

OVERTIME PAY RULES REVISED

By David E. Dubberly and Nikole Setzler Mergo

On April 23, 2004, the U.S. Department of Labor (DOL) published final regulations revising the “white collar” overtime pay exemptions of the Fair Labor Standards Act (FLSA). The new rules mark the first time the salary test has been revised since the 1970’s, and the first time the duties tests have been revised since 1949.

The final regulations were issued after the DOL published much-debated proposed regulations in 2004. Unless Congress blocks them, the new rules go into effect August 23, 2004. This update highlights some of the new rules.

Revised Salary Test

Minimum Salary. The final regulations require employers to pay overtime to employees who earn less than \$455 per week on a salary basis, or \$23,660 annually. This is a significant increase, as the current regulations require that overtime be paid to employees earning \$155 per week, or less than \$8,060 annually.

Highly Compensated Employees. The final regulations contain a new exemption for “highly compensated” employees. Under this exemption, employees who perform office or non-manual work and earn a salary of at least \$100,000 per year will be completely exempt from coverage if they customarily and regularly perform at least one of the duties of an exempt executive, administrative, or professional employee. The \$100,000 compensation can include bonuses and commissions, but not benefits.

New Permissible Deduction. The final regulations add a noteworthy exception to the salary basis test. Under the new rules an employer can deduct an exempt employee’s salary for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. The current regulations permit such deductions only if the suspension is for a full week, and it is imposed for “infractions of safety rules of major significance.”

New Safe Harbor Rule. The overtime exemptions can be lost where an employer makes improper deductions from salary. The final regulations create a new “safe harbor” to reduce the risk that improper deductions will destroy an exemption. Under this provision, the exemption is not lost if the employer: (1) has a clearly communicated policy prohibiting improper deductions; (2) reimburses employees for any improper deductions; and (3) makes a good faith commitment to comply with the FLSA in the future. This safe harbor is not available if the employer willfully violates the policy and continues to make improper deductions.

Revised Duties Test

The final regulations replace the current “long” and “short” duties tests with a “standard” duties test to determine which employees earning between \$23,660 and \$100,000 are exempt from overtime pay.

Executive Employees. To qualify for the executive employee exemption under the current short test, an employee must:

- Have the primary duty of managing the enterprise or a customarily recognized department or subdivision of the enterprise; and
- Customarily and regularly direct the work of at least two or more other fulltime employees.

The final regulations add to the standard test a third requirement from the long test. The employee must have the authority to hire or fire other employees or make recommendations about hiring and firing that are given “particular weight.”

The final regulations also provide an executive exemption for any employee who owns at least a 20 percent bona fide equity interest in the enterprise in which he or she is employed, provided the employee is “actively engaged in its management.”

Administrative Exemption. The final regulations do not significantly change the wording of the current administrative employee duties test. They provide that the exemption applies to employees whose primary duty:

- Consists of performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- Includes the exercise of discretion and independent judgment with respect to matters of significance.

Importantly, however, the final regulations clarify the exercise of discretion and independent judgment standard, and specify factors to be considered in applying the standard.

The new regulations also identify positions that typically satisfy the duties requirement for the administrative exemption, including: human resource managers, as long as they formulate, interpret, or implement employment policies; executive or administrative assistants to a business owner or senior executive, if they are granted authority over significant matters; management consultants; purchasing agents with authority to bind the company on significant purchases; insurance claims adjusters; and certain financial services employees.

Professional Employees. The final regulations generally track the language of the current professional employee exemption. They provide that the exemption applies to employees whose primary duty is the performance of work requiring:

- Knowledge of an advanced type (defined as work that is predominately intellectual in character and includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction – these are the learned professionals; or
- Invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor – these are creative professionals.

The final regulations, however, define more broadly some of the key terms of this exemption. Accordingly, some employees who are not currently covered by the exemption will be considered learned or creative professionals.

The new rules provide numerous examples of exempt learned professional occupations, including certain registered or certified medical technologists; registered nurses; certain dental hygienists and physician assistants; CPAs and accountants who perform similar duties; and certain chefs and athletic directors.

The FLSA also contains specific exemptions for computer employees and outside sales employees; however, the final regulations have not significantly changed the application of those exemptions.

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