

PERSONNEL NOTEBOOK

For Your Most Important Resource—The Human Resource

Prepared BY:

HUMAN RESOURCE ASSOCIATES

Personnel Consultants

FAIR PAY RULES II

Final Changes Updated

REVIEW

On August 23, 2004, the new “Fair Pay Rules” went into effect. The new regulations are part of the Federal Labor Standards Act (FLSA) and are enforced by the U.S. Dept Of Labor (DOL). The “Fair Pay Rules” tell us who does and does not have to be paid overtime.

This Personnel Notebook is a final update on the regulations and how they are being interpreted.

I First, The Basics

The FLSA requires 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 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.

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 *just one of the requirements, under one of the exemptions* is Exempt and overtime is not required.

For those in between those two dollar amounts, the content of the work will 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 (Systems Analysts, Programmers, Software Engineers or similar skill levels) that make at least \$27.63 per hour (\$57,470 annually).

III The Exemptions

To be classified as Exempt, the employee's work content must qualify within one of the following four (4) 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, or to approve promotions, advancements or other employment changes of status (beyond his/her own staff)

or whose recommendations are given particular weight in such.

- The Executive must be relatively free from direct supervision. They should decide them self, how much Exempt vs. Non-exempt work they do.

To be classified as an Executive, the individual does not have to be part of the "Top Brass" in the organization. The category is broad enough to cover Managers and Assistant Managers.

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. They do not have to meet the salary requirements.

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 it's 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

There are two (2) types of professionals who are exempt.

- A. The Learned Professional
- B. The Creative Professional

A. 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.

B. 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 and must be working away from the employer’s place of business.

IV Pay Practices

It has always been a problem to deduct lost time hours or partial days from an Exempt. Doing so says that you are paying him/her on an hourly basis.

Under the new rules, if you are audited by DOL and it is found that you have a practice of making improper deductions from an Exempt employee's pay, such as docking them for missing time during the day, or if the violation seems "willful", that employee and all similar employees under that Manager or Supervisor will lose their Exemption. Even if all are legitimately Exempt! This is in addition to back pay and severe penalties. However, There is a way to head this off in the new regulations. Section 541.603(d), it's called the "Safe Harbor".

V Safe Harbor

In order to prevent the possibility of a DOL audit causing you to lose those exemptions and to face those penalties, the new regulations give you an opportunity to deal with the problem up front. Here's how.

1. Establish a clear and prominent policy and communicate it to all Exempt employees stating that Exempt employees are on a salaried basis and will not be docked for missing hours in a day. (Note, if you have 50 or more employees and are subject to the Family and Medical Leave Act (FMLA) there are allowances for such deductions).
2. Set up a complaint system that allows employees who feel that they have been improperly docked, to state their case and if true, they will be reimbursed.
3. Inform them that there will be no retaliation against anyone for making the inquiry or filing the complaint.
4. Correct the problem and prevent it from reoccurring.

The policy should be in your employee handbook, on your company's intra-net,

given to all new employees and a copy sent to all Exempt employees. (note: see HRU section "HR Forms" for a sample letter to employees.)

The old 80/20 rule has been removed.

The old 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 that if the employee's work is even 50% Non-Exempt they will not lose their exemption. However, they are not required to limit it to 50%. But the primary function and purpose of the job must still be Exempt in nature.

Note that your state may have a more stringent set of rules than these new regulations call for. If yours is one of those states, you must follow *both* sets of rules.

There are 14 such states with extra rules: AL-ARK-CT-IL-KY-MD-MN-MT-NJ-ND-PA-WA-WV-WI.

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

Bill Cook
Human Resource Associates
hotline: (703) 897-8511
e-mail: hrahtl@consulthra.com