

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF NEVADA, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF
LABOR, et al.,

Defendants-Appellants.

No. 17-41130

**UNOPPOSED MOTION TO HOLD APPEAL IN ABEYANCE
PENDING NEW RULEMAKING**

For the following reasons, defendants-appellants respectfully ask this Court to hold this appeal in abeyance pending the outcome of new rulemaking, with status reports due at 180-day intervals. Plaintiffs-appellees consent to this motion.

1. Section 13(a)(1) of the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. § 213(a)(1), exempts from the Act’s minimum wage and overtime pay requirements “any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]).” Regulations implementing this exemption generally have required that employees meet three criteria in order to be subject to the exemption. To be treated as exempt, the employee must: (1) be paid

on a salary basis; (2) receive a specified minimum salary; and (3) have primarily executive, administrative, or professional duties. *See* 29 C.F.R. Part 541.

The Department of Labor has periodically updated the salary-level test. In May 2016, the Department issued a final rule revising that test. *See* 81 Fed. Reg. 32,391 (May 23, 2016); 29 C.F.R. § 541.600. The final rule set a minimum-salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). 81 Fed. Reg. 32393; 29 C.F.R. § 541.600(a). That methodology resulted in a salary level of \$913 per week based on data from the fourth quarter of 2015. *Id.*

2. Plaintiffs in these consolidated cases filed suit challenging the Final Rule. In November 2016, the district court issued a nationwide preliminary injunction, which the Department of Labor appealed. In the reply brief filed in July 2017, the Department informed this Court that it intended to revisit, through new rulemaking, the specific salary level set by the 2016 final rule. On August 31, 2017, the district court issued final judgment for plaintiffs and thus rendered the interlocutory appeal moot. On September 6, 2017, this Court granted the Department's unopposed motion for voluntary dismissal of the interlocutory appeal.

3. On October 30, 2017, the Department of Labor filed a notice of appeal from final judgment. As noted above, however, the Department is revisiting the salary level set by the 2016 final rule. In July 2017, the Department published a Request for Information (RFI) seeking public input on questions regarding the salary

level test and related issues. *See* 82 Fed. Reg. 34,616 (July 26, 2017). The Department provided the public 60 days, until September 25, 2017, to submit comments on the RFI. The Department received over 214,000 timely comments, which it is currently considering as it develops a proposal to revise the Part 541 regulations. The Department respectfully requests that this Court hold this appeal in abeyance, with status reports due every 180 days, pending the outcome of the new rulemaking.

4. Counsel for plaintiffs-appellees have authorized us to state that they do not oppose this abeyance motion.¹

Respectfully submitted,

MICHAEL S. RAAB

s/ Alisa B. Klein

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¹ The district court denied the motion of the Texas AFL-CIO to intervene in these consolidated cases. The putative intervenor filed a notice of appeal. Although this Court docketed that appeal, we note that the Texas AFL-CIO is not a party.

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2017, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein

Alisa B. Klein

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27 because it contains 484 words, according to the count of Microsoft Word 2013, and it was prepared in 14-point Garamond, a proportionally spaced font.

s/ Alisa B. Klein

Alisa B. Klein

Counsel for Appellants