

CUT AND PASTE POST JULY 2017 NEWS FLASH

Department of Labor Appeals White Collar Salary Rule Injunction

According to [Constangy, Brooks, Smith & Prophete, LLP](#), on June 30th, the U.S. Department of Labor (DOL) filed a reply brief asking the 5th Circuit U.S. Court of Appeals to reverse a lower court's 2016 ruling that enjoined the Obama Administration's White Collar Salary Rule.

As you will recall, on November 22, 2016, a federal judge in Texas enjoined the DOL from enforcing the new regulations. The rationale for the court's ruling was that the DOL did not have the legal authority to use salary level as a criterion for determining whether an employee qualifies for one of the white collar exemptions. In other words, the Court found that the DOL was limited to using a "duties test" to determine exempt status.

In its reply brief, the DOL argues that the district court's order was premised on an erroneous legal conclusion, and asks the Fifth Circuit to confirm that the DOL has statutory authority to establish a salary level test as part of the criteria for determining white collar exemptions. However, the new brief specifically asks the Court to *"not address the validity of the specific salary level set by the 2016 final rule (\$913 per week), which the Department intends to revisit through new rulemaking."*

Constangy, Brooks, Smith & Prophete's Analysis:

Even though the DOL has said it intends to open a new rulemaking proceeding, it is unclear exactly when this will occur, or how long it might take. In the meantime, it is also not clear whether the DOL intends to take steps to formally withdraw the Obama Administration's regulatory changes – a withdrawal that ideally needs to be retroactive to December 1, 2016, to prevent the potential for private litigation through collective action lawsuits. This retroactive withdrawal would be a critically important step, particularly if the Court of Appeals reverses the lower court's ruling and the injunction is vacated. It might not be enough for the DOL to just say it will not enforce the regulatory changes finalized under the Obama Administration.

Notwithstanding the injunction that has been in place since November 22, 2016, if it is vacated due to a reversal by the appeals court, legal arguments could be made both for and against private enforcement of the higher salary requirements during the pendency of the injunction. Undoubtedly, employers will not be interested in defending against private lawsuits claiming they should have complied with the higher salary requirements while the injunction was in place.

Complicating matters even further is that the district court case was not stayed pending appeal so, if the Fifth Circuit reverses, it is possible that the Obama regulations could take effect, but it is unknown what the effective date would be. Meanwhile, in a separate challenge to the regulations before the same district court judge, the U.S. Chamber of Commerce and other business groups have filed a motion for summary judgment seeking to invalidate the regulatory changes on other grounds. At any time, the district court judge could issue a ruling in that case, addressing whether the \$913 salary level is arbitrary and capricious, and that ruling could also be appealed to the Fifth Circuit.

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It might just be an exciting summer! Stay tuned!

Wage and Hour Opinion Letters to Return

On June 27, 2017, Secretary of Labor Alexander Acosta announced that the U.S. Department of Labor's Wage and Hour Division (WHD) is reinstating its practice of issuing Opinion Letters to help employers and employees understand their responsibilities under federal wage and hour law.

According to the WHD, as part of the administration of the Fair Labor Standards Act (FLSA) and Family Medical Leave Act (FMLA), interested parties may seek and WHD officials may provide [official written explanations](#) of what these laws require in response to their specific inquiry. At the department's discretion, opinion letters may be signed by the WHD Administrator or a lower level official. *Opinion letters issued by the Administrator may be relied upon as a good faith defense to FLSA wage claims.*

The WHD may also issue opinion letters addressing fact-specific questions under other federal wage and hour laws enforced by the agency, including the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the wage garnishment provisions of the Consumer Credit Protection Act (CCPA).

Professional Pointers – These opinion letters can be invaluable when you have questions about complying with the FMLA or the FLSA. Please note they are fact specific and apply to employers subject to the FLSA, but many states follow the federal DOL's lead in their determinations and you can use them in your compliance research. Read about [opinion letters here](#).

Senate Drafts Health Care Bill

A discussion draft of the U.S. Senate Republican Health Care Bill was released on June 23, 2017. The amended law would potentially:

- Attempt to stabilize insurance markets.
- Remove current healthcare mandates requiring healthcare purchase by individuals.
- Assist with health insurance affordability.
- Preserve access to care for individuals with preexisting conditions, and allow children to stay on their parents' health insurance through age 26.
- Reinforce Medicaid by granting flexibility to states.

No action was taken before the July 4th recess. View a section by section summary of the discussion draft [here](#).

Posters Updated

E-Verify – On June 13, 2017, the federal Department of Justice updated its E-Verify Right to Work posters website. These posters must be displayed in English and Spanish by participating employers to inform their current and prospective employees of their legal rights and protections. Find and print the updated posters [here](#).

USERRA – The Department of Labor updated this poster in April of 2017. Federal law requires employers to notify employees of their rights under USERRA. Employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees. You may [download the poster here](#).



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