

New Overtime Regulations Became Effective on August 20, 2004

By Laura B. Hoguet and Randi B. May

The United States Department of Labor recently announced new regulations governing exemptions from overtime pay requirements under the Fair Labor Standards Act (FLSA). Not paying overtime required by the FLSA can have dire financial consequences, so employers will want to make sure that employees the DOL considers entitled to overtime are correctly classified as “nonexempts”—that is, as employees who are subject to, and not exempt from, the FLSA’s minimum pay, overtime and recordkeeping requirements.

The Department of Labor forecasts that some 8 million employees who are not now receiving overtime will have to be reclassified under the new regulations. At first glance, this is puzzling because the regulations are not very different in substance from the old regulations that have been in place for over 50 years. The major change that survived the rulemaking process (DOL received over 80,000 comments on the regulations in their draft form) is that the new regulations provide updated examples of jobs to illustrate DOL’s position on what is required to qualify for the “executive,” “administrative” and “professional” exemptions under the Act. If it is true that employers have classified more new-economy jobs as “exempt” in recent years than DOL thinks appropriate, then enforcement of the new regulations could, indeed, lead to significant increases in overtime pay.

Some Fair Labor Standards Act Basics

The FLSA, enacted in 1938 as one of the centerpieces of New Deal labor legislation, guaranteed workers a minimum hourly wage plus time and half as overtime for hours worked over 40 hours in any given work week. The Act also requires employers to keep records of the time worked by employees covered by the Act.

Reflecting a deep-seated but hard-to-articulate difference between the workers who were intended to be protected under the Act and other employees who were not, DOL’s regulations implementing the FLSA from the outset divided all employees into two groups: “nonexempts,” that is workers who are guaranteed overtime and the minimum wage and for whom time records must be kept, and “exempts,” who are exempt from the Act’s coverage. Traditionally, manual or “blue collar” workers are nonexempt. Employees paid by the hour, including “white collar” workers, are also nonexempt,

while employees who are paid on a “salary basis” or “fee basis” and whose work is “executive, administrative or professional” are exempt. Also included as exempt under the statute are outside sales employees and certain computer employees.

In the more than fifty years that have elapsed since the FLSA was passed, the content of jobs in the workplace has changed dramatically. In the old days bosses dictated and typists typed, but in today’s workplace boss and admin both use the computer. Is the admin exempt? What about a paralegal, or someone who sits at a computer help desk? How about the analyst numbers cruncher? For answers to these and other overtime questions, it is prudent to consult the regulations rather than a summary of them such as that provided in this article, which is not intended to provide advice about any particular situation.

Overview of the New Regulation

Under the new regulations, as under the old, manual workers, and people paid on an hourly basis in general, are nonexempt. The new regulations specifically provide that police officers, firefighters, paramedics, emergency room technicians, licensed practical nurses and other so-called “first responders” are nonexempt.

Most FLSA classification problems concern office employees who are paid on a salary basis. The new regulations set an annual salary threshold for “automatic” exemption from the overtime requirements at \$100,000 (which may include commissions and discretionary bonuses). Employees who earn more than this amount are ineligible for overtime no matter what their job duties are. At the other end of the scale, employees who earn less than \$23,600 per year are, broadly speaking, guaranteed overtime without regard to what their jobs are.

Of course, the large majority of salaried, non-hourly employees earn somewhere between \$23,600 and \$100,000 per year. Except for a few categories of employees who are automatically exempt regardless of their duties (outside sales employees, teachers, practicing lawyers and doctors, some computer employees), the way to determine whether these employees in the middle salary range are exempt or nonexempt is to measure their job duties against the regulations’

description of the requirements for the executive, administrative and professional exemptions. Actual job duties, not job titles, are key to this inquiry.

Employees who qualify for the executive exemption are those whose "primary duty is management of the enterprise . . . or a customarily recognized department or subdivision thereof" and who "customarily and regularly" direct the work of two or more other employees and who have authority to hire, fire and promote, or whose recommendations concerning hiring, firing and promotion of other employees "are given particular weight." The regulations recognize that an employee may have concurrent job functions and still qualify for exemption as an "executive," as, for example, an assistant manager of a retail store who may help stock shelves or clean, but whose primary duty is management. On the other hand, an electrician is nonexempt even if he directs the work of other employees at a job site.

Employees who qualify for the administrative exemption are those whose "primary duty is the performance of office or non-manual work directly related to the management or the general business operations of the employer or the employer's customers" and whose "primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." This rubric encompasses tax, finance, accounting, auditing, insurance, advertising and marketing (but not selling) and a host of similar functions which, in many companies, are thought of as staff rather than line jobs. The "exercise of independent judgment" means more than the use of skill, and does not include secretarial or clerical work or data tabulation "or performing other mechanical, repetitive, recurrent or routine work." As examples, the new regulations say that insurance claims adjusters are probably exempt, as are financial services employees who collect and analyze information regarding customer income, assets and investments, and who advise customers about financial products. A project team leader will likely also qualify for the administrative exemption. An administrative assistant "to a business owner or senior executive of a large business" may qualify if "such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance." HR managers are usually exempt—but HR clerks who screen resumes are not.

Employees qualify for the professional exemption if their primary duty is the performance of work "requir-

ing knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" or "requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." The regulations in this category explain that registered nurses are exempt, practical nurses are not; dental hygienists are exempt, as are physicians' assistants; accountants are exempt, but bookkeepers "who normally perform a great deal of routine work" are not; chefs with an academic degree in culinary arts are exempt, but cooks who perform routine work are not; paralegals are not exempt even if they have been to paralegal school. In the "creative" category we find that actors, musicians, painters, and writers are usually exempt, as are journalists (except those who merely rewrite press releases, who are nonexempt).

The Consequences of FLSA Violations

The overtime regulations are a minefield for employers because overtime claims are doubled as a penalty and, under the case law, can't be settled or compromised—all the employer can do is pay the full amount when assessed plus interest and the employee's attorney fees. Some of the biggest overtime claim problems come from record-keeping violations—if an employer has classified employees as exempt and therefore has not kept time records for them, subsequent reclassifications triggered by a DOL audit can lead to very high payments to employees because the employer has no way to prove that the employees worked little or no actual overtime.

Enforcement of the overtime rules depends, in large part, on the budget and effectiveness of the Department of Labor. Audits sometimes occur as a result of complaints by employees who think they should be getting overtime but are not. The lower end of the salaried workforce, when business conditions have required employees to work overtime, is a likely source of such complaints.

Laura B. Hoguet is a founder of Hoguet Newman & Regal, LLP and a trial lawyer with wide experience in business, financial and employment matters.

Randi B. May is an associate at Hoguet Newman & Regal, LLP.