

PERSONNEL NOTEBOOK

For Your Most Important Resource—The Human Resource

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FAIR PAY RULES

CHANGES IN THE OVERTIME REGULATIONS

OVERVIEW

Current changes in the rules determining who gets paid overtime were published on April 23, 2004. They are scheduled to become effective on August 23, 2004.

Although no further comments from the public will be heard, it is possible that political disagreements in Washington may create additional changes before the August 23 deadline.

All employers are expected to be in full compliance by that date! The Department Of Labor (DOL) intends to proactively initiate investigations on target groups. However, they have announced that one complaint from a current or a former employee will be sufficient to open an investigation. In that DOL estimates that over 50% of all employers are in violation, they expect many complaints. It is important that all employers be aware of these changes and come into full compliance by August 23, 2004.

I First, The Basics

The Federal Labor Standards Act (FLSA) requires all that all employees must receive 1and1/2 times their regular rate of pay for all hours worked over 40 in the company's work week.

However, FLSA designates four (4) categories of employees who are exempt from those overtime rules.

Those exempt categories are:

1. Executive
2. Administrative
3. Professional
4. Outside Sales

That's why they're called "Exempts", they are exempt from the overtime rules. Those to whom the overtime rules do apply are therefore called "Non-Exempts" and must be paid overtime.

The two most significant criteria used to identify Exempts are wages and job content. Exempts have to earn over a specific amount and the content of their job has to fit into one of the above categories.

Problems

There were three (3) primary problems with the existing regulations:

1. The earnings set at \$250 per week for Exempts had not been adjusted in decades and were no longer relevant.
2. The work content definitions were vague and often resulted in legal suits over the interpretations.

3. Mis-identifying employee FLSA classifications was the number one legal mistake of employers.

So the new rules addressed these problems by:

1. Raising the earnings level
2. Slightly redefining the work content
3. Reinterpreting several sections.

II The New Rules

A Salary

- Any employee earning less than \$455 per week (\$23,660 annually or \$11.375 per hour) is automatically Non-Exempt and must be paid overtime.
- Any employee earning \$100,000 per year and who qualifies under the one of the exemptions is Exempt and is not required to receive overtime.
- For those in between those two dollar amounts, the content of the work would determine the classification.

Note that many forms of compensation can be used to calculate total earnings including wages, salary, commissions, and bonuses.

However total earnings cannot include board, lodging, facilities, payment for medical or life insurance, fringe benefits or payments to retirement plans.

B Work Content

There are a few general work types that are set aside as Non-Exempt.

All the following employees are automatically Non-Exempt:

- All Blue Collar workers
- Manual Laborers

- Those who perform repetitive work using their hands and energy
- Production, maintenance, construction and similar occupations-

-are all Non-Exempt regardless of their pay levels. For example, A construction worker earning over \$100,000 must still be paid overtime.

There are also a few general work types that are set aside as Exempt.

All the following employees re automatically Exempt:

- All Outside Sales employees
- Doctors
- Lawyers
- Teachers
- Certain Computer Occupations that make at least \$27.63 per hour (\$57,470 annually).

To be classified as Exempt, the employee's work content must qualify within one of the following categories.

1..Executive

- The primary duty is the management of the enterprise or of a major division or department.
- Regularly directs the work of two (2) or more full time employees and
- Has the authority to hire and fire other employees (beyond his/her own staff) or whose recommendations are given particular weight in such
- The Executive must be relatively free from direct supervision.

The old 80/20 rule has been removed.

This rule said that if an exempt employee spends more than 20% of their time doing Non-Exempt work, they must be classified as Non-exempt.

The new rule states if the employee's work is even 50% or more Non-Exempt they will not lose their exemption. Beyond that, they are not required to limit it to 50%. But the primary function of the job must still be exempt in nature. In the 'Executive' category the employees should decide themselves, how much Exempt vs. Non-exempt work he or she does.

Owner Executives

An employee who owns at least 20% of, and is engaged in the management of, the enterprise is Exempt even though they may be paid in erratic, non-standard increments.

2 Administrative

- The primary duty is the performance of office type or non-manual work related to the management of general business operations of the company or its customers. And
- Exercises discretion and independent judgment in significant matters. That is, matters that are not clerical, secretarial, tabulating data or following well established procedures such as might be described in manuals.

General Business Operations include:

Tax Finance Accounting
Budgeting Auditing Insurance
Quality Control Purchasing
Advertising Marketing
Procurement Research Safety/Health
Human Resources Employee Benefits
Labor Relations Legal Compliance
Public/Government Relations
Computer Network, Internet & Database-
-Administration
Executive Assistants or Administrative
Assistants to a business owner or Senior

Executive, who have been delegated authority over significant matters, are considered Exempt.

Personnel Clerks who "screen" applicants for qualifications or references are not Exempt

3. Professional

The Learned Professional.

The primary duty must be focused on advanced knowledge in a field of science or learning that has been acquired through a prolonged course of specialized intellectual instruction.

Advanced Knowledge means:

- Intellectual in nature
- Uses discretion and judgment
- Analyzes, interprets or makes conclusions from varying facts or circumstances

The Professional category does not include routine mental or manual, mechanical or physical work. This is not work that can be obtained at the high school level.

The Learned Professional fields include:

Law Theology Medicine
Accounting Teaching Pharmacy
Actuarial Computation Architecture
Chemical Sciences Physical Sciences
Biological Sciences Engineering

Specialized academic training must be a prerequisite for entering the field. The best evidence that an employee meets the requirement is a degree in the field.

The Professional exemption is not intended for knowledge that is acquired through:

- An academic degree in a non-related field.
- An Apprenticeship
- Training courses in routine mental, manual, mechanical or physical processes.

However, if the same knowledge has been acquired with a combination of work experience and intellectual instruction, and the employee is performing the work, the exemption is valid.

Accounting Clerks, Bookkeepers and Engineering Technicians are not Exempt.

The Creative Professional

The primary duty must be work requiring invention, imagination, originality or talent. It must be in a recognized field of artistic or creative work.

The Creative Professional Fields include:

- Graphic Arts, Painters, Photographers, Cartoonists
- Writing, Essayists, Novelists, Short Story Writers, Writing positions in advertising agencies.
- Acting.

The work cannot be primarily dependent on intelligence, diligence and accuracy. It must be creative and depend on talent.

4. Outside Sales

The employee must customarily and regularly sell tangible or intangible items or obtain orders or contracts for services away from the employer's place of business.

III Pay Practices

It has always been a problem to deduct lost time or partial sick days from an Exempt. Doing so says that you are paying him/her on an hourly basis. Exempt employees are not hourly, so in doing so you risk losing that employees exemption.

Under the new rules, if an employer has a practice of making improper deductions from an employee's pay, or if the violation seems "willful", the employer will lose the exemption for that employee and for all similar employees reporting to that particular supervisor.

One of the possible advantages for the most companies is the almost overlooked new rule that says Supervisors can spend approximately 50% of their time doing the same work as the people that report to them (Non-Exempt work) and still remain Exempt!

In the previous regulations Supervisors could do no more than 20% or they lose their exemption.

What Should You Be Doing Now?

1. Review job descriptions, assure that they accurately describe the work.
2. Assure that Exempts still qualify as Exempt.
3. Check payroll records to assure proper overtime pay is documented.
4. Make sure you have all the proper, legal postings
5. If you discover errors, resolve them by paying the back overtime now.

DOL intends to be tough on this. They have created a special task force to investigate complaints and to check on target industries.

We will update the Fair Pay regulations in more detail when the final regulations are actually final.

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