

Overtime Regulations Significant Changes Go Into Effect August 23

The U.S. Department of Labor recently announced its eagerly anticipated final overtime pay regulations. These new regulations make substantial changes to the criteria for overtime exemptions under the federal Fair Labor Standards Act (FLSA) of 1938. Some of the major provisions include:

Effective Date: The final Part 541 regulations will become effective on August 23, 2004.

Basic Framework: Although the regulations clarify the criteria for the Part 541 exemption, the basic regulatory framework remains the same. To be considered exempt under the regulations, “white collar” employees must: (1) be compensated above a specified “minimum salary level”; (2) be paid on a “salary basis”; and (3) perform certain specified primary “job duties” involving managerial, administrative or professional skills.

“Salary Level” test: The regulations increase the minimum salary level required for exemption from overtime pay to \$455 per week, or \$23,660 annually, for all white collar employee classifications – executive, administrative and professional employees. This means that employees paid less than this amount will not be exempt from overtime pay regardless of their managerial, administrative or professional job duties. The current minimum salary level is \$155 a week using a “long test” of job duties; \$170 per week for professionals; and \$250 a week under a “short test” requiring performance of fewer managerial, administrative or professional job duties.

For many employers, the new minimum salary level will require increasing the salaries for white collar employees to retain their current exempt classifications, since any employee paid less than that amount will automatically be eligible for overtime pay.

“Highly Compensated Employee” test: The regulations provide a new, special streamlined test for “highly compensated employees” who are paid at least \$100,000 a year (including base salary, commissions and non-discretionary bonuses). To qualify, a highly compensated employee must: (1) be paid at least \$455 per week in base salary; (2) perform office or non-manual work; and (3) customarily and regularly perform one or more exempt “job duties” (as discussed below) required for executive, administrative or professional employees, or computer or outside sales employees.

Helpline Offers Assistance

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“Salary Basis” test: The regulations retain the current requirement that exempt white collar employees must receive their full salary on a weekly or less frequent basis without regard to the quality (job performance) or quantity (number of hours) of work performed. Thus, the final regulations retain the controversial prohibition on deductions from pay for partial-day and many partial-week absences (“no pay-docking” rule). An employer may still dock for a partial-day absence under the Family Medical Leave Act.

The regulations do, however, make important changes permitting deductions for full-day disciplinary absences (i.e., a one-day unpaid suspension). Current regulations only permit one-day deductions for violations of major safety rules; otherwise, unpaid disciplinary suspensions must be for a full workweek.

The regulations also provide a broader interpretation of the “safe harbor” for employers that make improper deductions from exempt employees’ pay. The safe harbor will prevent the loss of the overtime exemption for either “isolated” or “inadvertent” deductions from pay.

Under the regulations, the overtime exemption would be lost only if a pattern or practice of improper deductions exists. Even then, the exemption would be lost only for the particular employees in the same job classification working for the same manager who is responsible for the improper pay deductions.

Similarly, the regulations provide an expanded “window of correction” for improper pay deductions that applies when employers: (1) have a policy that prohibits improper pay deductions; (2) clearly communicate that policy to employees; and (3) reimburse employees for any improper deductions.

“Job Duties” tests: Perhaps the most significant revisions in the regulations are in the “job duties” tests for executive, administrative and professional employees. The regulations eliminate the current long test/short test dichotomy and substitute a single “standard duties” test.

The regulations also eliminate the former requirement for all white collar employee classifications that exempt employees must not devote more than 20% of their time performing non-exempt work (or, under the former regulations, exempt employees in retail or service establishments spend no more than 40% of their time performing non-exempt work). Instead, the regulations substitute a “primary duty” test for each white collar employee classification.

The regulations, however, do retain the requirement that exempt “administrative” employees must consistently exercise “discretion and independent judgment.” The “job duties” tests under the regulations are:

- **Executive Employees:** An exempt “executive employee” must be paid a salary of \$455 per week and: (1) have the “primary duty” of the management of the enterprise or a recognized department or subdivision; (2) customarily and regularly direct the work of two or more other employees; and (3) have the authority to hire, fire, promote, etc., or where such recommendations

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- as to hiring, firing, promotion, etc. are given particular weight. The regulations delete the “sole charge” executive provision.
- **Administrative Employees:** An exempt “administrative employee” must be paid a salary of \$455 per week and: (1) have the “primary duty” of performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (2) customarily and regularly exercise discretion and independent judgment. Note that the job duties criteria for exempt administrative employees are essentially the same as the current short test.
 - **Professional Employees:** An exempt “learned professional” employee must be paid a salary of \$455 a week and have the “primary duty” of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which can be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. An exempt “creative professional” employee must be paid a salary of \$455 per week and perform the “primary duty” of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
 - **Outside Sales Employees:** An exempt “outside sales employee” must: (1) perform the “primary duty” of making sales or of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (2) be customarily and regularly engaged away from the employer’s place of business.
 - **Computer Employees:** The regulations make no changes to the current requirements for exemption of certain computer-skilled employees, either the salary level or job duties tests, since those requirements are codified in the FLSA’s Section 13(a)(7).

Although the U.S. Senate has passed provisions that would modify the regulations, the U.S. House is not expected to follow suit. Also, several groups have threatened to file suit to stop the enforcement of the regulations. The deadline for compliance, however,

is still August 23. Employers should become familiar with the new regulations and be prepared to comply with them.

INFORMATION LINK

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