

WHO GETS OVERTIME PAY? SWEEPING CHANGES TO RULES PROPOSED

Employees must be paid overtime for all hours worked over forty in a workweek unless they are exempt from the overtime requirements imposed by the federal Fair Labor Standards Act ("FLSA"). The Department of Labor has proposed changes to FLSA regulations which, if implemented, will significantly change current regulations regarding what are commonly known as the "white-collar" exemptions to FLSA overtime requirements. Although final regulatory changes have not yet been issued, it is clear now that important changes will be made which will require modification of overtime pay practices. When finally issued (possibly as early as next month), these new regulations will present employers with a unique opportunity to correct any existing misclassifications. This article discusses the likely revisions to existing law. We will update our readers regarding the final regulations when they are issued.

IN SUMMARY

The key proposed changes are as follows:

- Delete the "short" and "long" tests in favor of single tests based on a salary of at least \$425 per week.
- Create an exemption for "highly compensated" employees who are guaranteed to make at least \$65,000 per year and who perform at least one exempt function.
- To qualify for the "executive" exemption, hire/fire authority, or at least the ability to make effective recommendations regarding hiring/firing, will be required.
- The existing "discretion and independent judgment" requirement for "administrative exemption" will be deleted; instead, the employee must hold a "position of responsibility."
- For the "professional" exemption, delete discretion and independent judgment requirement; also, the educational degree in a field of science or learning no longer required if equivalent is obtained through work experience.
- Delete from the "outside sales" exemption the requirement that the employee devote no more than 20% of his or her work hours to non-exempt work.
- Delete from the "computer professional" exemption the discretion and independent judgment requirement.
- Under certain circumstances, disciplinary suspensions of salaried employees without pay for at least one day may be made without risk of losing an exemption.

SALARY AMOUNT

The proposed regulations streamline the existing salary amount test: to be classified as an exempt executive, administrative or professional employee, the employee must be paid on a salary basis at a rate of not less than \$425 per week. Computer employees paid hourly must be paid at least \$27.63 an hour.

The proposed regulations also create a new classification of "highly compensated employees." Under the proposed regulations, employees who (i) perform office or non-manual work, (ii) are guaranteed a total annual compensation of at least \$65,000, and (iii) perform *at least one* exempt duty or responsibility will be exempt from overtime requirements. This new classification does not require payment on a "salary basis." The definition of "total annual compensation" includes base salary, non-discretionary bonuses and other non-discretionary compensation when paid on at least a monthly basis, but not board, lodging or other facilities. Total annual compensation may be pro-rated for employees working less than a year.

DUTIES TESTS

The proposed regulations *eliminate* the distinctions of the existing "short" and "long" tests and create single tests based on a weekly salary of not less than \$425.

EXECUTIVE EXEMPTION

The proposed regulations modify the existing executive exemption by requiring that the employee have *the authority to hire or fire or at least make effective recommendations as to hiring and firing*, in addition to requiring that the employee (i) manage the enterprise or a recognized department or subdivision as a primary duty and (ii) direct the work of at least two employees.

Practical Tip

The addition of hire/fire authority or recommendation authority as a requirement likely will result in a substantial number of lower and midlevel managers and "working supervisors" *losing* the exemption as executives. While many such employees direct the work of others, they often do not have the authority to make or influence personnel changes.

ADMINISTRATIVE EXEMPTION

The proposed regulations delete the current "discretion and independent judgment" requirement and instead require that an exempt administrative employee hold "a position of responsibility." Under this new standard, the employee's primary duty must involve performing office or non-manual work directly related to the business operations of the employer or the employer's customers and the employee must hold a "position of responsibility."

To meet the new “position of responsibility” requirement, the employee must customarily and regularly either (i) perform work of substantial importance or (ii) employ a high level of skill or training. “Work of substantial importance” is work that, by its nature, affects the employer’s general business operations or finances to a significant degree—it does not, however, require participation in management. Work requiring a “high level of skill or training” is defined as administrative work requiring specialized knowledge, abilities or advanced training. The proposed regulations contain examples of positions and duties that may satisfy the requirement for this exemption.

Practical Tip

Based on these examples, and depending on the position and level of responsibility, potentially exempt administrative positions include:

- Tax, finance and accounting
- Auditing or quality control
- Insurance
- Purchase or procurement
- Advertising, marketing, research
- Safety and health
- Personnel management/human resources
- Employee benefits
- Labor relations
- Public or government relations

As currently proposed, it is likely that more employees will qualify for the administrative exemption. The new “position of responsibility” requirement, however, is rather vague and likely a fertile ground for legal challenges. Accordingly, we believe that employers should act conservatively and classify questionable positions as non-exempt until the parameters of this new exemption are clarified.

PROFESSIONAL EXEMPTION

The proposed regulations make two major changes to the professional exemption. First, employees will not necessarily be excluded from the professional exemption because of the lack of an educational degree in a field of science or learning. Second, employees will no longer be required to exercise “discretion and judgment.” In order to satisfy the professional exemption under the proposed regulations, therefore, the employee’s primary duty must consist of performing office or non-manual work requiring knowledge of an advanced field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction. Such knowledge,

however, may be acquired by an equivalent combination of intellectual instruction and work experience.

The most substantial impact created by the proposed change is that certain employees who currently do not satisfy the professional exemption requirements will be considered exempt under the proposed regulations (for example, depending on the facts, lab technicians or information technology workers).

OUTSIDE SALES

The proposed regulations *eliminate* the requirement that the sales employee devote no more than 20% of work hours per week to activities not an essential part of and necessarily incident to exempt work.

COMPUTER PROFESSIONAL

The proposed regulations no longer require “independent discretion and judgment.” The employee must work in a highly skilled position, such as computer system analysis, software engineering or other similar functions. The exemption does not include employees engaged in the manufacture, repair or maintenance of hardware or related equipment.

SALARY BASIS

The most significant proposed change in this area is to allow employers to suspend an otherwise exempt salaried worker without pay for a full day or more when done in good faith for violation of workplace conduct rules pursuant to a written policy uniformly applied to all workers, without losing exempt status. Further, even if an employer makes an improper deduction, a salary basis exemption will not be lost unless the employer has a “pattern and practice” of not paying employees on a salary basis. The proposed regulations also create a “safe harbor” that provides that an employer will not lose an exemption if it has a written policy prohibiting improper deductions, notifies employees of its policy, and reimburses employees for any improper deductions, unless the policy is repeatedly and willfully violated.

CONCLUSION

Employers should consider conducting a review of current classification practices in anticipation of the new regulations. Such a review should have two main purposes: (i) to determine what positions will be affected by the proposed regulations, and (ii) to determine whether any classifications are currently incorrect and will remain so under the proposed regulations. We believe the changes to the overtime regulations will present employers with a unique opportunity to correct any existing improper classifications while implementing changes either required or permitted by the new regulations.

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