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TO: All Clients

FROM: Kane Kessler, P.C.
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RE: Texas Judge Temporarily Blocks Overtime Rule Set to Become Effective on December 1st

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On November 22, 2016, Judge Amos Mazzant in the United States District Court for the Eastern District of Texas issued a nation-wide preliminary injunction that temporarily blocks the U.S. Department of Labor ("DOL") from implementing and enforcing its revised white collar overtime regulations. The regulatory revisions, which would more than double the minimum salary requirements for the major white collar exemptions to the federal Fair Labor Standards Act ("FLSA"), were set to become effective on December 1, 2016.

Judge Mazzant issued the ruling in a consolidated set of cases brought by 21 states and several business organizations. Both cases challenge the changes to a federal regulation that defines and delimits the standards for evaluating whether employees are exempt executive, administrative or professional employees, who are not eligible for overtime. Under the current regulations, the minimum salary requirement for these exemptions generally is $455 per week, or $23,660 per year. Under the revised regulations, the minimum salary would more than double to $913 per week, or $47,476 per year.

In his decision, Judge Mazzant found that the plaintiffs' challenge to the final regulations has a substantial likelihood of success on the merits and that the plaintiffs have shown that they would be irreparably harmed if the rule was not enjoined.

For the many employers that have been struggling to meet the December 1 effective date, the ruling offers some welcome relief. It does not, however, provide any certainty for the future. Although the injunction halts the revised regulations from becoming effective on December 1, it is a ***preliminary*** injunction, not a ***permanent*** one, and it does not necessarily mean that the new rule will be gone forever, either in its current form or in some revised form under a Trump administration. It is expected that the preliminary injunction decision will be

appealed to the Fifth Circuit Court of Appeals. If the decision is reversed by the Fifth Circuit, and the employer has not been in compliance on the December 1 effective date, a thorny question arises: whether the existence of the preliminary injunction precludes any liability between the December 1, 2016 effective date and the date the Court of Appeals issues its decision. Courts are split on this issue, which raises further uncertainty.

Employers must weigh various business and legal risks in deciding whether to comply with the now enjoined overtime regulations. There is a legal risk that if the regulations are later upheld, they may be enforced retroactively. In that event, employers may be liable for overtime payments to employees who were classified as exempt under the current regulations but who are not exempt under the new regulations, plus potential attorneys' fees. In the event of such a litigation attempting retroactive enforcement of the overtime rule, employers will have difficulty defending against claims if they do not have accurate records of the hours worked by employees. So, an employer that decides to hold off on complying with the new regulations may want to keep accurate records of the hours worked by any employee who is now considered exempt but could be considered non-exempt under the new regulations.

It is likely that any appeal of Judge Mazzant's ruling will fall to the new Trump administration, which may not be as motivated to enforce these Obama administration regulations. Additionally, congressional legislation invalidating the law has a greater likelihood of passage under the Trump administration – that legislation could pass prior to any decision on appeal, which would render the appeal moot.

For New York employers, the possibility of increased salary thresholds for exempt employees still exists. Under the State's October 19, 2016 proposed amendments to its existing wage orders, the salary thresholds for exempt employees will increase on a regional basis from the current $675 per week (or $35,100 per year) to at least $727 per week (or $37,804 per year) for certain regions and up to $825 per week (or $42,900 per year) for certain New York City employers, with such thresholds increasing on an annual basis through 2021. The amendments are currently subject to a public comment period ending on December 3, 2016 and, barring any surprise developments, are expected to take effect on December 31, 2016. If they do take effect, the proposed salary thresholds will exceed the minimum requirements under current federal regulations.

For now, the federal overtime rule will not take effect as planned on December 1, 2016, so employers will have to decide whether to put their compliance plans on hold in light of the ruling. If there are exempt employees who were going to be reclassified to nonexempt, but have not been reclassified yet, employers may want to postpone those decisions until there are further rulings from the courts or action by Congress. We recommend, however, that if an employer has begun to conduct an audit of employees, including assessing their job duties, they continue to do so since Judge Mazzant's opinion reiterates the importance of complying with the job duties test when determining exempt status. Employers will likely want to leave decisions in place if they have already provided salary increases to employees in order to maintain their exempt status. Any such decisions should be made in accordance with any applicable state and/or local notice requirements.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael Lydakis, Jennifer Schmalz or Jaclyn Ruocco.
