



**Sandy Seay**  
**President**

**SEAY MANAGEMENT REPORT**

**December 2, 2016**

## **Higher Exempt Salary Levels – Or Not -- Where Do We Go From Here**

*“The Wheel is come full circle . . . .” – Spoken by Edmund, “King Lear,” Act 5, Scene 3.*

*“I wish he would explain his explanation.” Lord Byron, “Don Juan.”*

OK, so the Department of Labor said they were raising the salary level for exempt employees sometime in 2015. Then they said they didn't know when it was going to be. Then they said December 1, 2016. They said the new number was \$970 per week. Then they said it was \$927. Then they said it was another number and they didn't know what it was. Then they said it was \$913. Now, at just about midnight, a Texas judge issues a preliminary injunction that prevents the rule from becoming effective on December 1<sup>st</sup>. So all of the work, preparation, sweat and tears that management has put into getting ready for change is for naught, at least for the time being. This is especially true for non-profit organizations and small businesses.

I talked with a manager the other day who was mad as a hornet. Listening to the Department of Labor, and attempting to be a good business leader, he had several months ago identified those employees who would be impacted by the new rule and had already implemented the changes of either increasing an exempt employee's salary to the new \$913 level or changing the employee to non-exempt, having the employee keep a time record and paying him or her an hourly rate plus overtime. “What am I going to do now?”, he asked, “Change them back or leave them as they are.” Here are our thoughts . . . .

- 1. Exempt Salary Level.** For the moment, the minimum salary an exempt employee must receive remains at \$455 per week. The proposed level of \$913 is not effective now. This means that your exempt employees will continue to be exempt if (1) they meet the duties tests and (2) their salary is \$455 or more.

2. **Currently Exempt Employees.** Some of your employees were going to be affected by the \$913 salary level and some were not going to be affected. If you have not made the changes to these affected employees – either by increasing them to \$913 or re-classifying them to non-exempt – then you do not have to make these changes for the time being.
3. **Employees You Have Already Changed.** If you have already made these changes, you have the right to change them back, but here are a few thoughts – if you increased the salary of an exempt employee up to \$913 because they were close to it anyway, it's probably best to leave that alone. On the other hand, if you re-classified an exempt employee to non-exempt and placed him or her on an hourly rate plus overtime, then reverting to the previous exempt classification may be a good idea. Here's why – most exempt managers did not want to be re-classified to non-exempt and most employers did not want to re-classify them to non-exempt. So, this will probably be a welcome development for both parties and management has the prerogative to make this decision.
4. **The Duties Tests.** The judge's preliminary injunction puts the exempt emphasis back on the duties tests. Prior to all of the attention given to the new salary test of \$913, the major emphasis for exempt employees was on the duties tests. The main duties test is that employees must be primarily involved in management, either of other employees, like a supervisor or department manager, or of an asset of the employer, like accounting or purchasing. There are other parts of the duties tests but this one is key. It is a misconception to think that an employer can simply place an employee on salary and that employee is, therefore, exempt. To the contrary, an exempt employee must meet both the duties tests and the salary test.
5. **The Exempt Salary Level Going Forward.** My grandmother used to tell me that nothing is guaranteed in this world but death and taxes so, if that's true, we can't predict with any certainty what the Department of Labor might do. However, we do know a few things.
  - The current exempt salary level of \$455 is fairly low so we expect that it will increase at some point, but not to the \$913 level that was proposed. I would not be surprised to see an exempt salary level in the \$600-\$700 range.
  - There is very little time left for the current administration to challenge the judge's ruling.
  - It seems that the new administration and the new Congress will have a more employer-friendly view and my sense is that they will move for a more reasonable exempt salary level.
  - Some states have individual exempt salary levels that are already in the \$700 -- \$900 range, and if you are located in one of those states, you must abide by the higher number. The exempt salary level in New York state, for example, is \$675 and New York City is \$825 for employers of 11 or more. In the state of California, it's \$840. In almost every case, these levels are scheduled to increase annually.

## **Concluding Thoughts**

There is clearly some upward pressure on the minimum exempt salary level. When the Department of Labor announced that it was more than doubling the number, all the way to \$913, all at one time, virtually every business observer realized that this was going to cause a great hardship on many businesses, perhaps most businesses. Most of my clients understood that an increase was appropriate, just not this much, and not all at one time. My sense is that sometime in the next 12 months, we'll begin to see a movement to increase the minimum salary level, probably into the \$600-\$700 range, perhaps with increments over several years.

We appreciate having you as a friend and client of our firm and will be glad to answer any questions you have about this enormous and, to some degree, unexpected development in the Wage and Hour regulations. If you'd like for Seay Management to conduct an exempt/non-exempt analysis of your employees, with an emphasis on the duties tests, so that you will have the confidence and assurance that your employees are properly classified, please let us know and we'll make those arrangements.

Sincerely yours,

**Sandy and the Seay Management Team**

*Remember, if you have an employment issue or challenge, and you need an answer right away, and you want the very best Human Resources Management advice available, you need to call . . . The Seay Team! We are proud to be your trusted advisors in Human Resources Management*