



LABOR AND EMPLOYMENT MATTERS

The New Overtime Requirements Are Now in Effect. Are You In Compliance?

Revised federal overtime rules implementing the most sweeping changes in decades took effect on August 23, 2004. The new rules create pitfalls and opportunities because they set new standards regarding entitlement to overtime. Although many political efforts have been made to repeal or modify the revised rules, none have succeeded, and employers are legally obligated to comply.

The Amount of Pay Matters

With litigation of overtime claims on the rise, the new regulations were intended to clarify and streamline existing eligibility requirements for overtime exemptions. For example, it is now clear that every employee making less than \$23,660 must be paid overtime for all hours worked in excess of forty in a week, regardless of whether he is paid a salary or by the hour. Likewise, employees making \$100,000 or more are not entitled to overtime pay, even if paid hourly. It is the large group in the middle that requires analysis.

Employees' Primary Duties Are Key

The new regulations clarify and address the five types of "white collar" employees that are exempt from the overtime pay requirements: executive, administrative, professional, computer, and outside sales.

To be an "**executive employee**" under the new overtime rules, an employee must be paid on a salary basis, manage the enterprise or a recognized business unit as her primary duty, direct the work of at least two employees, and have clear authority to hire and fire or at least strongly influence hiring and firing decisions.

To qualify for the "**administrative employee**" exemption under the new rules, an employee must be paid on a salary basis and his primary work must directly relate to management or operations and require "discretion and independent judgment" regarding matters of significance. Because the term "discretion and independent judgment" has always been frustratingly vague, it resulted in significant litigation. To clear this up, the new regulations list specific factors to be considered, including whether the employee performs work that substantially affects business operations, is able to commit the employer in matters with substantial financial impact, investigates and resolves matters of significance on behalf of management, or designs and implements firm policies, among others.



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To be a “**professional employee**” under the new rules, the employee must be paid on a salary basis and her primary work must be of a type that customarily requires advanced education. On-the-job training ordinarily will not be sufficient to qualify for overtime exemption as a professional. This exemption covers not only engineers, chemists, accountants, doctors and lawyers, but also teachers and creative professionals such as actors and musicians.

An employee who is properly exempt under the revised “**computer employee**” designation must be more than a help desk representative or hardware technician. To qualify for the exemption, he must be a computer programmer, systems designer, or technical writer, among other nuanced duties. Another change is that an employee who spends part of his time on sophisticated computer work and the remainder on other types of exempt work may be eligible for the exemption. Under the old rules no exemption was available unless an employee spent almost all of his time performing one particular category of work.

The “**outside sales employee**” exemption has been modified in recognition of the increased role of computers in sales efforts. The exemption previously required an employee to be away from the office nearly all of the time; the new regulations require only that he “customarily and regularly” be engaged in business away from the employer’s place of business in making sales or placing orders.

Full Day Disciplinary Deductions are Now Valid

Under the old rules, employers generally could not dock an employee’s pay for less than a full workweek without destroying the employee’s exempt status. Under the new rules, an exempt employee’s pay can now be docked in full day increments for unpaid disciplinary suspensions imposed for violating workplace conduct rules. The new rules also allow the employer to correct improper deductions that are inadvertent or isolated by making the employee whole, and this will not destroy the employee’s exempt status.

The New Safe Harbor Provision Will Help Employers

The new rules include a “safe harbor” provision that should protect employers in the event of improper deductions from pay. Under this provision, if a company has a clearly communicated policy of prohibiting improper deductions, maintains a complaint mechanism for reporting improper deductions, reimburses employees for improper deductions when informed of them, and makes a good faith commitment to comply going forward, an improper deduction will not destroy the overtime exemption unless the employer willfully violates the law by continuing to make improper deductions even after receiving employee complaints.



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Steps Your Company Can Take to Comply With the New Rules

The new overtime rules redefine the overtime exemption requirements, and companies should look carefully at their use of the exemptions to make sure they are in compliance with the new rules. As has been the case for decades, determining whether an employee fits within a particular exemption requires a fact-specific comparison of the employee's actual duties with the requirements of the regulations. Your company should consider doing the following:

- Look at how much your employees are paid. Are they paid at least \$455 in salary per week (\$23,660 per year)? Are they paid more than \$100,000 per year?
- Review job descriptions for employees classified as exempt to ensure they reflect actual job duties. Do those job duties qualify the employee as exempt under the new rules?
- Review your company's payroll practices to ensure deductions from pay are consistent with the new rules. Does your company have a communicated complaint procedure and mechanism for correcting erroneous deductions? Does your company have clear workplace conduct rules that include unpaid suspensions as possible punishment?
- Conduct an overtime audit, on your own or with counsel, to ensure your company is taking advantage of opportunities presented by the new rules and is protected from claims.
- Do your employees work in a state with more restrictive overtime exemptions?

If you have any questions about the new overtime rules or need assistance in complying with them, please contact either of the following Legge Farrow partners, both of whom are Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization:

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