

June 2004

Changes to FLSA White Collar Exemptions

Recently, the Department of Labor issued its final regulations containing extensive revisions to the white collar exemptions to the Fair Labor Standard Act. The new regulations become effective in August 23, 2004.

The changes are intended to streamline the regulations and provide better guidance for employers in complying with this area of the FLSA, which has been the subject of substantial litigation in recent years. However, whether the changes will result in less litigation is uncertain, since ambiguities persist and new terms will likely lead to new challenges. We provide below a brief overview of the most significant changes in the new regulations, however we encourage all of you to contact our office immediately to set up an appointment to assess how these changes may affect your business. This overview is no substitute for specific legal advice.

Salary Requirement

The new regulations nearly triple the minimum salary requirement to \$455 per week for exemption to be possible. Now, all employees who earn a salary of less than \$23,660 per year must be paid overtime. Exemptions for persons earning more than this amount require the employer to consider various issues to determine if the employee is exempt from payment of overtime. Just being on a salary is **NOT** enough.

The Executive Employee Exemption

The new regulations create a single duties test for the executive exemption including: (1) a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof (2) customarily and regularly directing the work of two or more other employees; and (3) the authority to hire or fire other employees or have particular weight given to suggestions or recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees. The new regulations eliminate the requirements that executive employees exercise discretion or independent judgment and devote certain percentages of time on exempt versus non-exempt work. The new regulations attempt to clarify the term “particular weight” regarding employee suggestions or recommendations. The regulations also specifically allow an executive employee to perform concurrently exempt and nonexempt work.



How will the new regulations affect you and your business?

The Professional Employee Exemption

The new regulations also streamline the current regulation for professional employees by adopting a single standard duties test. The standard provides that an exempt professional 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 and work experience; or (2) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

The Administrative Employee Exemption

The revised duties test for the administrative exemption includes (1) a primary duty of office or nonmanual work “directly related to the management or general business operations of the employer or the employer’s customers” and (2) the exercise of “discretion and independent judgment with respect to matters of significance.” The new regulations add the term “matters of significance” to the definition but the regulations do not define this term.

The Outside Sales Employee Exemption

The new regulations remove the time requirements placed on outside sales employees. Previously, the regulations required outside sales employees spend at least 80 percent of their time on outside sales activities and related tasks. Now, no specific time requirements apply to outside sales activities, as long as they are substantial enough to constitute the “primary duty.”

Furthermore, the regulations clarify specific aspects of the outside sales exemption. For instance, the regulations now specify that solicitations by mail, phone, or Internet are not “outside” sales activities unless adjunct to calls on customers at their place of business or home. The new rules also discuss in greater detail the exempt status of sales employees who promote sales at trade shows and drivers who sell during their contact with customers.

The Highly Compensated Employee Exemption

The regulations create a new exemption for employees whose total annual compensation is at least \$100,000 and who customarily and regularly perform one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. The regulations clarify that no employees performing non-management or production line work will qualify for this exemption, regardless of how highly they are compensated. The exemption is available only to employees whose primary duties are office or non-manual. The employer must identify the 52-week period in advance or the calendar year applies.

Deductions from Salary Can Jeopardize Exemptions

With some limited exceptions, you can not make deductions from a salaried employees pay check. The new rules provide for 7 permissible situations when deductions from salaries of exempt employees may be made: (1) an absence of 1 or more full days for personal reasons other than sickness or disability; (2) absences of 1 or more full days due to sickness or disability if the deductions are made under a bonafide plan or policy or practice of providing wage replacement benefits for these types of absences; (3) deductions from the daily rate equal to pay for monies received due to jury duty, witness fees, or military pay; (4) penalties imposed for good faith violations of safety rules which are of “major significance;” (5) disciplinary suspensions without pay for 1 or more *full days* which are imposed on an employee for a good faith violation of the work place conduct rules; (6) proration of full salaries for time actually worked in the first and last weeks of employment and (7) unpaid leave under the Family Medical Leave Act.



Under the old regulations a single unlawful deduction from salary could result in company-wide loss of exempt status for an entire classification of employees. Now, an unlawful deduction results in the loss of the exemption only for employees in the same job classification and working for the same manager responsible for making the improper deduction. The old rule allowed only a limited opportunity to correct improper salary deductions. By contrast, the new rule creates a broad safe harbor, allowing an employer to avoid liability for improper deductions with a clearly communicated policy that (1) prohibits improper pay deductions; (2) includes a complaint mechanism; (3) reimburses employees for any improper deductions; and (4) makes a good faith commitment to comply in the future. The regulations provide that the “best evidence” of such a policy is a written policy distributed to employees at the time of hire, published in a handbook, or available on the company’s intranet website.

In addition to the seven aforementioned situations for permissible deductions, now an employer can impose full-day suspensions without pay for violations of workplace conduct rules as long as the workplace conduct rules are set forth in a written policy applicable to all employees. For example, the regulations allow an employer to impose a three-day unpaid suspension on an exempt employee for violating the employer's written policy prohibiting sexual harassment. Likewise, an employer can impose a twelve-day unpaid suspension for violations of the employer's written workplace violence policy. The new rule still prohibits partial day salary deductions, unless done for FMLA purposes.

State Wage and Hour Laws

Employers should not lose sight of the fact that state wage and hour laws may contain more generous coverage, or differing duties tests than the new regulations. For example, the new regulations provide that an employee classified as an exempt executive will not lose that exemption if he performs both exempt and non-exempt duties concurrently. Further, the new federal regulations set the minimum salary at \$455 per week.

In conclusion, some of the changes to the regulations bring needed clarity and flexibility. However, overall, considerable ambiguity and room for interpretation still exists. Employers should begin to prepare for compliance with these rules, the clock is ticking. Here are some helpful hints: (1) if you have any employee who is making less than \$23,660 per year, you need to review their duties and salary and decide what, if any changes need to be made; (2) if an employee makes at least the minimum salary requirement, \$23,660.00 examine the duties they perform to find if those duties fall within any of the white collar exemptions to make them exempt under the overtime laws; (3) make sure you draft the policies that provides for a safe harbor as described on page 2; (4) make sure you have communicated clearly to non-exempt employees the requirement that all time must be recorded and all recorded working time will be paid. It is important that if an employee has to have prior written approval before engaging in overtime that he or she signs and acknowledges that requirement.

Free Employment Law Advice

The Department of Labor is offering a new feature to aid employers in complying with the laws governed by their department. The interactive tool allows you to ask questions regarding employment law and receive answers from the advisors. To utilize this tool visit the Department of Labors website at www.dol.gov. On the home page look under Compliance Assistance on the right hand side, click elaws-Employment Law Advisor and take advantage of what the Department has to offer.



CMS Has Issued the 2004 Physician Fee Schedule

CMS had announced that it would cut payments under the Medicare physician fee schedule by 4.5% in 2004, however, under the newly enacted Medicare reform legislation, those cuts will actually become increases (*see Is It The Most Important Medicare Law* below). To view the new 2004 fee schedule please visit <http://cms.hhs.gov/physicians/pfs>.

New Medicare Law

Some say that the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 is the most important Medicare law and providers of every type should become very familiar with its guidelines. In December of 2003 President George Bush signed the new Act into law. The new Act will help to create a modern Medicare system. The Act will add outpatient prescription drug coverage as well as allow for the biggest improvements in senior health care in nearly 40 years by providing seniors with prescription drug benefits and more choices in health care. The new law contains significant changes to the Medicare program one of which will allow for a 1.5% payment rate increase instead of the expected 4.5% payment cut in 2004. An additional 1.5% increase will replace another projected cut in 2005. For more information or an executive summary of this Act please contact our office.

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