



Kelly A. Campbell.....

"The previous minimum salary level for exempt employees of \$23,660 remains in effect due to the court-issued injunction against the new overtime rule, at least until the injunction is lifted or the DOL revises the rule."

..... tests to determine eligibility for time-and-a-half pay in the future. The DOL attorneys stated that they would not initiate a new rule-making procedure until the appeals court affirms the right to set a salary level.

However, on 6/27/17, the DOL sent a *Request for Information* to the Office of Management and Budget on the subject. That RFI was published in the Federal Register on 7/26/17, and invites public comment for a period of sixty (60) days on several questions, including the following:

- What methodology should be used to set a new salary threshold?
- Should the regulations contain multiple standard salary levels, depending on particular regions or industries?

DOL FOLLOWS THROUGH WITH PLANS TO REVISE NEW SALARY OVERTIME RULE

Last year a new salary overtime rule was to take effect, raising the minimum salary levels required for certain managerial overtime exemptions from \$23,660 to \$47,476, with automatic increases thereafter every three (3) years. No changes were made to the standard duties tests. Last November, a federal District Court in Texas enjoined the rule's implementation, and the issue was appealed to the Fifth Circuit Court of Appeals. Lawyers for the U.S. Department of Labor (DOL) told the appeals court on 6/30/17 that it planned to revise the overtime rule, but asked the court to first affirm the DOL's right to use salary

- Should there be different salary levels for different exemptions?
- Should there be a set salary level where the duties test no longer applies in determining exempt status?
- To what extent did employers make changes in anticipation of the new overtime rule, what was the impact, and were those changes reversed after the injunction?
- Should the DOL adopt a duties only test, eliminating the minimum salary requirement?
- Is permitting non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary level is appropriate?
- Should there be multiple compensation levels for highly compensated employees, and should these levels be automatically updated on a periodic basis?

The information gathered from this RFI will be used by the DOL in formulating a proposal to revise the new overtime rule. DOL Secretary Acosta has indicated that he is open to raising the salary threshold but not as much as the \$47,000 level set by the Obama Administration. Speculation suggests that Acosta may favor increasing the salary exemption level to something around \$33,000.

Editor's Note: The previous minimum salary level for exempt employees of \$23,660 remains in effect due to the court issued injunction against the new overtime rule, at least until the injunction is lifted or the DOL revises the rule. There is some uncertainty, however, due to the fact that the appeals court has the authority to vacate the injunction blocking the rule, although the DOL is likely to ask the court to continue the injunction in some manner pending revision of the overtime rule. The revision of the rule will take a considerable period of time, as there must be a new Notice of Proposed Rule Making and a comment period, leading to a new final rule.

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Anne T. McKnight

EEOC 2016 STATISTICS AND ENFORCEMENT GUIDANCE: TRENDS TO WATCH

At the end of each fiscal year, the EEOC releases statistical data about the charges it received for that year, the action taken with regard to those charges, and the enforcement action or litigation the agency ultimately pursued. Employers can use this data in conjunction with the EEOC's Enforcement Guidance to glean important information about relevant trends and how the federal agency is trying to further its agenda. In looking at the 2016 EEOC annual report (which can be accessed at www.eeoc.gov), several interesting points emerge. Primarily, ongoing reports of retaliation and harassment have led the EEOC to focus additional attention on ways to combat those issues. Further, while the number of EEOC lawsuits has decreased in recent years, the EEOC is clearly trying to find ways to have the greatest impact through the use of systemic investigations and multiple-victim litigation.

2016 Trends

After hovering just under the 100,000 charge mark from 2010-2012, the number of total charges filed with the EEOC dropped to 88,778 in 2014. However, for the second year in a row, the number of total charges has increased. Specifically, charges went up from 89,385 in 2015 to 91,503 in 2016.

Retaliation

Despite the ebb and flow of total charge numbers, retaliation charges have generally seen increase after increase over the past 16 years. Retaliation is the most common charge made with the EEOC. In 2016, it was included in 46% of all charges. Therefore, the EEOC's renewed focus on retaliation is not surprising. In August 2016, the EEOC issued its *Enforcement Guidance on Retaliation and Related Issues*, which advances a broader application of anti-retaliation laws.

For instance, under the Guidance, protected participation activity includes internal EEO (Equal Employment Opportunity) complaints made before a discrimination charge is actually filed with the EEOC. This is significant because, unlike with opposition activity, an employee need not reasonably believe that unlawful discrimination actually occurred for his or her participation activity to be protected. The new EEOC Guidance also implements a broader definition of opposition conduct. According to the Guidance, opposing an unlawful practice can be inferred from any circumstances that show the individual intended to convey opposition or resistance to a perceived EEO violation. Simply asking about compensation is identified as protected opposition activity. Additionally, while the EEOC acknowledges that opposition activity is only protected if the manner of opposition is

reasonable, the proposed Guidance would make it extremely difficult for an employer to ever establish that an employee's conduct was so outrageous that it loses the protection of federal anti-retaliation laws. For example, the EEOC states that protected opposition activity may include engaging in a production slow-down, writing critical letters to customers, or protesting against discrimination in an industry or society in general – without any connection to a specific workplace – even if that conduct causes the employer financial harm.

Further, under the Guidance, an employee may prove a causal connection (that the challenged employment action would not have occurred “but for” the desire or intent to retaliate) by presenting a “convincing mosaic of circumstantial evidence” from which retaliatory intent can be inferred. Such a mosaic may include evidence of suspicious timing, evidence that a similarly situated employee was treated differently, past instances of retaliation, or any other “bits and pieces” that, when taken together, might suggest a retaliatory intent.

The EEOC's Guidance also points out that adverse action is broader in the context of anti-retaliation than under other nondiscrimination provisions. From a retaliation standpoint, adverse action is any action that might deter a reasonable person from engaging in protected activity. It need not have a tangible effect on the individual's employment, and it need not actually deter the individual from engaging in protected activity — it only has to have the potential to do so.

Given the frequency and consistent increase of retaliation charges and the EEOC's recent efforts to expand anti-retaliation laws, the stage is set for an uptick in retaliation charges and litigation. It is imperative for employers to proactively assess their exposure for such claims and to take steps to counteract retaliatory animus or even the appearance of such.

Harassment

The EEOC is also troubled by the pervasive and consistent problem of harassment in the workplace. Workplace harassment allegations were included in nearly 31% of all charges in 2016. In June 2016, an EEOC task force released a *Study of Harassment in the Workplace*, a report of the task force's findings following a fourteen-month study. The report, available at www.eeoc.gov, calls for employers to “reboot” harassment prevention efforts, and provides recommendations for prevention strategies.

The proposed solutions from the EEOC study include a revamping of workplace culture through leadership and accountability, beginning with a top-down approach. The study urges employers to assess their workplaces for the risk factors associated with harassment and hold mid-level managers and supervisors accountable for preventing and responding to grievances.

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**Mary Celeste
Moffatt**

OSHA ELECTRONIC INJURY DATA REPORTING REQUIREMENTS DELAYED UNTIL DECEMBER

According to a proposed delay submitted by the Occupational Safety and Health Administration (OSHA), the Obama-era OSHA rule requiring employers to submit injury and illness data electronically to the agency that was originally set to go into effect on July 1, 2017, will be delayed to December 1, 2017. OSHA states that the agency plans to issue a separate proposal to review or remove various provisions in the final rule. Concerns were particularly expressed by employers that the rule, originally issued in May 2016, would enable OSHA to post injury and illness data on the agency’s public website. The U.S. Chamber of Commerce has petitioned the Department of Labor to reopen the rulemaking process to consider various changes, including a change involving restrictions on incentive and drug testing programs. The OSHA proposal suggests that pushing back the deadline would be the first step in a long process that could include fully reviewing or even revoking the record-keeping rule.

“EEOC 2016 STATISTICS AND ENFORCEMENT GUIDANCE”

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The report suggests that employers be wary of “zero tolerance” anti-harassment policies, as these policies may contribute to under-reporting of harassment, especially in situations of relatively minor harassing behavior. The study suggests that abandoning zero tolerance policies in favor of more proportionate discipline will likely encourage employees to report workplace incidents. In turn, management will have the opportunity to tackle and proactively design future anti-harassment training.

Further, the report highlights the importance of compliance training and the components to make such training successful. Training should shift from a legal compliance-focused approach to a preventative-driven teaching that is supported at the highest levels and routinely evaluated. In particular, the report highlights workplace civility training and the less-common “bystander intervention” training. Workplace civility training focuses on positive interactions and respect in the office that transcends federally protected classes (such as race, color, national origin, religion, sex, age and disability); while bystander intervention training empowers the individual to speak up when they witness harassment. The study suggests an interactive approach to training may be more effective.

EEOC Enforcement & Litigation

In 2016, the EEOC continued to spend a significant portion of its resources on investigating and litigating systemic discrimination, which the EEOC defines as involving “pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic location.” In fact, one of the EEOC’s performance goals was to increase the proportion of systemic cases on the EEOC’s litigation docket to 22-24%. In 2016, the EEOC exceeded that goal, as 28.5% of its active litigated cases were systemic. Employers should be aware of this priority, as the likelihood of a reasonable cause finding increases significantly when systemic allegations are involved. While the EEOC finds reasonable cause in less than 5% of all charges filed, in 2016, over 41% of systemic investigations resulted in a reasonable cause finding.

According to the EEOC’s annual report, it resolved 21 systemic cases, “six of which included at least 50 victims of discrimination and two of which included over 1,000 victims of discrimination,” and obtained \$38 million in damages. Some of these cases involved allegations of failure to hire based on sex, subjecting applicants to unlawful inquiries into medical or genetic information, and maintaining inflexible leave policies that denied reasonable accommodations for individuals with disabilities. The EEOC has acknowledged that systemic investigations will remain a priority.

Another interesting statistic from the annual report is the reduction in the number of lawsuits filed by the EEOC. From 2000 to 2011, the agency filed anywhere from 250 to 438 lawsuits each year. However, beginning in 2012, that number dropped into the 122 to 142 range. In 2016, the EEOC filed just 86 lawsuits. However, while the overall number of lawsuits dropped by 35% from the number filed in 2015, the number of systemic lawsuits increased from 22% to 28.5%. Twenty-nine of the 86 lawsuits involved multiple victims or discriminatory policies, while the remaining 58 involved individual lawsuits. Many suspect the EEOC may trend toward pursuing more systemic cases that have a higher success rate and where it can achieve more monetary recovery, representation of more individuals, and can ultimately seek a greater impact.

Of the lawsuits filed by the EEOC, it is worth noting that nearly 42% (36 out of 86) involved claims under the ADA (Americans with Disabilities Act). This represents a 5% increase from 2015, and highlights the expectation that disability discrimination and related litigation will remain a high priority for the EEOC.

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Conclusion

Employers who want to maintain an optimal and respectful working environment and who want to minimize liability for noncompliance with EEO laws, should continue taking as many preventative measures as possible by developing appropriate policies, regularly training managers and supervisors, conducting timely and appropriate investigations into reports of misconduct, and taking necessary action to address discriminatory and harassing behavior. Employers should also consider consulting with legal counsel as needed to develop strategic plans for safeguarding against and correcting discrimination and harassment in the workplace. These actions not only promote a legal and positive workplace, but may also keep your organization from becoming a 2017 statistic.

The Firm wishes to congratulate Anne McKnight for the publication of this article in HR Professionals Magazine (May 2017).



KNOW YOUR ATTORNEY - ANNE T. MCKNIGHT

ANNE T. McKNIGHT is a Member in the Nashville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in October 2009. Anne’s practice includes an emphasis in employment law, workers’ compensation, insurance defense and general civil defense litigation. Anne received her Bachelor of Science degree in Communication from the University of Kentucky in 2003, and a Doctor of Jurisprudence Degree from the University of Kentucky, College of Law in 2007. Anne is a member of the Middle Tennessee Society for Human Resource Management, and the Mid-South Workers’ Compensation Association.



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