

CLIENT ALERT

Employment, Labor & Immigration

May 2004

Volume VI No. 1

DOL ADOPTS FINAL RULE MODIFYING FLSA OVERTIME EXEMPTIONS FOR WHITE COLLAR EMPLOYEES

The U.S. Department of Labor (“DOL”) recently issued its final regulations modifying the “white collar” exemptions to Fair Labor Standards Act (“FLSA”) overtime requirements. These new rules, which take effect on August 21, 2004, are significantly different from those proposed by the DOL in March 2003. While many controversial proposed changes were abandoned, the new rules contain important changes in the manner in which the FLSA overtime exemptions are applied to employees in the categories of executive, administrative, professional, outside sales and computer employees. Employers will need to review their current practices to assure that employees are appropriately classified as to exempt status under these new rules, which are highlighted below.

Salary Requirements

For the first time in 35 years, the DOL has raised the minimum salary level needed for consideration of exempt status. Consequently, as of August 21, 2004, employees making less than \$455 per week (\$23,660 annually) in regular wages will not be considered exempt regardless of their assigned duties. This almost triples the existing salary requirement of \$155 per week.

Salary Deductions

The final rules continue the requirement that exempt employees be paid on a salary basis, regardless of hours worked in any work week. The DOL has expanded the employer’s ability to make certain deductions from salary, however, without losing exempt status. For example, the new rules allow for employees to be subject to unpaid suspensions of one or more days for workplace infractions, without jeopardizing the exemption. Partial day salary deductions are still prohibited.

Where an employer has a clearly

communicated policy prohibiting improper deductions and establishes a mechanism to resolve complaints and reimburse employees, the DOL has created a “safe harbor” to limit employer liability to the actual period in which improper deductions are made, without jeopardizing the exempt status itself. Employers will be well served by reviewing their existing policies to take advantage of this DOL modification.

Long and Short Tests Abolished

With the increase in the minimum salary level necessary to qualify for an exemption, the DOL has eliminated the previous long and short tests applied to employees at different salary levels under the existing rules.

Discretion and Independent Judgment Requirement

Although the proposed regulations would have replaced the “discretion and independent judgment” test in the current rules, the final rules retain this test with some minor changes, except as to executive employees.

Executive Employee Exemption

The new regulations clarify and potentially narrow the executive exemption by applying a single test which requires that the executive have the power to hire and fire employees, or at least have their recommendations be given “particular weight.” The executive must also direct the work of two or more employees and have a primary duty of managing the business or a customarily recognized subdivision or department thereof. The requirement to exercise discretion and independent judgment, however, has been eliminated, as well as the limitation on the percentage of time devoted to non-exempt work. Finally, the DOL has clarified that executives may engage in other management duties while simultaneously supervising employees.

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Administrative Employees

The revised test for the administrative exemption requires that the employee's primary duty be the performance of office or non-manual work "directly related to the management of general business operations of the employer or the employer's customers." Although slated for deletion in the proposed rules, the final regulations continue to require the exercise of discretion and independent judgment, but add "with respect to matters of significance." The regulations attempt to clarify some of the confusion in applying this exemption, which has resulted in substantial litigation, by including in the final rules examples of exempt activities and positions, as well as examples of types of work "directly related to management or general business operations" and tasks involving "discretion and independent judgment."

Professional Exemption

Under the final rules for the professional exemption, which deals with employees with advanced knowledge from prolonged instruction, or originality in a recognized artistic or creative field, the DOL has modified but not eliminated the requirement that the employee exercise discretion and independent judgment. In addition,

the 20% restriction on work which is not an essential part of, and incidental to, the professional work has been eliminated in the final rules. Finally, as with the administrative exemption, the DOL has sought to clarify the exempt status of specific occupations.

Computer Exemption

The DOL has created a separate exemption for computer employees outside of the category of professional employees. In doing so, the new rules make the exemption contingent upon the employee having a primary duty involving application of system analysis techniques or system/program development and design. As under existing regulations, computer employees may be paid on a salary basis or hourly at a rate not less than \$27.63 per hour.

Outside Sales Exemption

The new rules make significant changes to the outside sales exemption, eliminating the 20% limitation on non-exempt duties. Further, in lieu of the prior time requirements, the final regulations require that outside salespersons must have a "primary duty" of making sales away from the employer's business and engage in such sales "customarily and regularly." The new regulations also discuss specific tasks associated with

this exemption and address the exempt status of employees who promote sales at trade shows and drivers who sell to customers.

Highly Compensated Employee Exemption

The final DOL regulations create a new exemption for "highly compensated employees", defined as those employees receiving an annual salary of at least \$100,000 and who customarily and regularly perform one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. The rules also clarify that no employee performing non-management or manual work will qualify for this exemption, regardless of the level of compensation.

The above discussion only highlights the more than 500 pages of discussion and commentary set forth in the DOL's final regulations on the FLSA exemptions. Employers should consider the impact of these rules and the need to review compensation practices, job descriptions and employment policies to assure compliance prior to the August 21, 2004 effective date.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

IMMIGRATION NEWSFLASH

DEPARTMENT OF HOMELAND SECURITY AND DEPARTMENT OF STATE REQUEST EXTENSION FOR BIOMETRIC PASSPORT REQUIREMENT

VISA WAIVER PROGRAM TRAVELERS TO BE ENROLLED IN US-VISIT

On April 2, 2004, the Department of Homeland Security and Department of State announced that the Administration has asked Congress to pass legislation that would extend for two years the October 26, 2004 deadline for Visa Waiver Program (VWP) countries to have machine readable passports which include biometric identifiers, and for DHS to have readers for these biometric passports at all ports of entry. Homeland Security also announced that it will begin processing visitors traveling under the VWP in US-VISIT beginning September 30, 2004 at air and sea ports of entry.

The US-VISIT program was launched on January 5, 2004 and requires that most foreign visitors traveling to the U.S. on a visa and arriving at an air or sea port have their two index fingers scanned and a digital photograph taken to verify their identity at the port of entry. By September 30, 2004 this process will also apply to visitors traveling under the VWP at all air and sea ports of entry.

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