HINMAN STRAUB PC
ATTORNEYS AT LAW

121 State Street
Albany, New York 12207-1693
Tel: 518-436-0751
Fax: 518-436-4751

MEMORANDUM

FROM: Hinman Straub P.C.

RE: **Federal Court Blocks "White Collar" FLSA Overtime Exemption Changes**

DATE: November 23, 2016

Overview

As you are most likely aware, significant changes to the minimum salary necessary for a worker to be classified as an executive, administrative, or professional employee exempt from the Fair Labor Standards Act ("FLSA") overtime regulations (the "EAP threshold") were scheduled to go into effect on December 1, 2016. Specifically, effective December 1, 2016, the EAP threshold was scheduled to increase from the current $455 per week, or $23,660 annually, to $913 per week, or $47,476 annually.

However, on November 22, 2016 the District Court for the Eastern District of Texas granted the preliminary injunction and stayed the implementation of the Final Rule nationwide. The Court held that the Department of Labor exceeded its delegated authority and ignored Congress's intent of the FLSA. Notably, the Court ruled that the injunction applies nationwide—meaning that New York employers will not be forced to comply with the changes to the Final Rule unless the injunction is lifted by the Court. However, employers should be aware that failure to comply with the December 1, 2016 effective date could result in liability through private litigation.

The Final Rule

On May 18, 2016, the United States Department of Labor amended 29 CFR Part 541 and issued its Final Rule implementing revisions to the FLSA overtime exemption law. The Final Rule more than doubled the minimum salary necessary for a worker to be classified as an executive, administrative, or professional employee exempt from the FLSA overtime regulations (the "EAP threshold"). Effective December 1, 2016, the Final Rule would have increased the EAP threshold from the current $455 per week, or $23,660 annually, to $913 per week, or $47,476 annually.

The Final Rule was also set to increase the minimum salary for the Highly Compensated Employee exemption (the "HCE threshold") from $100,000 to $134,004, and allows employers to begin using nondiscretionary bonuses and incentive payments to determine whether employees are exempt from overtime requirements.

Multi-State Challenge to the Final Rule

Following the issuance of the Final Rule, the State of Nevada and twenty (20) additional states filed suit against the United States Department of Labor in an action entitled State of Nevada et al v. United States Department of Labor et al, Case No. 16-cv-00731, in the United States District Court of the Eastern District of Texas challenging the validity of the Final Rule.

On October 12, 2016, the Plaintiffs moved for an emergency preliminary injunction to prevent the Final Rule from taking effect on December 1, 2016.

On November 22, 2016, the District Court for the Eastern District of Texas granted the preliminary injunction and stayed the implementation of the Final Rule. The Court held that the Department of Labor exceeded its delegated authority and ignored Congress's intent of the FLSA. Of particular significance, the Court ruled that the injunction applies nationwide—meaning that New York employers will not have to comply with the changes to the Final Rule unless the injunction is lifted by the Court.

Final Rule and Employer Liability if Overturned on Appeal

Following the District Court's ruling, the Department of Labor issued a statement that it strongly disagreed with the Court's ruling and that:

> "[t]he department's overtime rule is the result of a comprehensive, inclusive rule-making process, and we remain confident in the legality of all aspects of the rule. We are currently considering all of our legal options."

If the decision is reversed by the Fifth Circuit, and the employer has not been in compliance on the December 1st effective date given the existence of the preliminary injunction a difficult question arises:

> Whether the existence of the preliminary injunction precludes any liability between the December 1, 2016, effective date and the date the Fifth Circuit Court of Appeals issues a decision?

District Courts are currently determining this very question in connection with another Department of Labor regulation that was invalidated by a District Court, but later reversed on appeal. That regulation concerned the companionship exemption to home healthcare workers employed by third parties. As you may recall, in 2013, the Department of Labor issued a new regulation removing the exemption. In December 2014, the Home Care Association of America sued the Department of Labor in the District Court for the District of Columbia, seeking to enjoin enforcement of the rule, and the District Court vacated the rule.

The D.C. Circuit Court of Appeals then reversed the District Court decision eight months later. Some employers, relying on the District Court's injunction, did not pay overtime. When the D.C. Circuit ruled, reversing the District Court's decision, employers in several states were sued for unpaid overtime for the eight-month period between the District Court's decision and the Circuit's reversal. One District Court in the Southern District of Ohio held the employer is not liable during the period the injunction was in place (Bangoy v. Total Homecare Solutions, LLC, No. 1:15-cv-00573-SSB, 2015 WL 12672727 (S.D. Ohio. Dec. 21, 2015)), but a District Court in Connecticut held just the opposite, and recently granted a request for an interlocutory appeal to the Second Circuit Court of Appeals, which is binding over Federal matters in New York. See Kinkead v. Humana, Inc., No. 3:15-cv-01637 (JAM), 2016 U.S. Dist. LEXIS 143000 (D. Conn. Oct. 13, 2016) (certifying for interlocutory appeal question of whether employer can be liable during period home care regulation was invalidated by district court and noting conflict).

Potential Impact of New Federal Administration on the Final Rule

Since the Department of Labor announced its proposed rule, various bills have been introduced in Congress to block the rule entirely, delay its implementation, or stagger the increases over time. However, President Obama vowed to veto any of these bills if passed by Congress.

It is unclear what impact the Trump Administration might have on the Final Rule. Once in office, President Trump may view the various legislative proposals differently. Moreover, if an appeal from the District Court's decision is still pending when such legislation is passed, the appeal may become moot. The Trump Administration also might direct the Department of Labor to abandon the appeal if it is still pending at the presidential inauguration.

We will continue to monitor new developments regarding the impact of the Trump Administration on the Final Rule and provide updates as they become available.

Proposed New York State Exemption Changes

While the increases to the EAP thresholds have been blocked on the Federal level, this development does not affect the New York State Department of Labor's proposed changes to New York's overtime exemption regulations, which are currently in the comment period.

On October 19, 2016, the New York State Department of Labor issued a notice of proposed rulemaking to increase the overtime exemption income threshold for executive and administrative employees from $675 per week to a series of annual increases depending on the location of the employer within New York State. The increases to the overtime exemption income threshold are similar in structure to the recently enacted NYS Minimum Wage changes.

The following chart summarizes the threshold changes under the FLSA, which is presently on hold, and the proposed New York State regulations:

Effective Date	Minimum Salary Per Week				
	FLSA (on hold)	**NYC 11 or more employees**	**NYC 10 or less employees**	**Nassau, Suffolk and Westchester**	**Rest of State**
Current	$455.00	$675.00	$675.00	$675.00	$675.00
Dec. 1, 2016	$913.00	$675.00	$675.00	$675.00	$675.00
Dec. 31, 2016	$913.00	$825.00	$787.50	$750.00	$727.50
Dec. 31, 2017	$913.00	**$975.00***	$900.00	$825.00	$780.00
Dec. 31, 2018	$913.00	$1125.00	**$1012.50***	$900.00	$832.00
Dec. 31, 2019	$913.00	$1125.00	$1125.00	**$975.00***	$885.00
Dec. 31, 2020	$913.00**	$1125.00	$1125.00	$1050.00	**$937.50***
Dec. 31, 2021	$913.00**	$1125.00	$1125.00	$1125.00	$937.50

* Proposed New York State Threshold Exceeds FLSA Threshold

** In the Final Rule, the USDOL will implement automatic increase to the EAP salary threshold through indexing.

The notice of proposed rulemaking for the New York State overtime exemption is available for public comment for a period of forty-five (45) days from October 19, 2016. Currently, the public comment period is scheduled to conclude on or about December 5, 2016. Assuming that the proposed regulations are not altered following the 45-day comment period, the New York Department of Labor will publish a final notice of rulemaking and the regulations will most likely go into effect with the first scheduled increase on December 31, 2016.

The proposed New York State regulations apply to employers in the building service industry, nonprofit industry, hospitality industry and all other miscellaneous for-profit businesses in the State of New York. Essentially, the regulations propose dramatic increases in the overtime exemption threshold in over the next few years. Thus, regardless of whether Federal courts ultimately implement the changes to the FLSA at the Federal level, New York employers must be aware of increases in New York's income threshold requirements.

Hinman Straub is available to provide a more in-depth analysis of the proposed New York State regulations, the status of the Final Rule, and their potential impact on your existing policies and procedures. If you have any additional questions, please contact Joseph M. Dougherty at (518) 436-0751 or jdougherty@hinmanstraub.com.