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New Overtime Regulations Update

by Christopher L. Ottele

NEW OVERTIME LAW REQUIRES YOU TO REVIEW YOUR OVERTIME PAY PRACTICES

On April 23, 2004, the Department of Labor published its revised rules for determining which employees are exempt from the overtime pay requirements of federal wage law. The new rules comprehensively revise the 50-year-old classification system many had argued was out-of-date and unnecessarily vague and confusing. Barring Congressional interference, the new rules take effect on **August 23, 2004**.

Organized labor and some members of Congress oppose some changes in the new rules. In response to the final rules, there has been a push in Congress to bar the rules from stripping any employees of their overtime rights. At this time, it is uncertain how these political maneuverings will affect the ultimate implementation of the rules, although it seems likely that at least some version of the new rules will go into effect.

Before the rules take effect, employers need to review their overtime pay practices. The new regulations simultaneously expand some classes of employees and narrow others. To avoid future lawsuits, you need to be clear on which employees are affected by the new law and how. You also need to make sure that everyone with responsibility for overtime in your workplace is apprised of the new rules. Finally, you should learn how the new law helps employers and how you can change your employment practices to take full advantage of the law.

Summary of the New Law

The new law's complexity will likely frustrate employers because it virtually invites an improper classification of an employee. The following overview of the new overtime regulations is merely a starting place for learning the new law's impact on your workplace.

Under both the old and new rules, certain types of white-collar employees are exempt from the requirements of the federal wage law that entitles employees to one-and-a-half times their regular pay for hours worked in excess of forty hours a workweek. The new rules determine whether an employee is exempt or non-exempt based on their job duties, their income level and whether they are paid on a salary basis.

Duties

The new rules classify white-collar employees who earn between \$23,660 and \$99,999 annually into the same exempt categories as the old rules. The new rules, however, have slightly modified the duties these employees must perform in order to fit into those categories.

Executive Exemption: Under the new rules, employees who qualify as "executives" will likely shrink. To be an executive under the new rules, an employee's primary duty must be to manage the employer's business or a department of the employer's business. The employee must also regularly direct the work of at least two full-time employees. Finally, the employee must have the authority to hire and fire or to make recommendations that are given particular weight with regard to the work status of other employees.

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Administrative Exemption: There are only slight changes to the administrative exemption under the old rules. To be an administrative employee, an employee's primary duty must be the performance of office or non-manual work directly related to management or general business operations. Further, the employee must exercise discretion and independent judgment on significant matters.

Professional Exemption: Like administrative employees, the treatment of "professional" employees varies little from the old rules. To be a professional, the employee's primary duty must require advanced knowledge in a field of science or learning that typically requires prolonged instruction. The rule however does not require professionals to have an academic degree. It identifies a number of positions that will typically qualify as professional positions: registered or certified medical technologies, registered nurses, certified public accountants, attorneys, medical doctors, engineers and actuaries.

Computer Professionals and Outside Salesmen: The new rules also continue to exempt outside salespersons and computer professionals. To qualify as an outside salesperson, the employee's primary duty must consist of making sales or obtaining orders or contracts for services while away from the employer's place of business. Departing from the old rule, a salesperson is exempt even though he or she spends more than twenty percent of his or her working time on non-incident activities. For computer professionals, the new rules have eliminated the traditional "discretion and independent judgment" requirement which should expand the employees eligible for this exemption.

Income Test

In addition to revising the duties of exempt employees, the new rules also raise the minimum income levels of exempt employees. Under the new rules, employees who earn less than \$455 a week or \$23,660 annually are nonexempt employees and should receive overtime pay regardless of their duties or responsibilities.

The new rules also create a new category of "highly compensated" employees who will nearly always be exempt. These employees must earn more than \$100,000 annually, perform office or nonmanual work and customarily or regularly perform one or more of the exempt duties of an executive, administrative or professional employee. The employee need only receive \$455 a week in salary; other compensation can be earned through commissions or bonuses.

Salary Basis Test

The largest area of change to the old rules concerns the "salary basis" test. Under the old rules, employers were often tripped up by the requirement that exempt employees be paid on a salary basis. This rule was interpreted to mean that if an employer deducted an employee's wages for any reason, including absences, the employee was not considered to be paid on a salary basis and therefore not considered exempt. Moreover, when an employer had a policy permitting such deductions but never actually acted on the policy, employees could still lose their exempt status. The new rules help employers comply with the salary basis test in three significant ways:

First, employers now can suspend exempt employees in full-day increments for violations of written workplace conduct rules, such as violations of the employer's sexual harassment policy or for absences, without losing the employee's exempt status.



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Second, and potentially even more significant, the new rules will only strip employees of their exempt status for improper policies if the policies resulted in an actual deduction.

Third, the new rules also create a “safe harbor” for employers who make an improper deduction from an exempt employee but who (a) clearly communicate a policy prohibiting improper deduction including a complaint procedure, (b) reimburse employees for any improper deductions and (c) make a good faith commitment to comply in the future.

These new rules are complicated and require careful consideration. The employment attorneys at Holme Roberts & Owen LLP invite you to contact us to help you adjust your workplace practices to fit the new rules. This assistance may include a thorough audit of each of your employees to determine which employees are entitled to overtime under the new law or an in-house training seminar to discuss the new laws with your human resource departments.

HRO employment attorneys can either speak with you in person or over the telephone to discuss particular classes of employees or some of the more complicated aspects of the law.

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