

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

STATE OF NEVADA, *et al.*,
Plaintiffs,

No. 4:16-CV-731-ALM

v.
UNITED STATES DEPARTMENT OF LABOR,
et al.,
Defendants.

Texas AFL-CIO's Motion to Intervene and Brief in Support

The Texas AFL-CIO, a federation of labor unions in Texas whose affiliated unions represent 235,000 working men and women throughout the state of Texas in virtually all sectors of the economy, hereby moves to intervene as a defendant in this action pursuant to Federal Rules of Civil Procedure 24. The Texas AFL-CIO seeks to intervene as of right pursuant to Rule 24 (a) (2) or, in the alternative, to intervene with permission under Rule 24 (b). Plaintiffs have indicated they oppose the Texas AFL-CIO's intervention and Defendants are still considering their position on this motion, so it is filed as an opposed motion.

INTRODUCTION

These consolidated lawsuits both seek to challenge the final rule promulgated by the United States Department of Labor ("DOL" or "Department") on May 18, 2016 entitled, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," (hereafter "the Final Rule") 81 Fed. Reg. 32,391 (May 23, 2016) on a number of grounds. The Plano Chamber of Commerce and the other "Business Plaintiffs" challenge the Final Rule as exceeding the authority of the DOL and other defendants,

and as being arbitrary, capricious, and contrary to procedures required by law. They also object to the escalator provision governing the minimum salary threshold set in the Final Rule. Nevada and the other “State Plaintiffs” challenge the Final Rule as violating the Constitution, (arguing that *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) precludes or should be overturned), that DOL went beyond its authority under 29 U.S.C. Section 213 (a)(1) and that DOL violated the Administrative Procedure Act (APA) by implementing the Final Rule and by the inclusion of the escalator provision.

The DOL has defended the Final Rule, and has pursued an appeal to the U.S. Court of Appeals for the Fifth Circuit of the Preliminary Injunction issued by this Court in the suit brought by the State Plaintiffs. The interests of the DOL in defending the Final Rule parallel the interests of the Texas AFL-CIO in many respects. However, the Texas AFL-CIO has additional concerns, exacerbated in last several days, as to which the Texas AFL-CIO believes it may not be adequately represented by the DOL. With the recent presidential election, and particularly as more information becomes available regarding the incoming Administration’s plans, policy and appointments, the Texas AFL-CIO has grave concerns as to whether its interests in the Final Rule will be represented by the DOL.

FACTUAL BACKGROUND

The Texas AFL-CIO is a federation of labor unions consisting of approximately six hundred fifty (650) local unions who represent two hundred thirty five thousand (235,000) dues paying members. The mission of the Texas AFL-CIO is to promote the interests of Texas wage earners, in legislative, judicial, and other public forums and activities. Texas AFL-CIO affiliates represent workers in every geographical area of the state, and in virtually all key sectors of the

economy. The Texas AFL-CIO's parent organization is the American Federation of Labor and Congress of Industrial Organizations (the AFL-CIO) in Washington, D.C..

On behalf of its affiliated and subordinate bodies, including the Texas AFL-CIO, the AFL-CIO actively participated in the regulatory process leading up to the Final Rule and filed comments supporting the DOL's proposed regulation but urging that the salary threshold should be raised above the level set forth in the proposed regulation. (Exhibit 1 is a copy of the comments filed by the AFL-CIO).

The Texas AFL-CIO's affiliates represent workers who are directly impacted by the Final Rule, which increases the salary threshold for automatic overtime eligibility to above the \$23,660 rate (the rate previously set by DOL in 2004). Many of these employees would be entitled to overtime under the higher salary threshold.

Moreover, as noted in the AFL-CIO's comments (Exhibit 1 at pp. 5-6), workers will benefit from the Final Rule in a number of ways, such as the reduction of salaried workers to 40 hours per week, with the reassignment of those hours to part-time or newly-hired workers. This aspect of the Final Rule will directly benefit workers throughout the state of Texas who are represented by many of the Texas AFL-CIO's affiliated local unions.

In addition, the Texas AFL-CIO has an interest in robust enforcement of the FLSA, including its overtime provision, because the overtime guarantee in the FLSA sets a floor for all workers covered by the Act, whether or not they are protected by a collective bargaining agreement. Often unions negotiate more favorable provisions in collective bargaining agreements, and any change in overtime protection under the FLSA affects collective bargaining rates for union workers and the rates and conditions which the unions can achieve above the floor provided by the FLSA. The long delay between the increase in the salary level in 2004 and

the effective date of the Final Rule has meant that fewer and fewer non-exempt workers who should be entitled to overtime have had the benefit of the “bright line” provided by the salary threshold to protect against misclassification of workers who should be non-exempt but improperly are being treated by their employers as exempt from overtime protections.

The Texas AFL-CIO also has a strong interest in the Final Rule because it represents a long overdue updating of the salary threshold, which, in the 12 years since the last increase in 2004, has substantially lagged behind salary levels in numerous non-exempt job classifications, creating increased incidents of misclassification by employers who unfairly seek to depress salaries and benefits, and creating competitive disadvantages for those employers who are willing to negotiate fair and higher level salaries and benefits in collective bargaining agreements. This creates a downward pressure on all compensation and working conditions for workers in Texas, an issue of utmost concern for the Texas AFL-CIO.

Events that have occurred in the last month since the presidential election on November 8 have led the Texas AFL-CIO to have increasing concerns about the incoming administration’s willingness to continue to support and aggressively defend the Final Rule. Most recently, President-Elect Donald Trump announced his choice of Andrew Puzder to be Secretary of Labor in the incoming administration. Puzder has strongly and publicly opposed the Final Rule.¹ In addition, given the strength of record and rationale supporting the Final Rule, the Texas AFL-CIO did not anticipate the Court’s November 22, 2016 ruling granting the Preliminary Injunction. For these reasons, the Texas AFL-CIO now seeks to intervene in the district court case, to protect and defend its interests in the Final Rule.

¹ <http://www.forbes.com/sites/realspin/2016/05/18/the-harsh-reality-of-regulating-overtime-pay/#7551aa962321> (most recently viewed on December 9, 2016).

ARGUMENT

I. The Texas AFL-CIO Should Be Granted Intervention as of Right

Under Federal Rules of Civil Procedure 24 (a) (2), an applicant is entitled to intervene as of right if (1) the motion to intervene is “timely,” (2) the movant “claims an interest relating to the property or transaction that is the subject of the action,” (3) the movant “is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest,” and (4) the existing parties do not already “adequately represent that interest.” Fed. R.Civ. P. 24(a)(2). The Texas AFL-CIO satisfies all four of these requirements.

A. The Texas AFL-CIO’s Motion is Timely

This motion to intervene is timely. While it was not filed at the initial outset of litigation, it has been filed promptly in light of the recent events outlined above. The substantive issues in the case are still pending before the Court, which has not yet ruled on the pending motion for summary judgment. Intervention by the Texas AFL-CIO will not unduly delay the matter. The Texas AFL-CIO is filing herewith a comprehensive proposed answer which will respond to the allegations in both complaints. The Federal Defendants have not yet filed answers, but presumably will be doing so in the near term. In addition, the Texas AFL-CIO hereby adopts and joins Defendants’ Response in Opposition to Plaintiffs’ Expedited Motion for Summary Judgment (Document # 56) and Defendants response and sur-reply in the preliminary injunction matter, (Documents # 37 and #51) as its own, and thus will not delay the proceedings.²

² The Texas AFL-CIO does hereby request leave to promptly file a short supplemental response in opposition to the Motion for Summary Judgment to highlight some issues from its unique perspective, but could do so very quickly, with the Court’s leave.

B. The Texas AFL-CIO Has an Interest Relating to the Transaction that is the Subject of this Action

The Texas AFL-CIO clearly has sufficient interest to justify intervention. The Texas AFL-CIO (as one of the national AFL-CIO's subordinate bodies) actively participated in the regulatory proceedings leading up to the issuance of the Final Rule and has demonstrated in the earlier Factual Background section of this motion the multiple ways in which the full and robust implementation and enforcement of the Final Rule benefits workers in Texas represented by the Texas AFL-CIO's affiliated local unions, as well as the overall interests and purposes of the Texas AFL-CIO in improving the wages and working conditions of workers throughout Texas.

C. The Texas AFL-CIO's Interests Would Be Impaired if Plaintiffs Prevailed

Were the plaintiffs to prevail, the Texas AFL-CIO, its affiliated local unions and the workers those unions represent will suffer substantial harm because they will lose all the benefits which have been described in the Factual Background section, namely the benefit of a "bright line" for workers who properly are non-exempt but are misclassified, the increased floor for salaries and working conditions above which Texas unions can negotiate improved benefits, salaries and working conditions, and the anticipated increased hours for part-time employees and potential new jobs which would be created where an employer sought to limit employees to 40 hours per week to limit overtime. In addition, should the plaintiffs prevail, the Texas AFL-CIO will be compelled to deal with the downward pressure on salaries and benefits created by continued unrealistically low (2004 level) salary thresholds. For all these reasons, the interests of the Texas AFL-CIO will suffer substantial harm, if plaintiffs prevail.

D. The Texas AFL-CIO's Interests May Not Be Adequately Represented by the Federal Defendants

To justify intervention as of right, the Texas AFL-CIO must show that its interests *may* not be adequately represented by the federal defendants, not that the representation actually is inadequate. *Supreme Beef Processor, Inc., v. U.S. Department of Agriculture*, 275 F.3d 432, 437-8 (5th Cir. 2001). To date the federal defendants have robustly defended the rule. However, as described more fully in the Factual Background section, the Texas AFL-CIO is very concerned that the incoming administration will change course. The Texas AFL-CIO therefore believes that its interests may not be adequately represented by the federal defendants with the change of administration as of January 20, 2017. *Legal Aid Society of Alameda Co. et al. v. Dunlop*, 618 F.2d 48 (9th Cir. 1980) (Chamber of Commerce's motion to intervene should have been granted when it appeared government's position in litigation was changing). The Texas AFL-CIO is concerned that the incoming Administration, notwithstanding the voluminous record supporting the need for and appropriateness of the Final Rule, might amend or repeal the Final Rule in a manner that does not conform with the Administrative Procedure Act.

II. In the Alternative, the Texas AFL-CIO should be granted permissive intervention.

Because the Texas AFL-CIO satisfies all the requirements of Rule 24 (a)(2), it should be granted intervention as of right. At a minimum, however, it should be granted permissive intervention under Rule 24 (b), which provides that “[o]n timely motion, the court may permit anyone to intervene whohas a claim or defense that shares with the main action a common question of law or fact.” The Texas AFL-CIO plainly satisfies both of the prerequisites for permissive intervention. As explained above, its motion is timely. *See supra* Part I.A. The

accompanying proposed answer and our adoption of the Defendants' response and reply in opposition to the motion for summary judgment demonstrate that the Texas AFL-CIO seeks to assert defenses which respond to the allegations in the plaintiffs' complaints and are consistent with the defenses already asserted by the federal defendants.

Once these two threshold requirements are met, the Court has discretion to allow permissive intervention. In exercising its discretion, a court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R.Civ. P. 24 (b). There is no risk of such delay in this case. The Texas AFL-CIO is submitting a proposed answer with this motion and has adopted herein the federal defendants' responsive pleadings related to the summary judgment issues. The federal defendants have not yet filed an answer and movant herein is seeking only a brief time period to file a supplemental response to the issues raised by the pending motion for summary judgment.

In this Circuit, intervention should be granted absent harm, so greater justice can be done. *EEOC v. Commercial Coating Service, Inc.* 220 F.R.D. 300; 2004 U.S. Dist. LEXIS 7818, quoting *John Doe No. 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001)(internal cite omitted).

Wherefore, the Texas AFL-CIO respectfully requests that its motion be granted and that it be permitted to intervene as of right, or in the alternative, be granted permissive intervention. In addition, the Texas AFL-CIO respectfully requests leave to file a supplemental response in opposition to Plaintiffs' Motion for Expedited Summary Judgment and Brief in Support.

Dated: December 9, 2016

Respectfully submitted,
/s/ Yona Rozen

Yona Rozen

Lead Attorney
Texas State Bar No. 17358500
Associate General Counsel
AFL-CIO
815 16th St. N.W.
Washington, D.C. 20006
Telephone: (202) 637-5198
Facsimile: (202) 637-5323
E-mail: yrozen@aflcio.org

Local Counsel:
Hal K. Gillespie
Texas State Bar No. 07925500
Email: hkg@gillespiesanford.com
Joseph H. Gillespie
Texas State Bar No. 24036636
E-mail: Joe@gillespiesanford.com
James D. Sanford
Texas State Bar No. 24051289
E-mail: Jim@gillespiesanford.com

GILLESPIE SANFORD LLP
4925 Greenville Ave., Suite 200
Dallas, Texas 75206
Tel.: 214-800-5112
Fax: 214-838-0001

Counsel for the Texas AFL-CIO

CERTIFICATE OF SERVICE

I certify that on December 9, 2016, the foregoing Motion to Intervene and Brief in Support Thereof, together with the accompanying exhibit and Proposed Answer, were filed electronically by submission to the Court's civil ECF email address and served on all counsel of record by electronic mail.

Dated: December 9, 2016

Respectfully submitted,
/s/ Yona Rozen

Yona Rozen, Associate General Counsel
Texas State Bar No.
AFL-CIO
815 16th St. N.W.

Washington, D.C. 20006
Telephone: (202) 637-5198
Facsimile: (202) 637-5323
E-mail: yrozen@aflcio.org

Counsel for the Texas AFL-CIO

CERTIFICATE OF CONFERENCE

I hereby certify that I have complied with the meet and confer requirement in LOCAL RULE CV-7(h). I met and conferred with counsel for Business Plaintiffs, counsel for State Plaintiffs and counsel for Defendants via email and telephone regarding Texas AFL-CIO's Motion to Intervene. The responses were as follows:

The State Plaintiffs oppose this motion for intervention

The Business Plaintiffs oppose this motion for intervention

Defendants: Counsel for Defendants stated that "Defendants were contracted by Counsel for the Texas AFL-CIO today and are still considering their position on this motion".

The discussions conclusively ended in an impasse, leaving an open issue for the court to resolve. LR CV-7(i).

Dated: December 9, 2016

Respectfully submitted,
/s/ Yona Rozen

Yona Rozen, Associate General Counsel
Texas State Bar No.
AFL-CIO
815 16th St. N.W.
Washington, D.C. 20006
Telephone: (202) 637-5198
Facsimile: (202) 637-5323
E-mail: yrozen@aflcio.org

Counsel for the Texas AFL-CIO