



ROBINSON & COLE LLP

Labor, Employment & Benefits



Revised Regulations Regarding FLSA Exemptions for White Collar Workers

INTRODUCTION

On August 23, 2004, the Department of Labor's revised regulations under the Fair Labor Standards Act (FLSA) regarding exemptions from minimum wages and overtime pay for executive, administrative, professional, outside sales and computer employees will take effect. The regulations, published at 29 CFR Part 541, revise the salary levels, the "salary basis" test, and the "duties" tests that determine whether a white collar worker will be classified as an exempt employee. The final regulations differ in significant ways from both the existing regulations and the regulations originally proposed by the Department of Labor in March 2003.

SCOPE OF REGULATIONS

The revised regulations apply only to white collar workers. The regulations do not affect employees who perform work involving repetitive operations with their hands, physical skill and energy, such as non-management production line employees, non-management employees in construction and maintenance companies, carpenters, electricians, plumbers, craftsmen, mechanics, and other such laborers. Additionally, the new regulations do not apply to police officers, firefighters, emergency medical technicians, paramedics, and similar public safety employees.

STATE WAGE & HOUR LAWS

The protections established by federal regulations cannot be waived or reduced by state laws; however, if a state offers more generous coverage to employees, then the state law governs. Employers are advised to consult with counsel regarding the impact the revised federal regulations may have on the state wage and hour laws.

SALARY LEVELS*

Under the revised regulations, white collar employees who earn less than \$455 per week (i.e. less than \$23,660 per year) are entitled to overtime pay, regardless of the nature of their job duties. In the past, the minimum salary level required for an employee to be classified as exempt was \$155 per week.

On the other end of the spectrum, employees who earn at least \$455 per week on a salary basis and earn at least \$100,000 per year are automatically classified as exempt under federal law if they customarily and regularly perform one or more duties of an executive, administrative or professional employee. This "highly compensated employee" test applies only to white collar workers, and does not affect employees engaged in manual labor or most police or fire personnel. [Click here to view a table on the salary level test.](#)

**The salary basis test and the minimum and maximum salary levels do not apply to outside sales employees.*

SALARY BASIS & DEDUCTIONS FROM SALARY*

With some limited exceptions, an employee must be paid on a salary basis in order to qualify for exempt status; in other words, the employee must be paid on a pre-determined or fixed salary that is not subject to reductions because of variations in the quantity or quality of the work performed. The revised regulations expand the circumstances under which an employer may legitimately take deductions from the salary of an exempt employee. Previously, an exempt employee who violated a workplace conduct rule could not be suspended without pay for less than a full work-week. Under the revised regulations, however, an employer can impose on an exempt employee "unpaid disciplinary suspensions of one or more full days" for violations of workplace conduct rules, provided that the workplace conduct rules are set forth in written policies applicable to all employees.

The revised regulations also modify the consequences of taking improper deductions. In the past, if an employer made a single improper deduction from the salary of an exempt employee, it could result in the loss of exempt status for all employees in the same classification. Under the revised regulations, inadvertent or isolated improper deductions will not change the exempt status of any employees as long as the employer reimburses the employees for the improper deductions. Moreover, even if the employer has engaged in an actual practice of making improper deductions, only those employees in the same job classification and working for the same manager(s) responsible for the improper deductions will lose their exempt status. Further, their exempt status will be lost only for the time period in which the deductions were made. The exempt status of employees working in different job classifications or for different managers will not change.

Employers should adopt a "clearly communicated policy" that prohibits improper deductions, describes the complaint procedure, reimburses employees for improper deductions, and makes a good faith commitment to comply in the future. Under federal law, if an employer adopts such a policy and, subsequently, makes an improper deduction, the deduction will not cause the employer to lose the exemption for any employee unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. Because this "safe harbor" is available only when the policy exists and is clearly communicated to the employees, employers are encouraged to memorialize the policy in writing.

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PRIMARY DUTY

The revised regulations streamline the tests for determining exempt status, and focus primarily, although not exclusively, on the employee's primary duty. In determining an employee's primary duty, the Department of Labor will conduct a fact-specific inquiry into the employee's job as a whole to determine his or her principal, main or most important duties. Although the amount of time an employee spends on a particular duty is a useful guide for determining whether it constitutes the employee's "primary duty," the revised regulations avoid identifying any particular percentage of time sufficient to qualify as a primary duty. That an employee also engages in non-exempt duties will not alter his or her exempt status provided that his or her primary duty is exempt.

THE EXECUTIVE EMPLOYEE EXEMPTION

An exempt executive employee must have as a primary duty the management of the enterprise in which the employee is employed or a customarily recognized department or subdivision, must customarily and regularly direct the work of two or more other full-time employees (or full-time equivalents), and must have the authority to hire or fire other employees or have particular weight given to his or her suggestions or recommendations as to the hiring, firing, advancement or promotion of other employees.

The regulations state that "management" includes, but is not limited to, establishing rates of pay, making job assignments, supervising employees, handling

employees' complaints, evaluating employees, disciplining employees, planning and controlling budgets, and monitoring and implementing legal compliance. In determining if the employee's recommendations are given "particular weight," the Department of Labor will consider whether it is part of the employee's job to make such recommendations, the frequency with which the recommendations are sought and the frequency with which the recommendations are relied upon.

The revised regulations also clarify that a business owner may qualify as an exempt executive employee only if he or she owns at least 20% of the company and is actively involved in the company's management. The salary basis test, however, does not apply to business owners.

THE ADMINISTRATIVE EMPLOYEE EXEMPTION

To qualify for the administrative employee exemption, the employee's primary duty must involve the exercise of discretion and independent judgment with respect to matters of significance and the performance of office or non-manual work that is directly related to the management or general business operations of the employer or the employer's customers.

The revised regulations clarify that the "exercise of discretion and independent judgment" involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. In determining whether an employee has satisfied this requirement, the Department of Labor will consider the following, non-exclusive, list of factors:

- Whether the employee has the authority to formulate, interpret, or implement management policies and operating practices;
- Whether the employee has the authority to negotiate for the company on significant matters and/or to commit the employer to matters that have significant financial impact;
- Whether the employee has the authority to waive or deviate from established practices or procedures without prior approval;
- Whether the employee provides expert advice or consultation to the employer; and
- Whether the employee is involved in planning short and long term business objectives.

An employee whose primary duty involves clerical or secretarial work or the recording and tabulation of data does not meet this test.

THE PROFESSIONAL EMPLOYEE EXEMPTION

An employee will be classified as exempt under the professional employee exemption if he or she is a "learned professional" or an artist. Under the first category, the employee's primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This work must be predominantly intellectual in character and must require the consistent exercise of discretion and judgment. The revised regulations specifically address the circumstances under which several specific occupations will or will not be exempt. The occupations discussed include medical technicians, nurses, accountants, chefs, paralegals, athletic trainers, and funeral directors.

An employee may also qualify as exempt if his or her primary duty requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, i.e., music, writing, acting and the graphic arts. This exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training.

THE COMPUTER EMPLOYEE EXEMPTION

The revised regulations clarify and consolidate the various regulations and statutes which govern computer programmers and analysts. A computer employee will be exempt if he or she is compensated on salary basis of \$455 per week or \$27.63 per hour and if his or her primary duty consists of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- The design, development, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the above-listed duties, the performance of which requires the same level of skills.

An employee who is primarily engaged in the manufacture or repair of computer hardware and equipment is not exempt. Likewise, the mere fact that an employee's work is dependant upon or facilitated by the use of computers does not qualify that employee for this exemption.

THE OUTSIDE SALES EMPLOYEES EXEMPTION

An outside sales employee will be exempt if his or her primary duty is to make sales or obtain orders or contracts for services or use of facilities and if he or she is customarily and regularly engaged in those sales away from the employer's place or places of business. The revised regulations eliminate the requirement that an outside salesperson spend at least 80% of his or her time on outside sales activities and related tasks. The revised regulations also clarify that solicitations by mail, phone or Internet are not "outside sales" unless that are used merely as an adjunct to personal calls. The salary basis test and the minimum and maximum salary requirements do not apply to outside sales employees.

PROCEDURAL UNCERTAINTY

Although the revised regulations are currently scheduled to take effect on August 23, 2004, some members of Congress have discussed introducing legislation to reverse or minimize the effect of the revised regulations. In that regard, the Senate recently passed two amendments; one amendment was designed to preserve the current regulatory status with regard to overtime for 55 job classifications and the other was designed to prohibit any portion of the revised regulations that would cause any worker who is currently eligible for overtime to lose that eligibility. The House of Representatives has not yet acted upon these amendments.

RECOMMENDATIONS

- Analyze the actual job responsibilities of your employees to determine whether your employees are appropriately classified.
- Revise your job descriptions to better express the actual job responsibilities of your employees.
- Review your policies to confirm that they comply with state and federal regulations.
- Adopt a written policy prohibiting improper deductions and establishing a complaint procedure.

QUESTIONS

If you have questions regarding employers' obligations under the revised regulations or would like a complete copy of the revised regulations, please contact the following attorneys:

In Connecticut -- [Erin Choquette](#) or [Alice DeTora](#) at 800-826-3579.

In Massachusetts -- [Catherine Reuben](#) or [Jeff Hirsch](#) at 800-762-2678.

For more information on our Labor, Employment and Benefits practice, please visit us at www.rc.com.

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