

THE
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Breaking Federal Developments in Labor and Employment September 2017

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Salary Test for Exempt Status Invalidated

Under the prior administration the DOL had issued amendments to certain exemptions from the overtime requirements of the Fair Labor Standards Act (“FLSA”), which would have dramatically increased the number of employees eligible for overtime pay to over 4 million workers within the first year of implementation. The amendments were to be effective on December 1, 2016, however their implementation was stayed by a federal judge last November, as reported in our [November 2016 Client Alert](#).

The new regulations were to essentially double the salary threshold for employees who would be exempt from overtime payments, assuming they met one of the three exemptions, from \$455 per week or \$23,660 per year, to \$913 per week or \$47,476 per year. Under these regulations, even if employees performed duties that would otherwise indicate they were exempt from overtime, if they made less than \$47,476 per year, their employers would have to pay them overtime regardless of their duties. Just last week, a federal judge in Texas invalidated the new regulations, and specifically found that, while a salary test was permissible, the minimum threshold of over 47K per year was too high, and in fact obviated the need for any other duties based analysis, which has always been at the heart of the executive, administrative, or professional exemptions.

Employer Tip

For the time being, employers can feel comfortable relying on the duties test to determine eligibility for overtime, however, the DOL has indicated that it is still looking at the minimum salary threshold, and employers should expect that threshold to increase from the current number of \$23,660. Employers would be well advised to take a look at their currently classified exempt employees making between 24-35K per year to determine whether such employees truly meet the duties test, and whether such employees are being paid at appropriate levels.

EEO-1 Salary Reporting Requirements Blocked

The new EEO-1 forms with reporting information for 2017 were to have included salary information in addition to the usual reporting requirements. The EEOC was presumably intending to use such information to target companies for Equal Pay investigations and complaints. Reporting is still due using the EEO-1 forms in March 2018, but the OMB has just announced that the forms are not going to require the reporting of salary information by gender and other protected characteristics, so employers have a reprieve with respect to federal reporting requirements.

Employer Tip

Employers should be mindful that the state and federal equal pay laws are still applicable, and it is always a good idea to do a self-audit of comparative pay data based on gender, race, and other protected characteristics in order to ensure compliance with such laws. Please also refer back to our April 2017 Client Alert with respect to NY pay equity laws and the salary history ban that goes into effect next month for NY employers.

New I-9 Form in Effect September 18, 2017

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Employers should be aware that a new I-9 form is going into effect on September 18th. The link to the new form can be found [here](#).

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