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## Judge sends labor laws into ‘overtime’

By: Adina Genn ◉ December 2, 2016 0

Employers may be breathing a temporary sigh of relief after a federal judge in Texas blocked a U.S. Department of Labor rule that would have raised salary limits for overtime pay, saying the rule was unlawful. That rule, which was supposed to take effect Dec. 1, is now on hold, and may prompt some workers into a state of wage-and-hour limbo.

Many employers spent months gearing up to comply with the rule, which stated that employees earning under \$47,476 but working more than 40 hours a week would qualify for overtime pay of time-and-a-half. Previously, the salary threshold in New York was \$35,100.

To comply, employers may have communicated that they were increasing employee weekly wages to \$913. Some employers may have already pushed those increases through. They might have switched exempt employees to non-exempt, or hired part-timers to avoid the need to pay overtime. And they might have put systems in place to track employee hours.

The preliminary injunction comes just before the incoming Trump administration, leaving the fate of the wage rule unknown. Experts wonder if the new president would bother with the rule, if the Labor Department will push for a hearing before the inauguration, or if the final outcome is some sort of variation of the original measure.

Steven Mitchell Sack, an employment lawyer with offices in East Meadow, called it “disappointing that the current court action prevented this rule from taking effect. There are many people who work in low-level positions 50 to 60 hours a week. If they are working those additional hours, they should be allowed to earn that extra money.”

“At the same time, employers must be in compliance to make sure their employees are properly categorized as either managers [exempt] or non-managers [non-managers/hourly employees] or else face stiff penalties,” he added.

In New York, the story is far from over, where the state’s Department of Labor is also proposing to increase salary thresholds as early as Dec. 31. That increase, however, is not as initially steep as the federal rule.

“The only thing that’s certain is that Dec. 1 is off the table,” said Dawn Davidson Drantch, of corporate counsel at Alcott HR, a PEO based in Farmingdale. “All the other variables are up in the air.”

The Labor Department had claimed that, in New York State, the new rule would have affected nearly 278,000 workers. That figure includes low-salaried workers with supervisory duties in industries such as fast food and retail.

Still, nationwide, compliance may have taken a toll on owners.

“It puts employers into a difficult situation,” said Mark Reinhartz, a labor and employment law attorney and member of Bond Schoeneck & King with offices in Garden City. “Companies spent lots of time” on compliance, he added, noting that some of those changes, including switching salaried workers to hourly, may have dampened morale.

The National Federation of Independent Business “surveyed small business owners when the rule was introduced in the spring and found that 44 percent of all small business owners have at least one employee [that] would be affected,” said Jack Mozloom, a spokesman for the organization. “That’s significant.”

The state’s Labor Department has proposed increasing the weekly salary threshold for the executive and administrative exemptions on Long Island to \$750 on and after Dec. 31. And those increases would continue each year as follows: \$825 on and after Dec 31, 2017; \$900 on and after Dec. 31, 2018; \$975 on and after Dec 31, 2019; \$1,050 on and after Dec. 31, 2020; and \$1,125 on and after Dec. 31, 2021. Elsewhere in the state, the thresholds differ. But experts are warning New York employers about the increases.



MARK REINHARTZ: Employers were put into a difficult situation. || Photo by Bob Giglione

"Employers have to be mindful that these changes could take effect at some point," said Kimberly Malerba, a partner and chair of the employment practice group at Uniondale-based law firm Ruskin Moscou Faltischek.

So the resources they spent to prepare for compliance may still be worthwhile. 

"A lot of our clients used this as an opportunity to review their existing practices," Malerba said. "In some circumstances, it was beneficial to evaluate current classifications" and to see whether employees met the duties test for supervisor and appropriate salary thresholds.

But what they might have determined may have brought new challenges.

"Anecdotally, we've heard from many of our members that they can't absorb the additional cost," Mozloom said. "Many are planning to convert salaried employees into hourly workers and cap their hours below 40. That's a terrible shame for employees on the management track who want the additional responsibilities."

Now, experts say, companies are grappling with how to move forward. Do they scrap plans to switch employees from exempt to non-exempt? Pull back on wage increases? It depends.

"There are a lot of moving parts – they need to consider all of the options and pros and cons of each, including employee relations issues and morale," said Jeffrey Brecher, an attorney at Jackson Lewis in Melville.

Many organizations may look to their bottom line when deciding, Reinharz said. They are asking themselves "Is it worth the aggravation of keeping track of time, and what will it do to morale?" And, he said, on Long Island, "If an employee is making \$735, it's probably easier to raise him to \$750." But if there are 10 people, the costs go up – and employers would need to gauge much overtime they really work, and keep track of hours.

In moving forward, employers should consider the "cost to the company," Malerba said, cautioning that reversing wage increases could lead to disgruntled employees. "There's a premium to recruit new people," she warned.

Employers "need to assess the risk," Drantch said. Should employers decrease wages, they need to give advance notice, she added, and be sure to follow specific rules per industry and by state. In New York, employers need to give at least seven days notice.

And when assessing the risk, consider the possibility of the original position being reversed on appeal, Brecher said, adding, "There may be retroactive liability."