December 1 Deadline for New Overtime Rules Cancelled – For Now!!

As previously reported, in May 2016, the Department of Labor issued a "Final Rule" that significantly changes employer overtime pay obligations under federal law. Specifically, the Final Rule increases the minimum salary threshold for an employee to qualify for a "white-collar" overtime exemption from $455 per week (or $23,660 per year) to $913 per week ($47,476 per year). Under the Final Rule, an employee who earns less than $47,476 per year must be provided overtime pay protections, even if that employee performs executive, administrative, or professional functions. The Final Rule *was* scheduled to take effect on December 1, 2016.

In September 2016, a group of 21 states (and several industries) filed a lawsuit in the Eastern District of Texas to block the Final Rule. Yesterday, that Court entered a preliminary injunction delaying implementation of the Final Rule pending further legal proceedings. The injunction is nationwide in scope, and applies in states that did not join the lawsuit. As a result of the injunction, the December 1, 2016 implementation date for the Final Rule is postponed in all jurisdictions, and employers are not required to comply with the requirements of the Final Rule until further notice.

For those of you interested in the legal theories behind the court's decision, the states' primary argument is that the DOL was acting beyond its authority in essentially creating legislation, which is of course the domain of Congress. The overtime exemptions require the passing of a two-part test. The so-called "duties" test (the person, for example, performs management duties), and the so-called "salary" test (the person is paid a salary of at least $455 per week under current law). The Court found that Congress' unambiguous intent in crafting the exemptions was that those exemptions would be based on *duties* rather than a minimum *salary* level and that the Final Rule increased the *salary* threshold to such as great extent it was tantamount to creating a "de facto salary-only test." Even DOL seems to agree that it does not have the authority to in essence revise the exemption test to be only based upon salary.

The Court's ruling, coupled with potential, future changes to Department of Labor administration, certainly casts doubt on the future of the Final Rule. That said, the Court's injunction does not permanently void the Final Rule. Rather, the ruling only acts as a temporarily postponement of its effective date. As such, employers are cautioned to remain prepared and ready to comply with the Final Rule until clear information instructs otherwise.

What to do?
First, understand the ruling is temporary. It may be reversed. And it is possible, though unlikely, that a reversal could be deemed retroactive to December 1. Employers must be sure to understand that even maintaining the *status quo* is not absent all risk.

Second, don't throw the baby out with the bathwater. Many employers saw this change as an elegant excuse to move salaried employees who were probably misclassified (due to not meeting the duties tests) to their proper place as non-exempt employees. If you fall into that category, you should still move ahead with the changes. If your employee was misclassified due to the duties test, (in other words you have them classified exempt but they probably do not meet the duties test and should be non-exempt), the injunction does not alter this fact. The person is still misclassified. You need to fix it.

Third, consider your options carefully. There is no "one size fits all" solution to an employment issue. Certainly not to this one. Many employers have spent months making payroll modifications and communicating with employees on the changes. While employers are free to not implement the changes, many may decide that moving forward is less risky and a more prudent business strategy. For example, many employers have decided to increase the salaries of certain employees to bring them over the new threshold and retain their exempt status. Employers should think long and hard before telling the employee promised a raise on

December 1 “never mind.”

We understand that this is a particularly uncertain time for employers. The Partridge Snow & Hahn Employment Law Team is fully updated on these and other related issues, and is available to answer to your questions.

Date Created
November 23, 2016