

STRUCTURAL BUILDING COMPONENTS MAGAZINE

January/February 2005

SUPPLEMENTAL SUPPORT DOCS:

For more information on the types of records that are required to be maintained go to [Support Docs Section: January/February 2005](#).

Knowledge Is Power

Federal Overtime Pay Regulations Modified by Kent J. Pagel

Have you heard about the recent changes regarding overtime pay at the Department of Labor? Find out how they may impact your business.

Federal law requires that most employees in the United States be paid overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. At the same time, the federal statute that dictates the minimum wage and overtime requirements, the Fair Labor Standards Act (also commonly referred to as the "FLSA"), provides certain exemptions from overtime requirements for employees. These exemptions fall into defined groups. The exemptions have been the subject of sweeping change with new Department of Labor (DOL) regulations that went into effect on August 23, 2004 ([see below for details on action taken in recent months to counter this legislation](#)).

The intent with the DOL regulations was to make it easier for employers to classify workers as eligible or not for overtime. Unfortunately for some employees, the new regulations will result in them losing their overtime protection. For employers, they need to be mindful that some employees who in the past were exempt from overtime may no longer be exempt.

To qualify for an exemption from overtime, the first test is whether the employee is paid on a salary basis (as that phrase is defined in the DOL regulations) at not less than \$455 per week—although the regulations provide for some exceptions. The second test is whether the employee's job duties meet one of the classifications that exist. Remember, JOB TITLES DO NOT DETERMINE EXEMPT STATUS. In order for an exemption to apply, an employee's specific job duties must meet all the requirements of the particular classification within the regulations. In the [chart below](#) you can see the various requirements that must be met for the executive, administrative, professional, computer, outside sales or highly compensated employee exemptions to overtime will apply.

Remember also the overtime exemptions apply only to "white collar" employees who otherwise meet the requirements I described above. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Employees that fall within this classification and who do not qualify for any overtime exemption (i.e., overtime must be paid) include employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers and laborers.

The FLSA also provides only minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any federal, state or municipal law or regulation 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. Furthermore, when the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees.

A few comments and observations on the new DOL regulations:

- Based on the new regulations, it appears that fewer positions are eligible for the Executive Exemption to overtime.
- Some examples of the types of work that meet the Administrative Exemption to overtime include: (1) tax, finance and accounting; (2) insurance; (3) quality control; (4) purchasing; (5) safety and health; (6) human resources, personnel management and employee benefits; and (7) computer network, Internet and database administration.
- An employee that falls under the Professional Exemption to overtime is the type of employee that generally uses advanced knowledge—knowledge that cannot be attained at high school. The best evidence that meets this requirement is having an appropriate academic degree.
- The new classification exempt from the overtime requirement, Computer Employee, consolidates the regulations that previously existed for computer professionals. Those employees who are highly dependent on the use of computers and computer software, such as engineers and draftsmen, but who are not primarily engaged in computer systems analysis and programming or other computer related activities fitting within the duties test, are not exempt under the Computer Employee exemption.
- The Outside Sales Exemption to overtime eliminates the previous 20 percent limitation on the outside sales employees, which required that these employees spend no more than 20 percent of their hours working on non-exempt tasks.
- The Highly Compensated Employee Exemption to overtime is a new classification and includes employees, who otherwise meet the duties tests, who earn at least \$100,000 per year performing office or non-manual work.

WHAT SHOULD EMPLOYERS DO?

Under the final DOL regulations, some employees that were once exempt are now entitled to overtime and vice versa. Employers must reassess those employees believed to be exempt. The new \$455 per week or \$23,660 salary requirement alone may cause workers who were previously exempt to be entitled to new overtime pay. Employers should also review existing positions to determine the nature of the position from a perspective of the duties involved, because that is the focus of the exemptions.

The DOL expected employers to be in compliance by August 23, 2004. There is no amnesty period for compliance, so if no action has yet been taken, it is important to do so now.

MAINTAIN GOOD RECORDS

Employers should not regard the recordkeeping requirements of the FLSA as optional in any respect. Not only does the law require it, but keeping accurate, reliable records regarding payroll matters is simply good strategy. The reason is simple: if an employee claims unpaid wages, and especially unpaid overtime, and the employer is unable to counter the claim with any documentation, the “best evidence” rule used by the DOL will generally mean the wage claimant will prevail on the issue of hours worked.

Legislative Action Regarding Overtime Regulations

Call it “the long and winding road” or a game of hurry up and wait. The following outlines the efforts of the U.S. Congress to alter or revise the overtime regulations proposed by the U.S. Department of Labor Senate:

September 9: The House passed HR 5006 (223-193), the appropriations bill for the Department of Labor. One effect of the bill was to block the new overtime regulations from taking effect.

September 17: The Senate Appropriations Committee approved the Harkin Amendment (16-13) on the Senate version of the DOL appropriation bill to also block the new overtime regulations.

November 19: The Conference Committee negotiators dropped the provisions blocking the new DOL rules on overtime pay from HR 4818.

November 20: Both the House and Senate gave initial approval to H.R. 4818, but refrained from sending it to the White House in order to fix a controversial tax review provision.

December 7: Both the House and Senate gave final approval to H.R. 4818.

The net effect: the overtime regulations were not overturned by either the actions of the U.S. Congress.

Exemptions

EXECUTIVE EXEMPTION

- The employee’s primary duty must be *managing* the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any

other change of status of other employees must be given particular weight.

ADMINISTRATIVE EXEMPTION

- The employee's primary duty must be the performance of office or non-manual work directly related to the *management or general business operations* (this is also a defined term in the regulations) of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of *discretion and independent judgment* with respect to *matters of significance*.

PROFESSIONAL EXEMPTION

To qualify for the *learned professional employee* exemption, all of the following tests must be met:

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the *creative professional* employee exemption, the employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

COMPUTER EMPLOYEE EXEMPTION

- As indicated above with one variation, the employee must be compensated **either** on a salary or *fee* basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below; and
- The employee's primary duty must consist of work that is specifically set out in the statute—e. g., (1) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems.

OUTSIDE SALES EXEMPTION

- The employee's primary duty must be making sales, or obtaining orders or contracts for services or for the use of *facilities* for which a consideration will be paid by the client or

- customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

HIGHLY COMPENSATED EMPLOYEES

Employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

NOTE: *Italicized terms are defined terms in the regulations.*

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