

Department of Labor Changes to White Collar Exemptions How Will They Affect Your Business?

By Jane H. Graham

On April 23rd, the department of Labor (DOL) issued final rules (the “Fair Pay Overtime Initiative”) revising the white-collar exemptions to the Fair Labor Standards Act’s (FLSA) overtime requirements. The rules are scheduled to take effect on August 23, 2004. Although political wrangling in Congress has the fate of the regulations still up in the air as of this writing, it appears that some changes to the white-collar exemptions are inevitable. The new rules themselves, which are nearly 30 pages long, are dwarfed by the accompanying summary, background and section-by-section comments, which span over 150 pages. This Note looks at some of the highlights.

Background: DOL regulations define which jobs are exempt from the minimum wage and overtime requirements of the FLSA. In most cases, exemption requires both that the employee earn a certain minimum salary and that his or her duties fit one of the five categories in the exemptions (executive, administrative, professional, outside sales or computer). The exemption rules have been out of date for many years. The minimum salary level for exempt status was last raised in 1975 to \$155 per week, which means that an employee could be earning less than the current minimum wage and still be exempt. The duties requirement in the regulations has not been changed since 1949. Drafted primarily for a manufacturing economy, many of the duties tests were nearly useless for analyzing the exempt status of today’s service-sector employees.

Key Changes:

Duties—New General Rules: The rules contain a new section providing that the exemptions do not apply to “blue collar” workers who perform “work involving repetitive operations with their hands, physical skill and energy” and who gained their skill primarily through “apprenticeships and on-the-job training” rather than “specialized intellectual instruction.” Also explicitly made non-exempt are employees such as police officers, deputy sheriffs investigators, correctional officers and other employees involved in similar public safety functions. Both of these categories are non-exempt regardless of salary level.

Salary: The new rules eliminate the different salary levels that used to accompany the “long” and “short” test for exemption. Now the minimum salary required for exemption, where applicable, is \$455 per week. All employees, other than those listed above who earn over \$100,000 per year in total compensation are exempt, so long as at least \$455 per week of that total is salary, and they customarily and regularly perform one or more of the exempt duties contained in the executive, administrative or professional exemptions.

Executive Exemption: The new rules retain the old “short test” requirements that the employee (1) manage the enterprise or a department or subdivision thereof and (2) direct the work of two or more other employees. They also keep the requirement from the old “long test” that the employee must have authority to hire and fire or to make recommendations as to the changes of status that are “given particular weight.” No doubt, what this means exactly will be subject to future litigation.

Administrative Exemption: Disappointingly for employers who have struggles to make sense of this exemption, the basic definitions are little changed. Administrative employees are still those whose primary duty is “office or non-manual work directly related to the management or general business operations” of the employer or its customers, and who exercise “discretion and independent judgment with respect to matters of significance.” Although the regulations explaining these key requirements have been rewritten and reorganized, and there are extensive comments that may affect a few jobs at the margin of this exemption, there does not appear to be a great deal of substantive difference.

Professional Exemption: This exemption appears to be little changed in substance. Professional employees must have as their primary duty the performance of work (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a long prolonged course of “specialized intellectual instruction” or (2) requiring “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” The new rules clarify that the advanced knowledge may be acquired through a mix of experience and education.

Computer Employees: The duties remain largely the same, but compensation can either be the minimum salary of \$455 per week, or hourly pay of at least \$27.63.

Outside Sales: The primary duty test remains the same, but the twenty percent limitation on non-exempt work has been eliminated.

Other Changes: Exempt employees can now be suspended for as short as one full day (rather than a full week) without losing exempt status, and the new rules make it somewhat easier for employers to fix isolated improper deductions without losing exempt status.

Fate of the Rules Uncertain: The Republicans and Democrats in Congress are battling over proposed amendments to the new Rules, but President Bush is vowing to veto any changes.

What Should Employers Do Now? First, remember that so far, Washington has not changed its exemption rules; although it is possible the state will ultimately follow the DOL interpretations. Until that changes, you will have to comply with whichever interpretation is more favorable to employee. Second, stay tuned on the fate of the rules in Congress. Third, begin a process of reevaluating jobs; at least those that appear to be near the margins of the exemptions. Fourth, if you have jobs that you are concerned may have already been improperly characterized as exempt under the old rules, the new rules are the perfect opportunity to reclassify them with reduced risk of back pay liability. Information and updates are available from the DOL at <http://dol.gov/esa/regs/compliance/whd/fairpay/main.htm>.

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