


DOL Posits Texas Court Erred in Ruling DOL Lacked Authority to Set Minimum Salary for Exempt Employees

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In May 2016 the United States Department of Labor (“DOL”) announced its new rule increasing the minimum salary required to be paid to employees to qualify for exemption from the overtime pay obligations of the Fair Labor Standards Act (“FLSA”). The increased minimum salary of \$913 per week was scheduled to take effect on December 1, 2016. A group of states, including Michigan, filed a lawsuit in the federal district court for the Eastern District of Texas challenging the DOL’s authority to set a minimum salary level for exempt employees. The court ruled on November 22, 2016 that the

minimum salary requirement was unlawful: the FLSA “does not grant the Department [of Labor] authority to utilize a salary level test.” The court enjoined the DOL from enforcing the new minimum salary.

On December 1, 2016, the DOL appealed this ruling to the Fifth Circuit Court of Appeals (covering Texas, Mississippi and Louisiana). The DOL filed its brief in support of its appeal on December 15, 2016. The state-plaintiffs defending the injunction filed their response on January 17, 2017. On January 20, 2017, President Trump was inaugurated. On January 25, 2017, the DOL requested and was granted the first of several extensions of time for filing



its reply brief. On Friday, June 30, 2017, the DOL filed its reply brief in support of its appeal of the injunction that had suspended enforcement of its May 2016 overtime rule.

In its reply brief, the DOL asserted that the district court erred in ruling that it lacked the authority to establish a minimum salary test for exempt employees. The DOL noted that it had included a minimum salary test for exempt employees from the FLSA's inception in 1938. The DOL's most recent increase before 2016 was adopted in 2004. If the 2016 increase in the minimum salary level was illegal, so was the 2004 increase to \$455 per week.

The DOL noted that the Fifth Circuit Court of Appeals had already ruled on the issue of its authority in 1966. At that time, the Fifth Circuit ruled the minimum salary level test was legal. *Wirtz v Mississippi Publishers Corp*, 364 F.2d 603 (5th Cir. 1966). The *Wirtz* opinion, written by then-Judge Warren Burger said, in part, “[e]very circuit [court] to consider the issue has upheld the salary-level test as a

permissible component of the EAP [Executive, Administrative, Professional] regulations.” DOL brief at p. 10. Even the United States Supreme Court has approved the DOL's requirement of a minimum salary for exempt employees. DOL brief at p. 11, citing *Auer v Robbins*, 519 U.S. 452 (1997). The

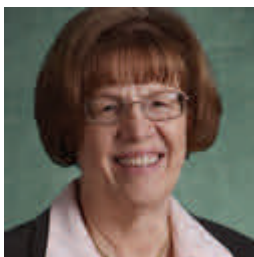
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district court erred in ruling otherwise.

The DOL observed that the district court did not rule that the \$913 per week salary level was arbitrary and capricious or unsupported by the administrative record; only that the DOL lacked authority to set a minimum salary level for exempt employees. The DOL did not advocate keeping the \$913 per week minimum salary level. Rather, it “intends to undertake further rulemaking to determine what the salary level should be” once the litigation is concluded. DOL brief at p.17. The

DOL is not going to initiate rulemaking on what the minimum salary level should be until the issue of its authority to establish a minimum salary level is settled. In the meantime, the DOL “soon” will publish a “request for information seeking public input on several questions that will aid in the development of a proposal” on the “appropriate” salary level. DOL brief at p. 18.

When the case was first appealed, the Fifth Circuit Court of Appeals had agreed to schedule oral argument on the appeal as soon as possible following the filing of the DOL’s reply brief. To date, the Fifth Circuit has not scheduled oral argument. For now, the injunction against enforcement of the \$913 per week minimum salary level remains in place. We will provide updates as they occur.



About the Author. *Karen L. Piper represents and counsels employers on employment law issues. She has conducted a number of employment investigations and training seminars for a variety of clients and has also successfully defended numerous discrimination and wrongful discharge cases at the administrative, trial, and appellate levels. Karen is a frequent speaker and writer for national and local industry associations.*

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