

PKF PERSPECTIVES

OVERHAULED FEDERAL LABOR REGULATIONS SCHEDULED TO TAKE EFFECT AUGUST 23, 2004

Exempt or Non-Exempt? That is the question that the United States Department of Labor's (DOL) update of the overtime provisions of the Fair Labor Standards Act (FLSA) attempts to make easier to answer. Known as the "FairPay Overtime Initiative," the new rules will guaranty, according to the DOL, overtime protection to 1.3 million low-wage workers previously denied under the old rules. At the same time, the DOL believes the revised rules will help deter legal challenges resulting from the old, more complicated provisions. The new rules generally apply to salaried "white collar workers" and specifically exclude manual laborers and other blue collar workers who, regardless of salary, are entitled to overtime pay.

New Salary Threshold

Any employee whose salary is less than \$23,660 per annum (\$455 per week), exclusive of board, lodging or other facilities, is generally classified as a non-exempt employee and thereby entitled to one and one-half times their hourly wage for all hours worked in excess of 40 in a work week. (The old threshold was \$8,060 per year and was last updated in 1975.)

Employers, however, should also be aware (1) that there are certain unique salary basis rules for certain types of employees, including academic administrative employees, computer employees, etc.; (2) that the minimum salary requirement may not apply to certain practicing lawyers or doctors, outside sales employees, etc.; and, (3) that administrative and professional employees may be paid on an agreed-upon "fee basis" for a particular job regardless of the time required as long as the amount paid is tested to determine that the fee payment is at a rate that would amount to at least \$455 per week.

New Duties Tests

Neither a salary in excess of \$23,660 nor a job title alone is sufficient to establish exempt status. The 1959 "long" and "short" tests to determine exempt status were discarded in favor of a standard duties test for each of the exemptions. The following exemptions are generally predicated on meeting the \$23,660 salary minimum and on

the performance of office or non-manual work. As used below, "primary duty" is defined as "principal, main, major, or most important duty that the employee performs". Generally, employees who spend more than 50% of their time performing exempt duties will qualify.



Executive: Exempt if worker (1) manages the enterprise or a regular department or subdivision of the enterprise, (2) customarily and regularly directs the work of two or more other full-time (or equivalent) employees, and (3) has the authority to hire or fire other employees or his/her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status relative to another employee is given weight.

Administrative: Exempt if worker's primary duty is directly related to management or general business operations of the employer or employer's customers and requires that the employee exercise discretion and independent judgment with respect to matters of significance. An employee must perform work directly related to assisting with the running or servicing of the business.

Learned Professional: Exempt if employee's primary duty requires advanced knowledge to perform the work which is defined as work that is predominantly intellectual in nature to analyze, interpret or make deductions from varying facts and circumstances and includes consistent exercise of discretion and judgment. This advanced knowledge must be in a field of science or learning and is customarily acquired through a prolonged course of specialized intellectual instruction combined with work experience. A veteran's military experience does not qualify as advanced instruction or work experience under this exemption.

Creative Professional: Exempt if employee's primary duty requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavors as opposed to routine mental, manual, mechanical or physical work. Music, writing, acting and the graphic arts are generally recognized fields.

Computer Employee: Exempt if worker's primary duty consists of computer systems analysis, programming or other similarly skilled tasks. Computer employees may also fall within the scope of "executive" or "administrative" or "learned professional" exemption. Employees primarily engaged in the manufacture or repair of computer hardware and related equipment are not exempt.

Outside Sales: Exempt if employee's primary duty is making sales, obtaining orders or contracts for services or for the use of facilities for which an employer is paid by the client or customer. The employee must be customarily and regularly engaged away from the employer's place of business. Outside sales does not include sales made by mail, telephone or the Internet unless such communication is used merely as an adjunct to personal contact.



Highly Compensated: Exempt if employee performs primarily office or non-manual work, earns \$100,000 or more per year, is paid at least \$455 per week, and regularly and customarily performs at least any one of the exempt duties of an **Executive, Administrative** or **Professional** employee. A year may be a calendar or fiscal year. Total annual compensation may also include commissions, bonuses and other non-discretionary compensation.

Salary Deductions Permitted

Employers continue to be permitted under various circumstances to deduct pay from exempt workers, including (1) absences for personal reasons, (2) sickness or disability after exhaustion of permitted leave and in accordance with stated company policies, (3) offsets for amounts for jury and witness fees, military pay, etc. These deductions generally must be taken in full-day increments. Because salary deduction may expose employers to risk a challenge to exemption, employers are encouraged to review Section 541.602 of the regulations which sets forth permissible deductions.

"Safe Harbor"

An employer no longer faces an automatic loss of exemption for an inadvertent improper deduction from an exempt employee's wages as long as (1) there is a clearly communicated policy prohibiting improper deductions, including a complaint procedure; (2) the employee is reimbursed; and (3) the employer makes a good faith effort to comply in the future.

Outranking the FLSA Rules

The FLSA rules stipulate the minimum standards, but in no way are intended to supplant more employee-favorable state or local laws or collective bargaining agreements. Further, these rules do not preclude an employer from providing more favorable treatment to their employees.

For an Employer's Consideration

This would be a good time to review your personnel roster to ensure that those employees classified as exempt meet the new salary threshold and duties tests, as well as to determine if state or local labor laws are more employee-favorable than the Federal laws. You should also review and revise, as necessary and appropriate, your personnel policies to reflect the rules. To take advantage of the "safe harbor" provision, an employer must establish an internal mechanism for employees to voice complaints if there is a pay discrepancy. You should also advise your human resources and payroll personnel of any changes affecting personnel classifications and wages, as well as consult with legal counsel.

Resource

You can find a copy of the new regulations, together with an abundance of commentary, on the DOL's website at www.dol.gov/esa.

Items in this publication should not be considered official statements of position, nor advice for individuals or organizations without consulting legal counsel. For more information, please contact Howard Pell or Leo Parmegiani at:



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