

Employment Law

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Proposed Changes To The Fair Labor Standards Act

The Department of Labor (DOL) recently proposed revisions to the regulations governing the Fair Labor Standards Act (FLSA), 29 U.S.C. 201, *et seq.* The FLSA establishes standards for minimum wages, overtime pay, record-keeping and child labor. These standards affect more than 100 million workers, both full-time and part-time, in the private and public sectors. A recent surge in overtime pay lawsuits aimed at employers has been a concern. According to the American Bar Association, workers filed 79 federal collective-action lawsuits seeking overtime pay in 2001, surpassing class-action job discrimination lawsuits against employers.

The proposed revisions would overhaul the FLSA provisions dealing with the administrative, executive and professional workers exemptions (a.k.a. “white collar” exemptions) and who is eligible for overtime pay. In essence, the proposed revisions increase the salary threshold and modify the “duties” tests for purposes of the FLSA’s overtime exemptions. Employers should be cognizant of these ongoing developments because these proposed changes could drastically alter the number of employees who are entitled to overtime pay and change the look of a company’s payroll.

CHANGES TO THE SALARY THRESHOLD

Currently, workers may be exempt from overtime pay if they earn more than \$155 a week, or \$8,060 a year, and satisfy other job-related criteria that allow them to meet one of several exemptions to the overtime requirement. The proposal would raise the salary cap to \$425 a week, or \$22,100 a year. Any worker earning less would be automatically entitled to overtime pay. The DOL estimates this change would make 1.3 million low-wage workers eligible for overtime. As an example, employees like assistant managers of stores,

restaurants and bars, etc., would be eligible for overtime pay despite their “management” status, provided they earn less than \$22,100 a year.

CHANGES TO THE “DUTIES” TESTS

The “duties” tests assess whether the tasks employees perform qualify them as administrative, executive or professional workers, thereby making them exempt from overtime pay. However, the definitions of administrative, executive and professional workers have been viewed by many as convoluted, confusing and in need of clarification. The proposed regulations clarify and simplify these definitions. The proposal would ultimately shorten the regulations from 31,000 words to 13,000 words.

Generally, workers would be exempt if they manage more than two employees and have the authority to hire and fire, or have an advanced degree and work in a specialized field or work in the operations, finance and auditing arenas. The proposed changes would also eliminate the requirement of an academic degree for an employee to be classified as a professional, exempt employee. The DOL estimates these changes could result in the reclassification of 640,000 workers who currently receive overtime pay but would become exempt under the new regulations. A side-by-side comparison of the current exemption requirements and proposed exemption requirements follows this Alert.

IMPACT ON EMPLOYERS

The DOL contracted with a private company to conduct an economic analysis to determine the costs employers may bear as a result of the proposed changes. As a direct result of these proposed changes, employers could face \$334 million to \$895 million in

direct payroll costs for the 1.3 million low-wage workers estimated to become eligible for overtime pay. Implementation costs alone could range from \$535 million to \$680 million. Despite these substantial costs, the benefits of increased productivity and fewer lawsuits could mean employer savings between \$1.1 billion to \$1.9 billion. The proposed revisions were published in the Federal Register on March 31, 2003. The overtime proposal is subject to a 90-day public comment period. Final regulations are likely to take effect later this year or in early 2004. These proposed regulations are in their infancy, so it is unclear whether the benefits will outweigh the costs.

What is clear is these new regulations will have a significant impact on employers and their businesses. Union officials already have voiced opposition to any changes that would cause longer work weeks, because they view overtime pay as the only brake stopping many employers from demanding excessive work hours. However, employees who work under collective bargaining agreements negotiated by unions would not be affected. With these significant changes on the

horizon, employers should begin to take proactive measures by assessing their overtime policies, the exempt status of their employees, and determine what effects the new regulations would have on their operations.

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U.S. Department of Labor Proposal to Strengthen Overtime Protection

SIDE-BY-SIDE COMPARISON

The following charts compare the current requirements for exemption from the Fair Labor Standards Act as an executive, administrative, professional, computer or outside sales employee with the regulations proposed by the Department of Labor.

<i>Executive Employees</i>			
	CURRENT LONG TEST	CURRENT SHORT TEST	PROPOSED STANDARD TEST
SALARY	\$155 per week	\$250 per week	\$425 per week
DUTIES	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p> <p>Customarily and regularly exercises discretionary powers.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p>	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p>

Administrative Employees

	CURRENT LONG TEST	CURRENT SHORT TEST	PROPOSED STANDARD TEST
SALARY	\$155 per week	\$250 per week	\$425 per week
DUTIES	<p>Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p> <p>Regularly and directly assists a proprietor, or exempt executive or administrative employee; <i>or</i> performs specialized or technical work requiring special knowledge under only general supervision; <i>or</i> executes special assignments under only general supervision.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p>	<p>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.</p> <p>Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.</p>

Learned Professional Employees

	CURRENT LONG TEST	CURRENT SHORT TEST	PROPOSED STANDARD TEST
SALARY	\$170 per week	\$250 per week	\$425 per week
DUTIES	<p>Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work.</p>	<p>Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment.</p> <p>Primary duty of performing</p>	<p>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 also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.</p>

Creative Professional Employees

	CURRENT LONG TEST	CURRENT SHORT TEST	PROPOSED STANDARD TEST
SALARY	\$170 per week	\$250 per week	\$425 per week
DUTIES	<p>Primary duty of performing work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination, or talent of the employee.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.</p>	<p>Performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor.</p>	<p>Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</p>

Computer Employees

	CURRENT LONG TEST	CURRENT SHORT TEST	SECTION 13(A)(17) TEST	PROPOSED STANDARD TEST
SALARY	\$170 per week	\$250 per week	\$27.63 an hour	\$425 per week <i>or</i> \$27.63 an hour
DUTIES	<p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; <i>or</i> (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; <i>or</i> (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; <i>or</i> (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; <i>or</i> (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; <i>or</i> (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; <i>or</i> (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>

Outside Sales Employees

	CURRENT LONG TEST	CURRENT SHORT TEST	PROPOSED STANDARD TEST
SALARY	None required.	None required.	None required.
DUTIES	<p>Employed for the purpose of and customarily and regularly engaged away from the employer's place of business in making sales; <i>or</i> in obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.</p> <p>Does not devote more than 20 percent of the hours worked by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations.</p>	No separate "short" test.	<p>Primary duty of making sales; <i>or</i> 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.</p> <p>Customarily and regularly engaged away from the employer's place or places of business.</p>



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