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ALERT

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ANOTHER ONE BITES THE DUST: TEXAS COURT INVALIDATES EAP SALARY REGS

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On November 15, 2024, in *Commerce v. USDOL*, a federal district court in Texas invalidated a Biden Administration regulation that had attempted to substitute a lofty salary test for statutory language that defined who qualifies as an executive, administrative, or professional (EAP) employee exempt from overtime. This important decision is but the latest in a series that is shaking the administrative state to its core and reasserting the supremacy of statutes enacted by Congress over regulations concocted by Federal agencies.

The Fair Labor Standards Act (FLSA) was passed by Congress in 1938 to establish minimum wages and require an overtime premium of 50 percent of a worker's hourly wage ("time and a half") for every hour worked over 40 in any week. But there were a number of exceptions. Most lawyers, teachers, and commissioned salespersons were not entitled to overtime or minimum wage, and the statute also exempted from overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity."

The statute expressed the exemption criteria strictly in terms of duties, but over the years the U.S. Department of Labor (DOL) developed certain short-cut tests based on the salaried workers' pay, reasoning that anyone who earned less than a certain level of salary wouldn't likely be discharging the requisite job responsibilities to qualify for the exemption. These were adopted by regulation through the Administrative Procedure Act (APA) notice and comment process. There was a major revamp in 2004, when the salary levels were increased to catch up with inflation; and in 2016, the Obama Administration tried – but failed – to impose an even more substantial minimum salary increase than what was contemplated in the 2024 rule.

Last April DOL issued a rule that would have raised the minimum salary at which EAP employees are exempt from minimum wage and overtime pay under the FLSA – currently $684/week – to $844/week starting in July 2024, with a further hike to $1,128/week in January 2025. DOL estimated that this change would render about three million additional employees nonexempt who were previously exempt, with no change in their duties. The rule also sought to implement a mechanism to automatically increase the salary level every three years, based on earnings data.

The State of Texas and several business organizations sued on behalf of themselves as employers. They asserted that the 2024 Rule injured them by forcing them either to pay overtime to newly nonexempt employees, or to limit the hours that those employees work, thereby foregoing their services. The economic impact was estimated in the billions. They moved for summary judgment against the government.

The Court invoked *Loper Bright*, last term's blockbuster Supreme Court decision that revoked the deference that Federal departments and agencies had long enjoyed when their regulations were challenged in court. And they noted that under the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law."

The law, in this case, was the FLSA and its "duties" test, which never included a minimum salary component. Texas and the business organizations argued that the 2024 rule with its salary thresholds and automatic-updating mechanism were "in excess of statutory jurisdiction, authority, or limitations" and were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The Court agreed. Statutory text that speaks only in terms of job duties cannot be overridden by other criteria, such as salary. "Put simply, in the EAP exemption, Congress elected to exempt employees based on the capacity in which they are employed. It's their duties and not their dollars that really matter." Moreover, the Court observed that the "bona fide" requirement is part of the EAP exemption. "Bona fide" means in good faith, with sincerity; genuinely. Congress chose those words for a reason.

DOL strayed too far from its statutory authority when it tried to substitute a salary test for the FLSA's duties test. This makes the "ratchet" provision in the 2024 rule – the automatic salary escalator installed in the regulation – particularly suspect. While Congress gave DOL authority to define and delimit the EAP exemption, that authority is subject to certain limits. A minimum salary requirement can be a proxy for the duties test but may not rise so high as to displace it. And, as for the automatic escalator clause, the Court held that "nothing in the EAP Exemption authorizes the Department to set its rulemaking on autopilot and evade the procedural requirements of the APA."

Turning last to remedy, the Court concluded that vacating the flawed rule was the only solution. The final rule is vacated and set aside, and the matter remanded to USDOL for further consideration.

OBSERVATION

Commerce v. USDOL follows in the footsteps of *Loper Bright* and a reinvigorated APA. The government can't subvert the text of a statute and must follow the notice-and-comment rules. Congress says what it means and means what it says. This is the lesson in statutory construction that the late Justice Antonin Scalia strove to teach. Maybe, finally, we're learning.

Questions? Need more information? Call Betsy Dorminey at 404-365-0900.

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