

What's up with the "new" Overtime Rule?

By: Lee Geiger on September 1, 2017 on graydon.law

It's been a good week for employers - at least from a governmental regulation perspective. Yesterday, we wrote about relaxed enforcement of the EEOC's EEO-1 form requirements. That means employers will not need to provide wage data on EEO-1 forms to be submitted by March 31, 2018. ([Click here for yesterday's article.](#))

We had no sooner published that article when bigger news broke: a judge in Texas officially struck down the Fair Labor Standards Act ("FLSA") "new" overtime regulation that was originally to have taken effect December 1, 2016. Among other things, the Obama-era regulation would have raised the threshold for exemption from the current \$23,660 to \$47,476. Employers were understandably concerned about the impact this change would have had on their business. Non-profits would have been hit particularly hard by the high threshold.

Last November, a district court judge in Texas issued an injunction temporarily halting implementation of the new rule. Yesterday, that same judge granted summary judgment in favor of the Plano Chamber of Commerce and the 50+ other businesses who fought the rule. Practically speaking, the "bell has tolled" on the Obama overtime regulations. Absent an appeal by the Trump administration (which seems unlikely), the regulations are essentially dead. Although there is still a case pending in the Fifth Circuit Court of Appeals that was filed during the waning days of the Obama administration, the Texas decision effectively moots that case.

Don't get too comfortable, though. The Trump administration has already signaled that, although it thought the \$47,476 threshold was too high, it also believes that the current level is too low. There is bipartisan support (really) for an increase of the \$23,660 threshold that has been in place since 2004.

My crystal ball is in the shop this week, so I have no way of knowing what the threshold will be or when it will be implemented. There are many hoops that the government needs to jump through for that to happen, so the process will not be quick. My best guess is that we'll be looking at a salary level somewhere between \$35,000 and \$38,000 with implementation in late 2018 or early 2019. If your crystal ball is working, send me your best guess. We'll keep track of the entries. Perhaps the person "closest to the pin" will be featured on *ESPN, Meet the Press* or *America's Got Talent*? [Click here to submit your guess.](#)

One last thing ... Employers should not forget about the "duties" test. To be exempt from the minimum wage and overtime provisions of the FLSA, employees must satisfy both the salary and the duties test. During last year's hoopla, many employers realized that their employees were misclassified regardless of the salary level because they did not satisfy the duties for exemption. Simply paying employees on a salary basis and at the salary threshold is not enough. If the employee does not meet the duties test, the employer is required to track hours and pay overtime on all hours over 40 in a workweek regardless of salary level.