On April 20, 2004, the Department of Labor ("DOL") issued new regulations regarding the overtime requirements of the Fair Labor Standards Act ("FLSA").

The FLSA generally requires that employees be paid overtime at 1.5 times their regular rate of pay for any hours worked over 40 per week. The "white collar" exemptions exclude certain executive, administrative, professional, computer, and outside sales employees from this requirement.

Generally, to be considered exempt under the "white collar" exemptions, employees must (1) meet certain minimum tests related to their job duties and (2) be paid on a salaried basis at not less than a specified minimum amount. Until April 20, the "duties" tests had remained essentially unchanged since 1949 and still included such long-forgotten jobs as "leg men, straw bosses and key-punch operators." The salary levels required for the exemption had not been changed since 1975.

The regulations generated a substantial fight in Congress, with disagreement about the effect the regulations would have. The DOL says that 1.3 million additional low-wage workers will gain overtime protection, 6.7 million workers will have their overtime rights strengthened, and "few, if any" employees will lose their right to overtime. Opponents of the regulations claim that the DOL's figures on workers who will gain overtime protection are inflated, and that over 8 million workers could lose the right to overtime pay. Democrats attempted to block the changes from going into effect, and some recently said that they will seek to rescind the changes.

The major changes include:

• Employees who are not guaranteed a $455 minimum weekly salary ($23,660 per year) are now entitled to overtime pay, regardless of their duties;

• Employees who are guaranteed a weekly salary of at least $455 and an annual salary of at least $100,000 are not entitled to overtime pay if their primary duty involves office work or non-manual work, and the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee;

• The "duties tests" for all of the exemptions have been simplified, as the old "long" and "short" tests have been eliminated and replaced with new standard tests. Other changes in the "duties tests" include:

  • The duties test for executive employees adds a requirement of the old "long" test, that employees have authority to hire or fire other employees or make recommendations as to hiring, firing, or other changes of employee status that are given particular weight, to the old requirements of the "short" test;

  • In a reversal from the proposed rules, the duties test for administrative employees retains the requirement that employees exercise "discretion and independent judgment" in order to be exempt. However, the final rules clarify that an exempt employee must exercise discretion and independent judgment "with respect to matters of significance." Arguably, this narrows the exemption somewhat;

  • Also reversing the proposed rules, the duties test for learned professional employees retains the requirement that employees exercise "discretion and independent judgment" in order to be exempt. The new professional exemption defines "knowledge of an advanced type" as "work that is predominantly intellectual in character and which includes work requiring the exercise of discretion and judgment"; and
• The “duties test” for computer professionals has been standardized, eliminating the current differentiation of higher paid computer professionals.

• A new executive exemption has been created for 20% owners of a business if they are “actively engaged” in the management of the business;

• Employers are now permitted to dock exempt employees for full-day absences for disciplinary reasons without defeating exempt status;

• The “safe harbor” provisions for improper deductions have been expanded, permitting employers with written policies against improper deductions that are disseminated to employees to avoid, in most situations, losing the exemption for a class of employees; and

• The new regulations also specify that police, firefighters, nurses, and employees in certain other occupations are entitled to overtime.

The new regulations are a “floor” of protection for employees, and States may have greater employee protections. Recently, Illinois became the first State to specifically reject some of the changes, even before the changes were finalized. On April 2, 2004, Illinois Governor Rod Blagojevich signed legislation that would remove Illinois from coverage of portions of the new rules. Specifically, Illinois law now states that an employee is exempt if they are employed in an executive, administrative, or professional capacity, as those terms were defined under the FLSA and its regulations as of March 30, 2003 – meaning that the old “duties tests” still apply in Illinois. However, the new Illinois law adopts the guarantee of overtime for employees earning less than $455 per week. Minnesota’s state Senate has passed similar legislation.

The new regulations will be published in the April 23, 2004 Federal Register. Employers have 120 days from April 23 to comply with the new rules. Each employer should, within the 120-day compliance period:

• review its FLSA compliance procedures, including a re-examination of the classification of all employees as exempt or non-exempt, examining both salary level and employees’ duties;

• identify and pay special attention to all currently exempt employees earning more than $250 but less than $455 per week, as these employees will automatically become non-exempt;

• re-examine and modify policies regarding docking of pay for disciplinary suspensions to allow for disciplinary suspensions of exempt employees in full-day increments; and

• ensure that all units of the employer have a policy prohibiting improper pay deductions, and ensure that all employees receive notice of the policy to take advantage of the safe harbor enhancement.

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