

Stalled overtime rule presents dilemma for employers

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Businesses are finding themselves in a quandary with respect to a temporary injunction issued last week by a Texas federal court that halted Thursday's scheduled implementation of new overtime rules.

There is no clear answer as to how employers should proceed, and much will depend on their circumstances, although any action they take holds potential risks, say experts.

"It's a mess," said John E. Thompson, a partner with Fisher & Phillips L.L.P. in Atlanta.

The ruling would have raised the threshold for exempt employees to \$913 a week, or \$47,476 annually for a full-time employee, compared with the current \$455 a week, or \$23,660 annually.

Many employers had already prepared for the rule's implementation by in some instances raising employees' salaries so they continued to be exempt, or by planning to introduce such changes this week.

But in a surprise sweeping ruling last week, Judge Amos L. Mazzant III issued the temporary injunction, stating it was clear Congress intended for the overtime exemption to apply to employees "doing actual executive, administrative and professional duties," rather than being based upon their salary level.

For now, "we go back to where we were six months ago," said Bennett Pine, a shareholder with Anderson Kill P.C. in New York. "Clearly, the overtime regulation is not going into effect Dec. 1, or any time shortly after that."

The U.S. Department of Labor has said it is considering its legal options, which include an appeal to the 5th U.S. Circuit Court of Appeals in New Orleans, although there is a question as to how quickly it can be appealed.

There is also the question of whether — and if so, when — the issue will reach the U.S. Supreme Court. This raises in turn the question of a 4-4 split on the issue under its current staffing, said Patrick M. DePoy, an associate with Franczek Radelet P.C. in Chicago.

There is also the possibility of congressional action. Legislation could kill the overtime rule completely, introduce a less dramatic increase in the overtime exemption salary threshold, or target for exemption from the regulation particular segments, such as nonprofits and small businesses.

Meanwhile, there is the question of whether, or if, Judge Mazzant, who is an Obama appointee, will make the temporary injunction permanent, or even be persuaded to let the regulation's implementation proceed.

Among employers' dilemmas at this point is whether to roll back any salary increases they have already introduced or announced, and what impact a rollback could have on labor relations.

At the same time, businesses that had not yet implemented the regulation could eventually have to implement them retroactively, and conceivably could also be held liable for not having done so earlier.

"There are so many imponderables right now," said Mr. Thompson. Employers must make a decision "that has to be tailored to each employer's particular circumstances."

Employers should evaluate the current landscape, then balance the potential advantages and disadvantages of any course of action, said Mr. Thompson.

"It's really truly an individualized decision. I don't think there's any one-size-fits-all" solution in this situation, said Alexander J. Passantino, a partner with Seyfarth Shaw L.L.P. in Washington.

David E. Dubberly, a member of law firm Nexsen Pruet L.L.C. in Columbia, South Carolina, said, however, that employers who have already implemented the new regulation "are going to find it difficult to just kind of roll back these changes, so what

they're going to want to do is just basically kind of wait and see what is going to happen with the new rules before deciding what to do next in most cases.”