

## Key Elements In Department Of Labor's New "Fair Pay" Overtime Rules For White Collar Exemptions

On April 20, 2004 the Department of Labor (DOL) finally issued its long-awaited revised regulations that define the Executive, Administrative, Professional, Computer, and Outside Sales exemptions under the Fair Labor Standards Act (FLSA). These revisions will be effective August 23, 2004, unless Congress acts to block them.

The changes affect nearly all employers. Many observers believe that with the release of the changes the DOL will increase its enforcement efforts. Given the widespread publicity, employees may also be more likely to file complaints. The consequences of failing to properly apply overtime rules can be significant and costly. Therefore it's important that all employers familiarize themselves with the new rules, examine their current practices, and be prepared to make the necessary changes. A few of the key changes are highlighted below. HRN's **HR Suite** clients will receive an expanded analysis of the new rules and side-by-side comparison of the specific current, proposed, and final exemptions in their May **HR Notes**. Over the next few months they will also receive numerous tools and resources that break the exemptions and other FLSA issues into smaller, more detailed topics so they are more easily implemented. Information is also available from the Department of Labor website at [www.dol.gov](http://www.dol.gov).

### Key Changes in the New Regulations

- The **minimum salary level** required for an overtime exemption has been raised from \$155/week to \$455/week (**\$23,660**). In effect, employees paid less than \$23,660 would be guaranteed overtime payments, regardless of their job duties, if they work over 40 hours in a workweek.
- A **new highly compensated exemption** was created for those earning at least \$100,000/year, perform office or non-manual work, and customarily and regularly perform at least 1 exempt executive, administrative, or professional duty. Basically these employees would be exempt from overtime payments. However, the regulations make clear that this exemption does not apply to "blue collar" employees no matter how much they make.
- The "long and short duties" tests have been replaced with a **standard duties test** for each exemption.
- The **primary duty** requirement for exempt status has been clarified so that attention is paid to the employee's principal function and not the percentage of time spent on exempt vs. nonexempt work. While the primary duty must be the performance of exempt work the regs don't require that exempt employees spend more than 50% of time performing exempt work. For example, an assistant store manager may have the primary duties of supervising employees, ordering merchandise, and managing the budget (exempt duties) but may spend more than 50% of his time on nonexempt work, such as running the cash register. Such employees may still be exempt. It's a case-by-case decision. Employees who spend more than 50% of time on exempt duties are presumed to have the primary duty of performing exempt work.
- To satisfy the **Executive** exemption an employee is now required to have authority or significant influence over **hire and fire** decisions.

- The **discretion and independent judgment** requirement was retained as part of the Administrative and Professional exemptions. This has been one of the most confusing and frequently litigated requirements. It still remains a case-by-case analysis although the DOL has provided additional guidance to aid in the effort. The proposed regulations of March 2003 had eliminated it.
- While the new standard duties test for the **Administrative** exemption changed only slightly, other regulatory **guidance** has been provided to interpret the requirements and provide **examples** of possible Administrative positions. The guidance recognizes that a number of positions may qualify for the Administrative exemption because their duties directly relate to the company's management or general business operations, provided they exercise the required discretion and independent judgment. Examples of the types of positions that could be exempt under the Administrative test include: computer network, Internet and database engineers and administrators, insurance claims adjusters, certain employees in the financial industry, human resource managers, and team leaders of major projects.
- The new rules basically retain the **Professional** exemption's education requirement that knowledge be "customarily acquired by a prolonged course of **specialized intellectual instruction**." The proposed changes had loosened this requirement for the **Learned Professional Exemption** by allowing a combination of instruction plus work experience and allowed instruction from technical schools, community colleges or the military. The final rules make clear that the knowledge required can't be gained through experience and general knowledge or just a high school education. The guidance does, however, provide examples of jobs that could be exempt including: registered nurses, dental hygienists, medical technologists, physician assistants, chefs, athletic trainers, actuaries, engineers, lawyers, doctors, pharmacists, teachers, and accountants. The **Creative Professional Exemption** has been broadened to include "creative" as well as "artistic" professionals and can now include such positions as actors and some journalists.
- The guidance also provides **examples of certain nonexempt positions** such as licensed practical nurses, paralegals, legal assistants, accounting clerks, bookkeepers, cooks, engineering technicians, and personnel clerks. The regulations are specific that the exemptions do not apply to **blue collar nonmanagement employees** such as carpenters, electricians, mechanics, plumbers, construction workers, and other manual laborers. An exception was also specifically carved out for certain **public safety employees** ("first responders") such as police officers, detectives, deputy sheriffs, highway patrol officers, investigators, inspectors, correctional officers, parole and probation officers, park rangers, firefighters, paramedics, EMTs, ambulance and rescue employees.
- The duties test for **Computer** employees remains basically unchanged other than it is now a separate exemption apart from the Professional exemption. Computer employees can still be exempt if paid on a salary or fee basis of at least \$455/week or at an hourly rate of \$27.63. Note also that more highly skilled computer employees may now qualify for exempt status under the Administrative test.
- The **Outside Sales** exemption was unchanged except that the 20% limit on nonexempt work has been replaced with the "Primary Duty" requirement. Note that inside sales people still don't qualify for the exemption. Remember also that the salary requirements do not apply to the Outside Sales exemption.

- The **Salary Basis** test is still a fundamental part of the exemption requirements. That test requires that, except for a few limited exceptions, an exempt employee must be paid on a salary basis and that her pay may not be improperly docked. Improper pay docking risks the loss of the exemption. The regulations make clear that there are several exceptions to the pay docking rule under which an employer make dock an exempt employee's pay in less than full week increments. They include:
  - Absences from work for one or more full days for personal reasons;
  - Absences from work for one or more full days due to sickness or disability if the employer has a sick leave program and the employee has yet to qualify for it or has exhausted the leave available;
  - Offsets for any payments for jury or witness fees or military pay;
  - Penalties imposed for violating major safety rules;
  - Time not worked during the first or last week of employment;
  - Unpaid leave taken under the Family and Medical Leave Act; and
  - **Unpaid disciplinary suspensions** of one or more full days. This **new exception** would allow a company to suspend an exempt employee in full day increments for such things as violation of harassment or other serious workplace policies.
- A new **Safe Harbor Rule** provides that isolated salary deduction mistakes will not destroy an exemption and thereby require that employees be treated as nonexempt employees and paid overtime. Under the new rules an inadvertent improper deduction won't defeat an exemption if the employer:
  - Has a clearly communicated policy that prohibits improper deductions and includes a complaint mechanism;
  - Reimburses the employee for any improper deduction; and
  - Makes a good faith commitment toward future compliance.