DON’T FORGET ABOUT DOL’S NEW OVERTIME RULES JUST YET

In November, a federal court in Texas issued a nationwide injunction blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. Because of the injunction, the new overtime regulations did not go into effect on December 1, 2016, as planned. However, they have also not completely gone away, and their fate is still uncertain.

The Obama administration immediately appealed the injunction to the Fifth Circuit Court of Appeals and asked for an expedited proceeding, which was granted. The DOL filed its initial brief on December 15, 2016, and the twenty-one states, which had opposed the implementation of the new overtime regulations and were granted the injunction, filed their brief on January 17, 2017. DOL’s final reply brief was originally due January 31, 2017. However, since President Trump was inaugurated on January 20, 2017, the Trump administration has asked for three extensions to file its reply brief, all of which have been granted. The first two extension were requested so that the new administration could consider its position on the new regulations and whether it would continue to defend them. Most recently, on Wednesday, April 19, 2017, the Fifth Circuit granted the DOL another two months, until June 30, 2017, to file its brief due to the fact that Alexander Acosta, the nominee for Labor Secretary, has not yet been confirmed.

It is not yet clear what stance the Trump administration will take on the overtime regulations, as there has been no official position taken by the President and nominee Acosta did not take a definitive position during his confirmation hearings. However, even if the administration decides not to pursue the appeal, others may. For example, the AFL-CIO’s Texas branch has petitioned to join the litigation as a defendant due to its concerns that the current administration will not adequately defend the prior administration’s regulations, and the national AFL-CIO has threatened to sue the DOL if it tries to scale back the regulations in any way. Additionally, the lower court, which issued the initial temporary injunction, could still issue a permanent injunction or rule on a pending motion for summary judgment, as it declined to halt proceedings while the Fifth Circuit reviewed the injunction. Therefore, these overtime regulations should still be on employers’ radar, and we will keep you updated on further developments.

OSHA NEW ANTI-RETALIATION RULES GOES INTO EFFECT DECEMBER 1, 2016

On November 28, 2016, a Texas federal district court denied a motion for an injunction to block the December 1, 2016 implementation of the anti-retaliation provisions found in OSHA's new injury and reporting rule. Therefore, starting tomorrow, OSHA's new anti-retaliation provisions will limit post-accident and post-injury discipline and drug testing, as well as how accident and injury-related incentive programs can be administered by employers. These new rules will apply to all employers. Accordingly, all employers should review their safety-related policies and practices to determine if their existing policies or post-accident drug testing policies violate the new anti-retaliation rule.

Additionally, starting January 1, 2017, companies with 250 or more employees must electronically submit their OSHA 300, 300A, and 301 Forms, which cover information about workplace injuries and illnesses. Companies with 20-249 employees in certain "high risk" industries such as construction and manufacturing must electronically submit their OSHA 300A Forms. Our other coverage of these new OSHA rules can be found at our previous blogs here and here .

BREAKING: NEW DOL OVERTIME RULE WILL NOT GO INTO EFFECT DECEMBER 1

Yesterday, a federal judge in Texas issued a nationwide injunction (full decision here) blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. The judge ruled that the twenty-one states and certain business groups that had sued to block the implementation of the regulations were likely to be successful on the merits of their case and that there would be harm to the states and businesses if the rule was implemented on December 1.

The basis for the ruling is that the new salary basis test is a *de facto* salary test that no longer takes an employee's job duties into consideration. The Court found that the type of work actually performed by the employee is what Congress intended the exemption to be based on, and that the updated DOL rule supplanted the duties test with a minimum salary threshold. The Court found that this was outside the intent of Congress and, therefore, outside of the DOL's statutory authority. Additionally, the judge ruled that the DOL did not

have statutory authority to implement the automatic increase provision of the rules, which would have automatically readjusted the minimum weekly salary level every three years.

Although this may not be the end of litigation over this matter, the DOL's new overtime rules will not take effect on December 1, 2016, and therefore, employers do not need to implement any changes. For those employers who have already implemented changes in preparation for the updated overtime rules, they have the option to keep those changes in place or reverse those changes and wait to see how this matter ultimately resolves. However, employers must keep in mind that, although the minimum salary level will remain, for now, at $455 per week, to be considered exempt, employees must still meet the job duties tests.

FEDERAL DISTRICT COURT TO RULE NOVEMBER 22, 2016 ON ATTEMPT TO BLOCK NEW OVERTIME RULES

As we have previously reported, the U.S. Department of Labor (DOL) has issued an update to the federal overtime regulations defining the overtime exemption for executive, administrative, and professional employees, known as "white-collar" exemptions. These changes focus primarily on updating the salary level for white-collar employees including increasing the minimum salary threshold from $455 per week to $913 per week, among other changes. The new rule is set to go into effect on December 1, 2016.

The new overtime regulations have been controversial and subject to various challenges. Specifically, twenty-one states and certain business groups have sued the DOL in Texas federal district court in an attempt to block the DOL from implementing the new overtime rules. Yesterday, November 16, 2016, the federal district court held a hearing on a motion to enjoin the DOL from implementing the new overtime rules. During the hearing, the federal district court judge stated that the Court would make a decision on the motion for a preliminary injunction by November 22, 2016. This is welcome news given that the new overtime rules' effective date is just two weeks away.

During the motion hearing, the business groups and states made various arguments about why the rule should not be implemented, including that the drastic increase in the salary threshold was a "fundamental, radical social policy change." It was also argued that implementation of the new overtime rules should be at least delayed until it could be reviewed by President-elect Trump's administration. In response to that argument, the Court stated that what a new administration may do with the new overtime rules is not relevant

and too speculative to affect as how the Court would rule. On the other hand, the DOL argued that the agency had reached these new salary levels in a reasonable way through the rulemaking process, and as a result, agency should be entitled to deference from the Court.

The Court seemed receptive to some, but not all, of the arguments to block implementation of the new rules. The judge questioned whether the new salary basis was a *de facto* salary-only test, why the change was so drastic, and how 4.2 million employees could go from being exempt one day to non-exempt the next, despite having the same job duties. However, he did state that his role was not to get involved in policy making and he would not base his decision on whether he thought the rule was good or bad.

It is premature to state for certain as to how the Court may rule; so, the wise course of action for employers, for now, is to continue to move forward with plans on how to implement the new overtime regulations for their workforces on December 1st. We will, of course, provide you with an update regarding the Court's decision as soon as it is issued.

EMPLOYMENT LAWSCENE ALERT: VOTING LEAVE – WHAT WISCONSIN EMPLOYERS NEED TO KNOW

Tuesday, November 8, 2016 is Election Day. While there is no federal law that requires employers to grant employees leave to vote, Wisconsin law does require voting leave. Wis. Stat. § 6.67. What Wisconsin employers need to know:

- All Wisconsin employers are required to give employees who are eligible to vote up to three consecutive hours of leave to vote while the polls are open. Wisconsin's polls are open from 7:00 AM – 8:00 PM.
- Employers cannot deny this leave on the basis that employees would have adequate time outside of their working hours to vote while the polls are open.
- The law does not require that these hours are paid. However, employers should be cautious about reducing an exempt employee's pay.
- The employee must request the time off to vote prior to the election.
- The employer can specify which three consecutive hours an employee is permitted to utilize as voting leave.
- Employees cannot be penalized for utilizing voting leave.

Two other provisions that Wisconsin employers should be aware of are 1) they may not refuse to let employees serve as election officials under Wis. Stat. § 7.30 or make any threats or inducements to prevent employees from doing so; and 2) they cannot distribute printed

materials to employees that contain a threat that if a particular party or candidate is elected that the business will shut down, in whole or in part, or that the salaries or wages of employees will be reduced. Wis. Stat. § 12.07(2)-(3).

EMPLOYMENT LAWSCENE ALERT: OSHA DELAYS ENFORCEMENT OF ANTI-RETALIATION PROVISIONS

On October 12, 2016, the Occupational Health and Safety Administration ("OSHA") agreed to further delay the enforcement of the anti-retaliation provisions of the injury and illness tracking rule until December 1, 2016. Enforcement was originally scheduled to begin August 10, 2016 and then delayed until November 10, 2016. OSHA's agreement to once again delay enforcement of its new anti-retaliations provisions is in response to a request from the U.S. District Court for the Northern District of Texas, which is currently considering a motion challenging OSHA's new rules.

Despite its self-imposed delay in enforcement of its anti-retaliation provisions, last week, OSHA released a memo with examples discussing in more detail how the new anti-retaliation amendments will be interpreted and implemented by OSHA. *See* OSHA Memorandum for Regional Administrators (10/19/2016).

OSHA explained that its purpose in including the new anti-retaliation provisions is to address workplace retaliation in three specific areas: (1) Disciplinary Policies; (2) Post-accident Drug Testing Programs; and (3) Employee Incentive Programs. Although neither employee disciplinary policies, post-accident drug testing programs, or employee incentive programs are expressly prohibited by the new rules, employers will need to be careful about how their policies or programs are drafted and enforced so as to not, in the eyes of OSHA, discourage or deter employees from reporting work-related injuries or illnesses.

EMPLOYMENT LAWSCENE ALERT: YOUR ARBITRATION AGREEMENTS WITH EMPLOYEES

MAY BE INVALID

Last week, the Seventh Circuit Court of Appeals issued a decision stating that class waivers in arbitration agreements for employees are invalid. The Court in *Lewis v. Epic Systems Corp.* adopted the controversial position of the National Labor Relations Board (NLRB) and found that a collective and class action waiver in an employer's contract violated Section 7 of the National Labor Relations Act (NLRA) by prohibiting employees from engaging in collective activity and forcing them into individual arbitration for their wage and hour claims.

The Seventh Circuit based its decision on the concept that the NLRA prohibits an employer from barring workers from engaging in concerted activity. The Court's reasoning followed that, because class and collective actions could be considered concerted activity, an agreement that prohibited such activity was a violation of the NLRA. The Court found that individual arbitration was not bargained for by the employees and could not be rejected without penalty to the employees. Because it found that the provision was illegal under the NLRA, the Court held that the Federal Arbitration Act (FAA) did not mandate enforcement because, under the FAA, an arbitration agreement is not valid where grounds exist for the revocation of the agreement. The Seventh Circuit determined that violation of the NLRA constituted such ground for revocation. Use of arbitration agreements with class and collective prohibitions has long been a point of contention with the NLRB, but until now, it had been an issue that the NLRB was finding little success with in the circuit courts. However, the Seventh Circuit's decision gives the NLRB additional standing for its position, particularly in Wisconsin, Illinois, and Indiana, where the decision applies.

This decision creates a circuit split because the Fifth Circuit has ruled in two separate cases (*Murphy Oil and D.R. Horton*) that mandatory individual arbitration clauses in employment agreements are enforceable. The Fifth Circuit found that the NLRB, in determining that collective and class waivers were illegal under the NLRA, did not give proper deference to the FAA because the NLRA does not contain any specific language that prevents arbitration agreements from being enforced pursuant to their terms. The Fifth Circuit found that the NLRB's interpretation that such clauses violated the NLRA by prohibiting concerted activity was not entitled to the level of deference that the Seventh Circuit found it was. The Second and Eighth Circuits have issued rulings similar to those of the Fifth Circuit. Now with a split in the federal circuits, the issue is ripe for consideration by the U.S. Supreme Court. However, with Justice Scalia's recent death, the Court's precarious 4-4 split, and the political balance of the Court dependent upon the outcome of the Presidential election, the outcome on this issue before the U.S. Supreme is anything but certain, even taking into consideration the Supreme Court's recent strong support for the enforceability of arbitration provisions.

Therefore, until this decision is overruled by the Supreme Court, employers in Wisconsin, Illinois, and Indiana should not limit their employees to individual arbitration or should, at the

least, allow employees to opt out of mandatory individual arbitration without penalty.

U.S. DOL ANNOUNCES THAT IT WILL PUBLISH FINAL RULE TO UPDATE OVERTIME REGULATIONS

Today, the U.S. Department of Labor announced that it will publish on May 23, 2016 its Final Rule to update the federal regulations defining the overtime exemption for executive, administrative, and professional employees or otherwise known as ”white-collar” employees. The pre-publication version of the Final Rule is, however, available now. The final rule will become effective December 1, 2016.

The Final Rule focuses primarily on updating the salary level requirement for white-collar employees, increasing the salary level requirement from $455 per week ($23,660 annually) to $913 per week or $47,476 annually for a full-year employee. The Final Rule amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. The Final Rule also sets the total annual compensation requirement for highly compensated employees (HCE) subject to minimal duties test to $134,004 up from the current $100,000 salary threshold.

The initial increases to the standard salary level from $455 to $913 per week and HCE total annual compensation requirement (from $100,000 to $134,004 per year) will be effective on December 1, 2016. Future automatic updates to those salary level thresholds will be automatically updated every three years beginning on January 1, 2020.

Currently, for an employee to be exempt from the minimum wage and overtime requirements under the Fair Labor Standards Act (FLSA), an employee must be paid on a salary basis meaning that the employee must receive a predetermined amount of at least $455 per week which cannot be subject to a reduction because of variations in the quality or quantity of the work performed. In addition, the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (“duties test”).

The Final Rule is not changing any of the existing job duty requirements for employees to qualify for the white collar overtime exemption. The Final Rule is also not changing the HCE duties test. The DOL expects that the standard salary level set in the Final Rule and automatic updating will work effectively with the duties test to distinguish between overtime-eligible workers and those who may be exempt.

The effect of the increase in the salary level test from $455 per week to $913 per week will result in certain employees who are now considered exempt under the current regulations to lose their overtime exemption effective December 1, 2016 unless their employers increase their salary level to the new salary level requirement. The DOL estimates that the change in the salary level requirement will permit approximately 4.2 million more employees who are not currently eligible for overtime under the FLSA to be entitled to overtime once the Final Rule becomes effective on December 1, 2016.

O'Neil Cannon will be hosting a seminar on June 8, 2016 at the Country Springs Hotel in Pewaukee, Wisconsin providing important information and insight for employers on the new overtime rules. Please visit our firm website for more information.

EMPLOYMENT LAWSCENE ALERT: DEFEND TRADE SECRETS ACT OF 2016: EMPLOYERS MUST INCLUDE NEW WHISTLEBLOWER IMMUNITY NOTICE IN CONFIDENTIALITY OR NON-DISCLOSURE AGREEMENTS

On May 11, 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA") which amends the Economic Espionage Act (18 U.S.C. § 1831, *et seq.*).

The DTSA creates a private cause of action for trade secret misappropriation under federal law and opens a direct avenue for trade secret cases to proceed in federal court. While making it easier for employers to bring suits for trade secret misappropriation in federal court, the DTSA does not replace or preempt state trade secrets laws such as the Wisconsin Uniform Trade Secrets Act ("WUTSA") (Wis. Stat. § 134.90 *et seq.*). This means that an employer who believes that one of its trade secrets may have been misappropriated may proceed under either the DTSA or the WUTSA, or both, to enjoin the misappropriation of a trade secret and remedy the harm.

The DTSA has a similar definition of "trade secrets" that is found in the WUTSA. Like the WUTSA, the DTSA defines the term "trade secret" to include all forms and types of financial, business, scientific, technical, economic, or engineering information where reasonable measures are taken to keep such information secret and the information derives independent economic value, actual or potential, from not being generally known to the public. The DTSA

also defines the term “misappropriation” relative to the theft of a trade secret identically to the way it is defined by the WUTSA.

While appearing similar, the DTSA, however, differs significantly from the WUTSA on two fronts. First, the DTSA, unlike the WUTSA, permits an owner of a trade secret to obtain an *ex parte* seizure order providing for the seizure of property necessary to prevent the further dissemination or use of a misappropriated trade secret. Similar seizure remedies are found in the Copyright Act and the Lanham Act. Such an order could include, for example, an order seizing an employee’s computers or smartphone or even an order seizing an employee’s new employer’s computers if evidence exists that the misappropriated trade secret was transferred and disseminated by a former employee to his/her new employer. This *ex parte* seizure remedy is only available under extraordinary circumstances. Realizing that such a powerful remedy could be subject to abuse, Congress included a provision within the DTSA that permits a person who is subject to a wrongful or excessive seizure to recover civil damages.

Second, the DTSA has a whistleblower protection provision that is not found in the various Uniform Trade Secrets Acts enacted by various states, like in Wisconsin under the WUTSA. Specifically, the DTSA amends 18 U.S.C. § 1833(b) to provide criminal and civil immunity under any federal or state trade secret law for the disclosure of a trade secret that either is made: (i) in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law; or (ii) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

Overlaying this immunity protection under the DTSA is also a notice requirement. Specifically, starting May 12, 2016 employers must give employees, contractors, and consultants notice of this potential immunity in any contract or agreement that governs or protects the use of a trade secret or other confidential information entered into or amended after this date. The DSTA requires that this whistleblower immunity notice be expressly provided in a contract protecting trade secrets or should at least contain a notice provision that cross-references a policy that contains the employer’s whistleblower reporting policy for a suspected violation of law. Failure to provide this notice, however, does not invalidate the enforceability of the agreement or preclude an employer from bringing a claim under the DTSA. Rather, failure to provide the required whistleblower immunity notice simply precludes an employer from recovering exemplary damages or attorneys’ fees under the DTSA.

To comply with the new whistleblower immunity notice requirement under the DTSA, all employers must include this notice in any contract protecting the use of trade secrets or confidential information entered into or modified on or after the effective date of the DTSA (May 12, 2016) involving any employee or any non-employee individual performing work as a contractor or consultant for the employer. Employers are not required to amend existing

contracts. Employers should take immediate action to incorporate the DTSA's new required whistleblower immunity notice in all new or modified confidentiality or non-disclosure agreements entered into on or after May 12, 2016.

EMPLOYMENT LAWSCENE ALERT: NEW OSHA ANTI-RETALIATION PROVISION REQUIRES EMPLOYERS TO RETHINK THEIR SAFETY-RELATED POLICIES

Last week, the Occupational Safety and Health Administration (OSHA) finalized new record-keeping and reporting rules that require certain employers to electronically submit information about workplace injuries and illnesses to OSHA. The electronic reporting requirements of the rule apply only to employers with 250 or more employees and to employers with between 20 and 249 employees in certain "high-risk" industries, such as construction and manufacturing. A full list of the affected industries can be found here . The full rule (which can be found here) goes into effect January 1, 2017, while certain provisions, like the anti-retaliation provision, go into effect August 10, 2016. Non-personal injury and illness information reported under the rule will be posted on a publicly accessible OSHA website. The new rule does not change the requirement that employers with 10 or more workers in most industries prepare injury reports, compile a log of these incidents, and complete an annual summary of work-related illness and injuries, which OSHA can access during an investigation.

The new rule further requires employers to inform workers of their right to report work-related injuries and illnesses without fear of retaliation and provides additional information on employees' rights to access workplace injury data. Moreover, OSHA's new rule prohibits any workplace policy or practice that could discourage employees from reporting workplace injuries or illnesses. Such policies subject to greater scrutiny under OSHA's new anti-retaliation rule could include post-accident drug testing policies. Employers will have to review their safety-related policies to determine if their policies or practices run afoul of OSHA's new anti-retaliation rule or otherwise discourage employees from reporting workplace safety incidents. The anti-retaliation provisions apply to all employers.

OSHA's stated purpose for the additional reporting and public access are to increase workplace transparency and to encourage employers to increase their efforts to prevent work-related injuries and illnesses. However, employers should be cautioned that such information will make it easier for OSHA to target companies with multiple injuries or illnesses

for compliance and enforcement actions, despite any precautions that are being taken, as well as open up companies with high rates of illness or injury to increased union organization.

Employers of all sizes and in all industries should continue to strive to achieve workplace safety. They should also immediately review their workplace safety policies to make sure that appropriate anti-retaliation provisions are included.