

New United States Department of Labor Regulations Regarding Overtime and Exempt Status For White-Collar Employees Go Into Effect

By Bennett Pine

The U.S. Department of Labor has issued revised regulations, effective August 23, 2004, which significantly change the guidelines to define those "white collar" employees who are "exempt" from overtime pay and those who are not. The "FairPay Rule Initiative," which follows a year of debate, changes the basis for making this determination by altering both the "salary test" and the "duties test," the two traditional methods for resolving entitlement issues regarding overtime pay.

As a general proposition, employers are required by the federal Fair Labor Standards Act ("FLSA") to pay employees overtime at a rate of one and one half times their regular rate of pay for all hours worked in excess of 40 hours in one workweek unless the employee is reported or "exempt" from such entitlement. If a non exempt employee is treated incorrectly as "exempt," from the overtime requirement, the employee could be entitled to unpaid overtime for up to three years retroactively.

Salary Test: For this purpose, the minimum weekly salary was raised by the Department of Labor from a threshold of \$115 per week to \$455 per week (\$23,660 annually) for all exempt status employees other than outside sales persons. An employee who is not paid this minimum salary is considered non-exempt, and must be paid overtime wages under the FLSA's new requirements, regardless of his/her duties.

Standard Duties Test: If an employee is paid this minimum salary or more, s/he must also meet the new standard duties test for "executive," "administrative" and "professional" employees. Under previous regulations, determination of exempt status for an employee was based on either a short or long form job-duties test, depending upon salary level. The new regulations replace this with a single standard duties test for all employees earning over \$455 per week.

Redefining Exempt Categories: Under the new regulations, there are six (6) specific exempt categories in addition to a streamlined exemption test for highly compensated employees. A highly
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Litigation Corner

Investigating Employee Claims of Sexual Harassment

By Dona Kahn

Under applicable law an employer is liable for hostile work environment-type harassment only if the plaintiff employee can show that the employer "knew or should have known" it was occurring and failed to take prompt and effective steps to end the harassment.

But if harasser is the direct supervisor, an employer will be liable for sexual harassment or requests for sexual favors by the supervisor if the supervisor takes "tangible employment action"—such as denial of promotion or an adverse pay decision stemming from a subordinate's response to the harassment—which inflicts "direct economic harm" on the subordinate. An employer is strictly liable for such an action whether or not it knew of the supervisor's harassing conduct.

Either way, it is important for an employer to take "prompt and effective steps" once an employee claims harassment. Below is an outline of items which you should consider in this regard.

A. Procedures for Handling Sexual Harassment Complaints

1. Supervisors should be made aware that they are responsible for communicating allegations of harassment to Human Resources.

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compensated employee—an employee who earns over \$100,000 per year—is exempt from FLSA overtime pay rules if any *one* or more of the duties of an executive, administrative or professional employee are met.

Executive Employee: An employee is an exempt executive if their duties include: the management of the enterprise or a department of the enterprise; directing the work of two or more other employees; and having the authority to hire or fire or other change in status or make recommendations on personnel decisions which are given particular weight. Examples of executive employees include department heads, retail enterprise managers, and building superintendents.

Administrative Employee: The primary duties of an exempt administrative employee include: 1) performing office or non manual work directly related to management policies or general business operations of the employer, *and* 2) customarily exercising discretion and independent judgment with respect to "matters of significance." Purchasing agents, executive assistants, human resource employees, benefit and purchasing managers are some examples of administrative employees.

Learned Professional: An employee is considered an exempt learned professional if their primary duties require the level of specialized knowledge in a field of science or learning which would have been attained from an advanced course of study. Doctors, lawyers, nurses, accountants and teachers are examples of learned professionals.

Creative Professional: Designers, artists, journalists, musicians, actors, writers, and decorators are all considered exempt creative professional employees because their primary duties require invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Professional: An employee is considered an exempt computer employee if s/he is paid a salary no less than \$455 per week (or on a hourly basis of at least \$27.63) *and* their primary duties consist of the 1) application of systems analysis techniques or procedures, 2) the design, development, documentation, analysis, creation, testing or modification of computer systems, or 3) design, documentation,

testing, creation or modification of computer programs related to machine operating systems.

Outside Sales Person: Finally, an employee is considered an exempt outside sales employee if their primary duties are "making sales" or obtaining orders *and* the employee is customarily and regularly engaged *away* from the employer's place of business. Note that the \$455 per week minimum salary requirement does *not* apply to the outside sales exemption.

Salary Basis and Permissible Deductions: An employee will not be considered exempt unless they are paid on a *salary* basis, whether or not they meet minimum salary and duties tests. Employees are paid on a salary basis if they regularly receive a predetermined salary each pay period which is not subject to deductions for any variations in the quantity or quality of work performed. Under the previous rules, the salary basis for testing was reduced if an employee was suspended without pay for any reason other than the violation of health and safety rules. The new regulations now specifically include "unpaid disciplinary suspensions for infractions of workplace, conduct rules" in the same category with health and safety rules. This exception enables employers to hold exempt employees to the same standard of conduct as that required of their non exempt employees for violations of written work place rules, such as sexual harassment, work place violence, or other similar misconduct.

Blue Collar Workers: The exceptions provided by these new regulations apply only to "white collar" employees who meet the salary and duties tests set forth above. The exemptions do *not* apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skills and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the new regulations no matter how highly paid they might be.

Police, Fire Fighters, Paramedics & Other First Responders: The overtime exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators,

inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole, interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

Other Laws & Collective Bargaining Agreements May Provide Greater Rights: The FLSA provides *minimum* standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any federal, state or municipal laws, regulations or ordinances establishing a *higher* minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the new regulations relieves employers of their contractual obligations.

Conclusion and Additional Information

It can be anticipated that there will be much confusion and uncertainty as both employers and the Fair Labor Standards Administration grapple with issues under the new regulations. For additional detailed information, visit the U.S. Department of Labor Wage-Hour Division's website, www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm or contact me or another member of our Employment and Labor group. ■



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2. Human Resources should conduct an investigation in a timely manner.
3. Statements should be taken from all parties involved:
 - a. Witnesses
 - b. Victims
 - c. Alleged Harasser;
4. If the complaint is justified, disciplinary action, up to and including discharge, should be taken against the employee whose conduct is considered harassing or intimidating;
5. Confidentiality should be maintained to the extent possible to ensure integrity of the process and those involved; and
6. All involved should be informed that retaliation against parties involved in the investigation is strictly prohibited by law and policy.

B. Promises of Confidentiality

1. No one can be assured absolute confidentiality and should be forewarned that certain facts may have to be shared on a "need to know" basis;
2. Even if complainant doesn't want to go forward, this should not end company responsibility to investigate. Make certain withdrawal of, or reluctance to file, a complaint was not coerced by harasser; and
3. Tell complainant and harasser about retaliation prohibition.

C. Objectives When Investigating The Complaint

1. Prompt/timely resolution;
2. Appropriate resolution—fair to both the complainant and accused;
3. Provide feedback as you proceed to all involved; and
4. Demonstrate commitment and credibility.

D. If You Have An Anonymous Or Reluctant Complainer

1. Assure everyone that retaliation will not be tolerated;
2. Investigate any specific allegations;
3. Notify person alleged to be harasser of the complaint, even if anonymous; and
4. Protect alleged harasser as well as complainant as much as possible.

E. investigation

1. Set up investigative file;
2. Conduct all interviews in a manner which does not

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- suggest predisposal toward truth of allegations;
- 3. Present written summary of what interviewers said for their signature; and
- 4. Use legal counsel for advise during deliberations to preserve confidentiality.

F. Final Report

- 1. A written investigative summary should be prepared at the end of the investigation;
- 2. Interview summaries should be included in the report;
- 3. A recommendation for resolution (e.g. dismissal of complaint or discipline of accused) should be made if appropriate; and
- 4. The investigation file should be kept confidential (i.e., separate and apart from the regular personnel file) with limited access, and information regarding the investigation should not be shared with anyone who does not have absolute need to know.

G. Summary of Steps to Take on First Receiving Complaint of Discrimination

- 1. Investigate immediately;
- 2. Take prompt action—act fairly since juries decide on the

- basis of fairness;
- 3. Check treatment of similarly situated persons where discrimination alleged, to make certain there is a uniform application of practices and policies;
- 4. Get legal counsel involved to avoid exposure to punitive damages, especially in terminations and lay-offs;
- 5. Analyze and strategize the case if litigation is threatened, before even responding to an EEOC charge;
- 6. Retain expert for damages, as well as psychiatrist for emotional distress; and
- 7. Think about offering a settlement in exchange for release. ■



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Employment Law Q&A

Q: We are a company in the office machines business. One of our regional sales managers recently resigned in order to join a competitor and we have learned that he is now calling on our customers. Can we stop him?

A: Generally speaking, unless an employee has signed a written confidentiality and non-compete agreement, commonly referred to as a "restrictive covenant," he is free to compete with his former employer in the free and open marketplace. Moreover, many courts are reluctant to enforce vague and expansive non-competes such as those which seek to prevent an individual from making a living by, e.g., stating he cannot work in a particular industry for a year or more. It is our experience that, in order to be enforceable, any post-employment restriction should be drawn as narrowly as possible, such that the departing employee may not solicit business from any client or employee of the employer with whom the former employee had contact in order to be enforceable.

In addition, employers should be aware that New York courts recognize the common law "duty of loyalty" which arises and exists during the employment term. Under this doctrine, the "faithless servant" who is working for another entity or otherwise self or double dealing while still employed (and drawing a paycheck) may, under some circumstances, be required to return compensation to the employer beginning from the time of the employee's first "disloyal" act.