

DOL's OT Rule Strategy May Leave Employers In Limbo

By Vin Gurrieri

Law360, New York (August 29, 2017, 7:41 PM EDT) -- The U.S. Department of Labor's decision not to ask the Fifth Circuit to pause a challenge to an injunction freezing the Obama administration's controversial overtime rule while the agency crafts a replacement means the 2016 regulations could get a green light before a replacement rule is ready, creating a potential compliance nightmare for employers.

Finalized in the last year of President Barack Obama's term, the regulation in question broadened federal overtime pay regulations to cover nearly 4 million more people, raised the minimum salary threshold required to qualify for the Fair Labor Standards Act's "white collar" exemption to just over \$47,000 per year and increased the overtime eligibility threshold for highly compensated workers from \$100,000 to about \$134,000.

But just days before it was scheduled to take effect on Dec. 1, 2016, U.S. District Judge Amos Mazzant granted a request for a preliminary injunction by numerous states that had challenged the rule. The Obama administration appealed the ruling before President Donald Trump was sworn in.

Labor Secretary Alex Acosta, meanwhile, told congressional lawmakers on several occasions earlier this year that the DOL would be seeking to revise the overtime rule, setting the salary threshold somewhere between the previous level of \$23,660 and the \$47,476 level set by the Obama administration, which Acosta criticized as being too burdensome on employers.

In July, the DOL followed up Acosta's statements by issuing a request for information seeking public feedback on ways to revise the Obama administration's rule. That RFI came about a month after the agency filed a long-awaited reply brief telling the Fifth Circuit that it would not seek to reinstate the Obama salary level, but that the appellate court should overturn Judge Mazzant's finding that the agency lacks the authority to set any salary test at all.

But one thing the agency didn't do was ask the Fifth Circuit to stay the case while the regulatory process to revise the rule is pending. That decision potentially creates a situation where the Fifth Circuit could dissolve the injunction — thus, allowing the rule to take effect — long before any replacement is ready.

Michael Puma, a partner at Morgan Lewis & Bockius LLP, said he believes the reason behind the DOL's decision to not ask for a stay is that it wants a decision confirming that it has the authority to set a salary level test, even if the agency is no longer advocating for the salary level set by the Obama administration.

The DOL, Puma said, "may want to know what the Fifth Circuit's position is" before investing time and resources into creating a replacement rule that may itself also include a salary level test.

Lori Adelson, a partner at Kaufman Dolowich Voluck LLP, categorized the DOL's decision as "very clever" and not an oversight by the agency. She says the agency is essentially giving itself multiple paths for changing the rule through either a summary judgment ruling in its favor in the litigation or through the rulemaking process.

"With Acosta in place, the goal is to figure out how to make the rule different," Adelson said, adding that the issue over whether the DOL had the authority to use a salary test "needs to be resolved" one way or another.

But in declining to ask for a stay, the DOL may have potentially opened the door for a situation in which the Obama-era rule takes effect while the Trump DOL is moving on another track to hone a replacement. While that scenario isn't set in stone — since the Fifth Circuit could also choose to affirm Judge Mazzant's injunction and maintain the status quo — it is likely that the court will issue a decision either way long before the regulatory process is completed.

According to statistics issued in June by the Administrative Office of the U.S. Courts, the median time for cases in the Fifth Circuit to be completed after a notice of appeal has been filed is just over nine months. Accounting for delays, and with oral arguments scheduled for Oct. 3, a panel decision in the instant case should issue in early 2018.

When it came to the initial regulation, the DOL first published a notice of proposed rulemaking in the federal register on July 6, 2015, and gave stakeholders about two months to offer feedback. The agency received over 270,000 comments, which it is legally required to consider under the Administrative Procedure Act, and ultimately issued a final rule on May 18, 2016, more than 10 months after the NPRM was sent out.

If the department were to proceed along a similar timeline for a replacement to that initial regulation, the revised overtime rule would come out at the earliest in late 2018. An NPRM is expected once the DOL has considered public comments to its request for information. The comment period expires on Sept. 25. As of Tuesday, the department has already received nearly 135,000 comments.

So if the Fifth Circuit chooses to dissolve Judge Mazzant's injunction, both the DOL and employers may be left in a bind, with the former having to figure out how to implement a rule it plans to scrap, and the latter having to evaluate how or whether to apply to their workforces a rule that is likely to change.

"It's a bit of an open question as to how the DOL will deal with a situation where the injunction is dissolved," Mayer Brown LLP partner Lori Zahalka said. "From an enforcement perspective, the DOL could choose not to enforce [the regulations]."

A representative for the DOL did not respond to an inquiry about whether the agency has a plan in place for implementing the rule if the Fifth Circuit dissolves the injunction.

While Puma acknowledged that the DOL may choose to simply not pursue violations of the rule in the interim period between when the injunction is dissolved and when a new rule is finalized, he cautioned that employers may still face legal liability if plaintiffs attorneys sue on behalf of individuals alleging they weren't properly paid under the standard set by the Obama administration's rule.

Employers may be best served by capping employees' hours to avoid the possibility of overtime violations during any interim period when the 2016 rule is in place and the Trump DOL is working on a replacement, Puma said.

Employers generally want to be in compliance with whatever the law is, according to Zahalka, who also said many had already made preparations or changes to be in compliance with the Obama administration rule before Judge Mazzant's eleventh-hour injunction. Those employers should have an easy time implementing systems that comply with the 2016 rule should the Fifth Circuit dissolve the injunction, she says.

"The issue is how much is it going to cost them," Zahalka said, also noting that employers may begin paying closer attention to the issue once the Fifth Circuit has heard oral arguments and perhaps tipped its hand as to what it is planning to do with the injunction. "It's not a great position for employers. They have to weigh the legal risk of what their potential exposure might be."

--Editing by Pamela Wilkinson and Catherine Sum.