Employment Flash

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Texas Judge Blocks National Implementation of DOL Final Rule

On November 22, 2016, the Eastern District of Texas temporarily enjoined the U.S. Department of Labor (DOL) from implementing and enforcing its new overtime exemption rule (DOL Final Rule) originally scheduled to become effective December 1, 2016. As noted in the August 2016 edition of the *Employment Flash*, the DOL Final Rule would have more than doubled the minimum salary requirement from $455 per week, or $23,660 per year, to $913 per week, or $47,476 per year, for the executive, administrative and professional exemptions under the FLSA. The preliminary injunction will preserve the status quo until the court renders a decision about the DOL's authority to make the DOL Final Rule and the validity of the DOL Final Rule.

In determining that plaintiffs (21 states) satisfied all prerequisites for a preliminary injunction, the court reasoned that the plaintiffs showed a likelihood of success in their challenge to the DOL Final Rule because they established a "prima facie case that the [DOL]'s salary level under the final rule and the automatic updating mechanism are without statutory authority" while recognizing and without disturbing the existing salary prong. The court concluded that the DOL was not entitled to deference in creating the DOL Final Rule because there is nothing in the FLSA indicating that Congress wanted the DOL to define employee classifications based on a minimum salary level. The court further found that due to the costs of complying with the DOL Final Rule, the states would suffer irreparable harm if the overtime rule was implemented. In contrast, the DOL failed to show that it would be harmed if the implementation of the DOL Final Rule was delayed. On December 1, 2016, the DOL filed an appeal to the 5th Circuit Court of Appeals, and on December 8, 2016, the 5th Circuit granted the DOL's motion seeking an expedited appeal.

DOL Final Rule Injunction and New York State and City Overtime Laws

Although the DOL is temporarily enjoined from implementing the DOL Final Rule, employers in New York state should note the proposed amendments announced by the New York State Department of Labor (NYSDOL) on October 19, 2016. The proposed amendments modify the state's minimum wage orders to increase the salary basis threshold for executive and administrative employees on a yearly basis until the salary threshold reaches $1,125 per week in all counties. The current salary threshold for the administrative and executive exemptions under New York law is $675 per week, or $35,100 annually, throughout the state. In New York City, the proposed salary threshold increase increments for large employers (*i.e.*, employers with more than 11 employees) are $825 per week ($42,900 annually) on and after December 31, 2016; $975 per week ($50,700 annually) on and after December 31, 2017; and $1,125 per week ($58,500 annually) on and after December 31, 2018. Similar increases will occur in counties outside of New York City but over a longer period of time. For example, increases in Nassau, Suffolk and Westchester counties will occur through 2021, when the $1,125 per week threshold is reached. The 45-day public comment period for the proposed amendments ended December 3, 2016. If finalized, the proposed amendments will become effective on December 31, 2016.

OSHA Injury and Reporting Rule to Take Effect

On November 28, 2016, a Texas federal court in *Texo ABC/AGC Inc. et al. v. Perez et al.*, No. 3:16-cv-01998 (2016) denied a request by numerous business groups for a national injunction of an injury and reporting rule entitled "Improve Tracking Workplace Injuries and Illnesses" (OSHA Rule) issued by the Occupational Safety and Health Administration (OSHA). The OSHA Rule therefore went into effect as scheduled on December 1, 2016. Among other things, the OSHA Rule prohibits employers from implementing procedures that would deter an employee from accurately reporting a work-related injury or illness and from retaliating against workers for reporting work-related injuries or illnesses. OSHA noted that safety incentive programs rewarding workers and supervisors for low injury and illness rates may discourage or deter workers from reporting a workplace injury. The OSHA Rule also prohibits employers from using drug testing as a form of adverse action against employees who report work-related injuries or illnesses. The plaintiffs, who sought a preliminary injunction of the OSHA Rule, argued that the OSHA Rule, in particular its anti-retaliation provision, is unlawful to the extent that it limits incident-based safety programs and mandatory post-accident drug testing programs, in part because such programs reduce work-related injuries. The court found the plaintiffs' arguments speculative and conclusory in nature and agreed with the DOL that the OSHA Rule merely incorporates the existing requirement that an employer's procedure should not deter an employee from reporting a workplace injury and the existing statutory prohibition on employer retaliation against employees for reporting work-related injuries. The court held that the OSHA Rule does not categorically ban post-accident drug testing or incident-based safety incentive programs; instead, the OSHA Rule requires procedures to be structured in a way that encourages workplace safety without discouraging employee reporting of work-related injuries and illnesses.

New York City Passes the Freelance Isn't Free Act

New York City became the first city in the United States to pass a bill protecting freelance workers from nonpayment of fees when the New York City Council unanimously approved the Freelance Isn't Free Act on October 27, 2016. Aiming to address New York City's growth in temporary, contingent, contract and freelance workers, the bill requires a person retaining the services of a freelance worker to agree in writing to a timetable and procedure to promptly pay such workers. The Freelancers Union campaigned for over a year to pass the bill, arguing that the current labor and employment laws are outdated and unable to protect the estimated 4 million freelancers working in the New York metropolitan area. In a study performed by the Freelancers Union, the Freelancers Union found that 71 percent of freelancers had struggled to collect payment for hours worked at some point during their career. To address these issues, the bill requires written contracts for any freelance relationship for which the compensation is at least $800 over a four-month period, implements a 30-day window in which freelancers must be paid for hours worked, allows freelancers to file complaints with the Office of Labor Standards against non- and late-paying clients, prohibits retaliation against freelancers who seek to enforce their rights under the bill, and institutes greater penalties against clients found guilty in small claims court of nonpayment to freelancers. The new penalties include double damages if a freelancer proves in court that he or she was not paid, as well as payment for the freelancer's legal fees. Further, if a court finds that the freelancer performed work without a contract, the entity for whom the freelancer performed work will be subject to additional penalties. In addition, New York City's corporation counsel can initiate lawsuits against repeat offenders of the bill, resulting in civil penalties of up to $25,000 against such offenders. If signed by New York City Mayor Bill de Blasio, the bill would apply to all freelance workers in the New York City metropolitan area.

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International Spotlight

Below is a discussion of recent noteworthy employment law decisions and legal developments emanating from the United Kingdom (U.K.) and the European Union (EU).

UK Corporate Governance Reform and Employee Representation at the Board Level

Although many European countries have introduced some form of mandatory employee representation on the boards of directors of companies, there is no existing requirement in the U.K. for public or private companies to include employee representatives on company boards. In the wake of recent high-profile scandals at a small number of leading U.K. companies that have left key stakeholders, most notably employees, without pension entitlements or a voice regarding increased levels of executive pay, the U.K. government has turned its attention toward reviewing and reforming the U.K. corporate governance regime. The review has focused on the ability of shareholders to vote on executive pay and the ways in which the views and interests of employees are taken into account when key business decisions are made. These proposals extend further than previous proposals because they may apply to public companies and larger privately-owned businesses. As a result, these reforms may have a significant impact on the governance regime of large U.K. private company subsidiaries of international organizations.

Despite early indications from the U.K. government that the U.K. may adopt a mandatory system of employee representation on company boards similar to those systems already in place in Norway, France and Germany, the U.K. government has since rowed back on its original proposals. Businesses have emphasized that other European countries have experienced practical problems appointing or electing employee representatives and that such problems would be exacerbated in the U.K. given that a relatively low proportion of the workforce is represented by trade unions and other employee representative bodies. In addition, because employee board members would be considered statutory directors of a company and bound by a duty of confidentiality during board discussions, transparency between employee board members and the workforce could be hampered and accusations of tokenism may arise.

As alternatives to employee board members, the U.K. Government's proposals incorporate three potential options for reform in this area:

- **Stakeholder advisory panels:** Company boards could create stakeholder advisory panels for directors to hear directly from their key stakeholders, including employees, customers and key suppliers. These advisory panels could be invited to full board meetings to offer views about certain issues, such as executive pay, before the board makes key decisions.
- **Designating existing non-executive directors as employee representatives:** Some commentators in support of employee representatives on company boards had hoped that the U.K. government would propose a system of employee non-executive directors to sit on boards and represent the workforce as full directors. The U.K. government has instead proposed that existing non-executive directors be designated to provide "an independent and clear voice for key interested groups," such as employees. These individuals might also chair board committees focused on employee issues or sit on a board remuneration committee to ensure that concerns of the workforce are considered when decisions about executive pay are made. This system would need to ensure that the existing non-executive directors designated for the task have a strong understanding of employee issues to ensure that employee concerns are properly represented at the board level.
- **Strengthening reporting requirements related to employee engagement:** Certain U.K. companies are already obliged to provide information about actions taken during the financial year to introduce, maintain or develop arrangements aimed at informing or consulting employees about a number of specific issues. The U.K. government has proposed that this obligation could be developed further by requiring companies to provide information about how often and the mechanism through which the board has considered different stakeholders' interests.

The aim of the proposals is largely in keeping with the flexible framework of the existing U.K. corporate governance regime, offering flexibility for different companies and business models without mandating a one-size-fits-all approach. The proposals suggest that increased employee representation will go hand-in-hand with increased employee and shareholder say about executive pay.

The consultation process regarding the proposals will end in February 2017. Firmer proposals are expected in the latter half of 2017.

New Collective Bargaining Rules in France

French companies and their employees can now sign internal collective agreements deviating in key respects from national collective bargaining agreements (CBAs) on a wider range of issues. The Law of August 8, 2016 on Labor, the Modernization of Employee Dialogue and the Securing of Career Paths (*Loi relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*) (MEDSCP) contains multiple employment law reforms, several of which were summarized in the October 2016 edition of the *Employment Flash*. This edition of the *Employment Flash* addresses the MEDSCP's provisions with respect to CBAs. Notably, the MEDSCP reverses the presumption that national industry-wide CBAs prevail over company or group-level agreements with respect to working time issues. Accordingly, companies and their employees can make their own decisions (within the limits of the law) about important issues, such as overtime pay rates, payment for rest periods and hours worked in excess of the basic working day, without being bound by a national CBA. Previously, such deviations were limited to a narrower range of issues, such as the implementation of time monitoring within companies. In addition, the MEDSCP provides further legitimacy to collective agreements signed with employee representatives who are not union-affiliated. The MEDSCP removes the previous requirement that a commission at a national level must approve such agreements. This possibility extends to agreements covering various topics, including working time issues.

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