considerations should be explored

in determining what parts, if any, the employer decides should move forward.

What other things should employers be thinking about?

First, employers should be happy about this because it gives them more control over their labor budgets and bottom line.

It also gives them more flexibility to implement any changes they desire. Specifically, the now-defunct December 1, 2016 deadline was a Thursday and 11 months into the calendar year. That made little sense to any employer's payroll or tax planning purposes. Now, employers can implement changes on a schedule that makes sense for them. It could be January 1, 2017 and the beginning of a new calendar year, a new fiscal year from the employer, or some other date that makes sense for the employer.

An employer's preparation work was not in vain. In reviewing their workforces to affect the Final Rule, many employers discovered significant FLSA errors, and not just misclassification errors. Many employers discovered other significant FLSA errors, such as, travel time errors, tip sharing/pooling errors, off-the-clock time errors, clock in/out errors, etc. Finding and correcting these errors is significant because it reduces the employer's potential FLSA liability. Employers should keep these changes because they were for the overall better good of the company. These changes might include reclassifying employees that were determined improperly classified as exempt.

The bottom line is that this is extremely good news for employers. While employers do not have to effect salary changes by December 1, 2016, they likely discovered a lot of changes they should continue to make. While the exercise of reviewing the workforce and setting up such significant changes seems like an exercise in futility given there is no requirement for immediate change now, employers should have a better sense of where they are compliance-wise with the FLSA and move forward with other changes that may have been necessary to keep them on the right side of the FLSA.

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