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Late Release of Overtime Rule Could Mean Short Implementation Period

By Allen Smith 11/13/2015

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The Department of Labor (DOL) will not release its final rule revising which workers are and are not eligible for overtime until late 2016, Solicitor of Labor Patricia Smith told an American Bar Association conference Nov. 5. That suggests that the time between publication of the final rule and its effective date will be short, according to Paul DeCamp, an attorney with Jackson Lewis in its Washington, D.C., region office, and a former administrator of the Wage and Hour Division.

The Wall Street Journal reported Smith's assertion, which the newspaper article said "elicited 'gasps' from the audience at the American Bar Association's Labor and Employment Law conference in Philadelphia."

"The later the final rule is published, the smaller the window of time the department can allow before the new regulations become effective," DeCamp said.

"In 2004 [the last time the Fair Labor Standards Act (FLSA) overtime rules were overhauled], the department provided 120 days for employers to review the new regulations and to make the necessary changes in their practices," he said. "In 2016, the department might find itself with a much shorter window, perhaps only 30 or 60 days, between when they publish the final rule and when the rule has to go into effect."

The proposed rule ([/legalissues/federalresources/pages/shrm-proposed-overtime-rule-salary-level-high.aspx](#)) was released on June 30 of this year and received more than 250,000 comments during the comment period this summer.

If employers really do have as little as 30 days to implement the final rule, they may prepare to reclassify workers by getting ready now for different possible scenarios under the final rule; do their best to reclassify after the final rule; or—on the riskier side—wait until after the presidential election in hopes that, should a Republican prevail, the rule might be revoked.

“I think the later the release, the better for employers,” said Jeffrey Ruzal, an attorney with Epstein Becker & Green in New York City. “A later release gives employers a longer runway to audit their workforce and address any potential misclassification issues.”

Ruzal added, “Employers can and should act now to make any adjustments necessary to avoid imminent noncompliance.”

“Frankly, having a final rule before late summer or early fall [of 2016] was probably an optimistic prediction, given the volume of comments filed and number of other U.S. DOL regulatory initiatives,” said Alfred Robinson Jr., an attorney with Ogletree Deakins in Washington, D.C., and a former acting administrator of the Wage and Hour Division.

Presidential Election

The pressure on the Labor Department to make the rule effective as soon as possible after its publication arises from the possibility that a Republican may win the White House.

“Depending on how the November elections go, it is possible that the president-elect—if Republican—could provide clear enough assurances following the election that employers might be willing to ride things out for a few weeks at the end of the term rather than converting employees, knowing that help is right around the corner,” DeCamp said. “In that case, the next president might revoke the regulations even if they have already gone into effect, at least so long as a mass conversion to nonexempt status has not already occurred.”

In addition, DeCamp said the later the final rule comes out, the greater the chances of litigation to run out the clock until the next president can revoke the rule.

“The department needs to have the rule become final before the next president takes office, at least if that president is Republican, because otherwise the next president could undo the rule. The department needs employers to convert everyone who is going to be converted to nonexempt before there is an opportunity for the next president to undo the rule. Because once employers convert people, they are much less likely to convert them back,” DeCamp added.

“Of course, this whole discussion is moot if a Democrat wins in November,” he noted. Democratic presidential candidate and former Secretary of State Hillary Clinton has come out in favor of the Department of Labor’s overtime pay proposal (<http://www.newsmax.com/Newsfront/overtime-pay-hours-workers/2015/06/30/id/652860/>).

Phased-In Effective Date?

Another possibility, however, is a phased-in effective date, which is rumored to be gaining favor on Capitol Hill.

“A phase-in that exceeds the term for this administration is possible but would probably mean that the president-elect is a Democrat,” Robinson said. “It also would depend on whether the final rule only increases the salary level or contains some duties tests (</legalissues/federalresources/pages/dol-questions-duties-tests.aspx>) changes, too. The more changes that the final rule makes, the greater the chance that this administration may allow time to phase it in. However, if the final rule only contains a major salary level increase, the less likely there will be any phase-in.”

Phased-in effective dates have been used with minimum wage laws in some cities this year (</legalissues/employmentlawareas/pages/minimum-wage-increases.aspx>), noted Robert Hingula, an attorney with Polsinelli in Kansas City, Mo. Hingula said it’s not beyond the realm of possibility for the raised salary threshold to be increased on a phased-in basis to make it more manageable.

He also thinks the DOL might listen to employers’ pleas for a longer implementation period and not make the final overtime rule take effect until the beginning or middle of 2017, regardless of how the presidential election turns out.

While Republicans may try to block a raise in the salary level if they win the White House, Hingula noted that there is support in both parties for raising it some—just not necessarily more than doubling it from the current \$455 a week to the DOL’s proposed \$970 a week with annual raises.

“We’ll have to wait and see,” Hingula said.

Allen Smith, J.D., is the manager of workplace law content for SHRM. Follow him @SHRMlegaleditor (<https://twitter.com/SHRMlegaleditor>).

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