

New Overtime Regulations Take Effect

The Department of Labor's long-awaited revisions to the overtime regulations under the Fair Labor Standards Act (FLSA) became effective on August 23, 2004. The new regulations are intended to update and streamline the "white collar exemptions," which define categories of employees considered exempt from the FLSA's overtime requirements. These new regulations do not effect many industry specific regulations that have been adopted over the years. For instance, the exception for small market radio and television stations for announcers, news editors and chief engineers is unaffected by these new rules. These rules do, however, provide a clearer way of evaluating certain employment positions to determine if those who fill those positions may be exempt from requirements that they be paid overtime.

The following is a brief summary of the most significant aspects of the new regulations.

- **New Salary Threshold:** Under the new regulations, to qualify for the executive, administrative or professional exemption, an employee must receive a minimum salary of \$455 per week (\$23,660 annually). Therefore, all employees who make less than \$23,660 annually must be paid overtime.
- **New Executive, Administrative and Professional Duties Tests:** The new regulations provide a more direct methodology for evaluating whether a position is subject to an exemption from overtime requirements, eliminating the "short test/long test" dichotomy that Human Resources professionals may be familiar with from the old regulations. The new tests are summarized below.

Executive Exemption Test: To qualify for this exemption, an employee must: 1) have a primary duty of managing either the enterprise or a customarily recognized department or subdivision; 2) customarily and regularly direct the work of two or more employees; and 3) have authority to hire or fire other employees, or to make recommendations as to hiring, firing, promotion or other change of status that are given particular weight. The new regulations provide that in determining whether an executive's recommendations are given "particular weight," factors to consider include whether it is part of the employee's job duties to make such recommendations, the frequency with which such recommendations are made, and the frequency with which they are actually relied upon.

Administrative Exemption Test: The new regulations require that an administrative exempt employee: 1) have as his/her primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and 2) have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance.

The new regulations provide a list of specific examples of functions that meet the first prong of the test, such as accounting, human resources, budgeting, procurement, purchasing, quality control, and database administration. The regulations also attempt to clarify the meaning of the term “discretion and independent judgment.” Among other guidance provided, the new regulations state that the exercise of “discretion and independent judgment” involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. Factors to be considered are whether the employee has authority to formulate, affect, interpret, or implement management policies or operating policies. Employees may exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.

Professional Exemption Test: To be considered an exempt professional under the new regulations an employee must have a primary duty of performing office or non-manual work: 1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (“learned professional”); or 2) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (“creative professional”).

The new regulations clarify that journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. For example, the new regulations state, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals

- **Highly Compensated Employee Exemption:** The new regulations create a new exemption for “highly compensated” employees. To qualify under this exemption an employee must be 1) paid a total annual compensation of at least \$100,000 (including at least \$455 per week on a salary basis), 2) perform office or non-manual work, and 3) customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. Essentially, this new exemption makes it easier to establish exempt status for highly paid employees, because it provides that such an employee need meet only one – and not all – of the duties requirements applicable to an exempt administrative, executive, or professional employee. For example, the new exemption would allow an executive who managed a department but supervised only one employee to be classified as exempt, provided that the executive was paid at least \$100,000 per year.

In calculating whether an employee has annual compensation of at least \$100,000 for the purposes of this regulation, an employee’s commissions and non-discretionary bonuses may be included as part of his/her salary. Lodging, board, and other fringe benefits may

not be included in the employee's salary. *Note:* This exemption is not applicable to computer professionals (see note below).

- **Unpaid Disciplinary Suspensions:** The new regulations allow employers to impose on exempt employees suspensions in increments of one or more full days for violations of written workplace policies that are applied uniformly to all workers (i.e. harassment or violence). Under the old regulations, any disciplinary deductions less than a full work week would have eliminated an employee's exempt status (other than suspensions for major safety violations).
- **Safe Harbor Provision:** The new regulations include a "safe harbor" provision to protect employers who make improper deductions from exempt employees' salaries. Previously, employers who inadvertently made improper salary deductions could face the loss of exempt status for all employees potentially subject to the improper deductions. Under the new regulations, improper deductions will not result in the loss of exempt status, provided that the employer (1) has a clearly communicated policy prohibiting improper deductions, including a complaint mechanism; (2) reimburses employees for any improper deductions and commits in good faith to comply in the future; and (3) stops making improper deductions after receiving employee complaints.

The new regulations leave unchanged the special exemption for "computer professionals." This exemption applies to certain highly-skilled computer professionals (such as systems analysts, programmers, and software engineers) who are paid at a rate of at least \$27.63 per hour – or, in California, \$43.58 per hour, and whose primary duty involves:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on or related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the duties described above, requiring the same level of skills.

No degree is required for the computer professional exemption, but the exemption applies only to highly skilled employees who have achieved a sufficient level of proficiency in their field to allow them to work independently. It does not apply to trainees or entry-level employees. Nor does it include employees who merely operate computers, who

provide troubleshooting or “help desk” assistance, or who repair or maintain computer hardware and related equipment.

It remains to be seen how the new regulations will be interpreted by the courts. Additionally, there are still plans afoot on Capitol Hill, backed by organized labor groups, to attempt to withhold funding from the Department of Labor or otherwise derail the new regulations. However, unless and until such legislative or judicial developments occur, employers should comply with the new regulations.

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