

OVERTIME OVERVIEW --

WHAT EMPLOYERS AND EMPLOYEES NEED TO KNOW ABOUT OVERTIME REGULATIONS

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Introduction

On August 23, 2004, the first major overhaul of Federal Labor Standards Act (FLSA) overtime rules in 50 years went into effect. It is estimated that 6.7 million salaried workers will receive as much as \$375 million in additional earnings every year because of it.

Non-compliance is very expensive. In 2008, the Department of Labor's Wage and Hour Division recovered over **\$185 million in back wages** and assessed employers with nearly \$10 million in civil penalties.

More important, there are a growing number of huge verdicts and settlements in class action wage and hour lawsuits. Here is a sampling:

- Farmers Insurance Company suffered a \$90 million class action verdict involving 2,400 claims adjusters just in the state of California. The case was ultimately settled this summer for \$200 million.
- Wal-Mart agreed to a \$54.3 million settlement with a class of about 100,000 current and former Wal-Mart workers in Minnesota.
- Staples reached a \$42 million settlement in several class-action lawsuits claiming that it had not paid its assistant store managers overtime to which they were entitled.
- FedEx Corp.'s ground unit has agreed to pay about \$27 million to settle a lawsuit accusing it of misclassifying about 200 California drivers as independent contractors.
- Coca-Cola paid \$20 million to settled misclassification charges brought by California employees.
- A suit by UPS workers misclassified as exempt settled for \$18 million.
- The top 10 private wage-and-hour settlements paid or agreed to in 2009 under the Fair Labor Standards Act totaled \$363.6 million, a 43.9% increase from 2008, according to a report which analyzed 715 cases in federal and state courts last year.

It is also worth mentioning that it only takes one employee to complain to the Department of Labor about an overtime issue to trigger an investigation into a company's entire classification system.

What follows is a brief overview of the overtime rules – which were changed for the first time in 40 years in 2004 – and a discussion of how they should be applied as well as what you should do now to protect yourself.

The Big Three Exemptions

The first step for an employer or an employee dealing with the new overtime regulations is to understand what has changed, and what has not. Both employers and employees often incorrectly assume that if an employee is paid as **salary** that he or she is automatically exempt from receiving overtime. That is not true. The FLSA provides that only certain categories of employees are exempt from the overtime requirements of the statute. Typically, employees are eligible for overtime *unless* they hold positions falling within one of three "white collar" exemptions:

1. Executive;
2. Administrative; and
3. Professional.

Even if a "salaried" employee is labeled an "executive," described as an "administrative" employee, or considered a "professional," however, the employee must satisfy both a **salary test** and a **duties test**. In other words, you cannot simply give someone the title of Vice President of Sanitation Engineers and put that individual into an exempt category. Those tests will be addressed next.

A. Salary Basis Test

An employee must be paid "on a salary basis" or "on a salary or fee basis." "Salary basis" is defined as "a predetermined amount constituting all or part of . . . [the employee's] compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." A salaried employee must receive his or her full salary for any workweek in which he or she performs work, regardless of the number of days or hours the employee actually worked. As a general rule, salaried employees cannot be docked a partial day's pay. Docking any part of a salaried employee's daily compensation may result in the loss of exempt status.

The new regulations maintain the current definition of a salary basis of payment (a fixed amount not subject to reduction or increase based on quality or quantity of work performed). The regulations also generally continue the current rules concerning the deductions from salary that are permitted. But the regulations broaden the scope of permissible deductions in a number of respects. These include partial day deductions for

suspensions for infractions of major safety rules (previously, only full day suspensions were permitted). Also permitted now are deductions for disciplinary suspensions for one or more full days for infractions of workplace conduct rules besides just safety issues, pursuant to a written policy applicable to all employees. Previously, non-safety related suspensions had to be imposed in full week increments to exempt employees.

The new rules also extend the DOL's imprimatur to several practices for salaried employees which were suspect under the old regulations. For example, deductions from accrued leave balances for partial day absences will not destroy the salary basis of payment, nor will requiring employees to record or track hours, or to work a specific schedule. Likewise, providing extra compensation, in addition to a guaranteed minimum salary, will not remove exempt status.

Since 1975, workers paid a salary of less than \$155 per week (\$8,060 per year) have been eligible for overtime, regardless of their job duties or how they are paid. Now that threshold has been raised considerably, to \$455 per week (\$23,660 per year). The "highly compensated employee" test will make workers with an annual salary of at least \$100,000 exempt, if they perform office or non-manual work and "customarily and regularly" perform one of the duties of either an exempt executive, administrative, or professional employee. The exempt duty need not be the employee's "primary duty."

Manual laborers, other blue-collar workers, licensed practical nurses, and "first responders," such as police officers and firefighters, will be eligible for overtime regardless of salary.

B. Duties Test

An "**executive**" employee must have as his or her "primary duty" the management of an enterprise, or a customarily recognized department or subdivision. The "primary duty" test, however, has been made significantly more flexible, both for "executive" positions and for "administrative" and "professional" employees. First, while duties that involve more than half an employee's time are still generally considered "primary," the new regulations provide greater leeway for a finding of exempt status even where less than 50% of the employee's time is taken up with exempt functions. In addition, under the new regulations, non-exempt tasks that are "directly and closely related" to an employee's exempt responsibilities may now be counted as exempt work, in determining the employee's "primary duties." The standard for what constitutes "management" duties has also been expanded, as has the definition of a customarily recognized "department or subdivision" of an enterprise.

"**Administrative**" employees must have as their primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and those primary duties must include the exercise of discretion and independent judgment with respect to matters of significance (because of the "discretion and independent judgment" requirement, there are many "administrative" employees in every organization, including most

"administrative assistants," who are *not* covered by the "administrative" exemption, and who *must* be paid overtime premium pay). While this duties test is largely unchanged under the new regulations, the number of positions likely to meet the test has increased.

"Professional" employees must have as their primary duties work requiring knowledge of an advanced type, work in a field of science or learning, or work customarily acquired by a prolonged course of specialized intellectual instruction. In addition to loosening the "primary duty" test, the new regulations make it clear that occupations whose educational prerequisites involve three years of non-specialized college instruction and a fourth year in an accredited specialized program will generally be exempt.

In light of the new regulations, each employer should take the following steps:

- **Review your classification of all exempt and non-exempt employees** -- if every employee in your organization is treated as exempt, or if most of them are, this may be a problem.
- **Revise or adjust formal job designations as appropriate** – old job descriptions (e.g., more than 10 years) that include as a duty “making photocopies” probably need to be revised.
- **Adjust compensation of lower-paid employees** -- bring them in line with the revised exemptions if you can justify a raise.
- **Adjust compensation of higher-paid employees** – take advantage of the new exemption for highly paid employees.
- **Adopt written workplace conduct rules** – so you can suspend exempt employees for non-safety related workplace misconduct.
- **Adopt a policy concerning improper deductions** – for exempt employees.
- **Talk to your lawyer.**
- **Review the FLSA "traps for the unwary"** -- the new regulations have left unchanged many of the traps employers often fall into and create some new pitfalls. The most common of these are as follows:
 - Failing to pay for covered travel time;
 - Providing "compensatory time off" instead of required overtime premium pay;
 - Failing to aggregate hours worked for two or more related employers;

- Counting only base pay in calculating the "time and one-half" overtime premium;
- Paying non-exempt employees with a flat rate or lump sum payment instead of the "time and one-half" rate;
- Ignoring "small amounts" of overtime and other time card inaccuracies; and
- Failing to pay for time worked by employees who start early, stay late or work through lunch.

As you can see, the regulations continue to pose significant risks to employers and should not be taken lightly.

Conclusion

The new overtime law changes took effect on August 23, 2004 and there is still a lot of confusion about how to apply them to a given individual or job classification. You should take the necessary steps mentioned above to ensure compliance with the amended regulations with all deliberate speed.

Footnotes

The penalties involved with FLSA violations can be enormous. Employers who violate the FLSA are liable for the unpaid overtime for two years preceding the complaint, and, if it is determined that the employer willfully failed to comply, the employer is liable for overtime payments for three years preceding the complaint. The employer may also be liable for an additional amount known as "liquidated damages" for non-compliance, effectively doubling the amount of the employer's liability. Those numbers are then multiplied by the number of workers involved.

The official Department of Labor site is designed to help employers and employees understand the Department's new rules. Here is the Internet link:

<http://www.dol.gov/whd/index.htm>