

## 2024 Employment Law Developments

There are significant employment law developments for 2024 which make the new year a good time to analyze changes that may impact employers' planning, policies, and procedures. Four of these areas are highlighted here.

### Alabama Department of Revenue Issues Guidance on Overtime Pay Exemption

The Alabama Department of Revenue (ADOR) has issued guidance on Act No. 2023-421, which amended the Alabama Code to exclude from gross income any amount paid to full-time hourly waged employees for hours worked over 40 hours per week. This "overtime exemption" was designed to allow hourly workers to keep more of their earnings with no state tax being withheld for amounts received for hours worked over 40 per week. The exemption from gross income applies to the full amount paid for hours over 40 not just the half time differential. In its guidance to employers, the ADOR consistently points to a literal meaning of "full-time hourly waged employees" and "any hours worked above 40 in any given week." The ADOR advises that hours worked over multiple weeks are not averaged and hours that an employer considers overtime but that are not actually over forty hours are not exempt. The exclusion does not apply to salaried employees and does not include commissions or bonuses. Only hours physically worked by the employee count toward the 40 hours, so paid time off and holiday pay remain subject to Alabama withholding tax.

The Act requires employers to provide data on the total amount received by employees as compensation for work performed in excess of 40 hours and the total number of employees for which that amount was paid. For the tax year beginning January 1, 2023, employers must submit the aggregate data no later than January 31, 2024. Going forward the same data should be reported monthly or quarterly. Unless extended by the Legislature, this temporary relief for Alabama workers will end on June 30, 2025. The ADOR guidance is linked here: [www.revenue.alabama.gov/individual-corporate/overtime-exemption/](http://www.revenue.alabama.gov/individual-corporate/overtime-exemption/).

### Federal Trade Commission Continues to Disfavor Non-Compete Agreements

As mentioned in a previous alert, the Federal Trade Commission (FTC) issued a proposed rule in January 2023 that would essentially ban non-compete agreements between employers and American workers, including employees, independent contractors, interns, and volunteers. If finalized in its proposed form, a non-compete clause will be broadly defined as any contractual term that prevents a worker from seeking or accepting other employment or from operating a business. Employers would be prohibited from entering into non-compete agreements, maintaining existing agreements, or representing to workers that they are subject to a non-compete clause. The rule would preempt any state laws that provide less protection.

It is projected that the FTC will vote on a final version around April 2024 and, if approved, it will be published in the Federal Register and in effect 60 days thereafter. Legal challenges are likely.

## EMPLOYMENT Alert

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## Department of Labor Impacts the Number of Workers Covered by FLSA Protections

By reclassifying some independent contractors as employees and by limiting the Executive, Administrative, Professional (EAP) exemption, two Department of Labor (DOL) regulations are projected to significantly increase the number of workers who fall within the federal wage and hour protections of the Fair Labor Standards Act (FLSA).

A DOL final regulation, issued on January 9, 2024, will likely result in more workers being classified as “employees” entitled to protections instead of “independent contractors” not entitled to protections. In recent years, a determination of independent contractor status was made using a streamlined analysis which emphasized the two core factors of opportunity for profit or loss and the nature and degree of control over performance of the work. Beginning on March 11, 2024, the DOL will return to a totality of the circumstances analysis which considers the four additional factors of (1) investments by the worker and potential employer, (2) the degree of permanence of the work relationship, (3) the extent to which the work performed is an integral part of the employer’s business, and (4) the skill and initiative of the worker. Under the final regulation all six factors will be considered together and each factor will have equal weight in the analysis. Two lawsuits have already been filed challenging the new rule and the DOL’s authority under the Administrative Procedure Act.

Last Fall, the DOL released proposed regulations that would narrow the EAP exemption. To satisfy the EAP exemption, employees must meet certain tests regarding job duties and generally must be paid on a salary basis that is at least the amount specified in regulations. Currently, the annual salary threshold for exempt status is \$684 per week (\$35,568 per year). Under the proposed rule, the threshold salary would increase to \$1,059 per week (\$55,068 per year). The salary threshold for persons qualifying as “highly compensated employees” would also increase from \$107,432 to \$143,988. The DOL has stated that when it promulgates its final rule it will use the most recent data available, which could result in a threshold even higher than the amount currently proposed, perhaps to \$60,000. Salary thresholds would automatically adjust every three years to account for wage data current at the time. No change in the salary basis or job duties test is being proposed, only the salary threshold.

The DOL is projected to issue its final rule in about April 2024 with implementation 60 days thereafter. In the meantime, employers should begin assessing the financial impact of the anticipated increase by identifying employees who will fall below the proposed threshold and determining the working hours of those who may be affected. With this information, employers can make decisions about whether to raise an employee’s salary to the new threshold or reclassify the impacted employee as non-exempt. For any currently exempt employees who will transition to non-exempt status, education and training is advised regarding proper timekeeping practices, including for work time while remote, like responding to emails and taking calls which qualify as compensable time.

## Unites States Citizenship and Immigration Services Announces Updated Form I-9

The Unites States Citizenship and Immigration Services (USCIS) has issued an updated I-9 form which employers are now required to use. The new form does not include substantive changes but compresses and simplifies the previous form.

Historically, employers were required to physically examine an employee's original identity and work authorization documents. This requirement created compliance challenges for employers with remote hires. With the revised form, temporary COVID allowances for remote verification are made permanent. Eligible employers who are currently active and compliant with E-Verify may verify documents remotely by checking the appropriate box to indicate that documents were verified electronically.

Members of our Employment team will continue to monitor these important developments, and are available to provide further information, assistance, and practical advice on planning for and implementing these and other significant changes.

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