

# JOB Law

## FOCUS ON: FINAL OVERTIME REGULATIONS

On April 20, 2004, the U.S. Department of Labor (“DOL”) issued final regulations intended to modernize the 50-year-old regulations under the Fair Labor Standards Act (“FLSA”).

The FLSA generally requires employers to pay their employees a minimum wage and overtime pay of one and one-half times an employee’s regular rate of pay for hours worked over 40 in a workweek. The

FLSA exempts from its minimum wage and overtime requirements executive, administrative and professional employees, as well as outside sales representatives and certain computer employees. The tests to determine whether employees qualify for these exemptions have been the subject of long overdue, yet highly controversial revisions. Previously, these tests were quite difficult and complicated

to administer, often resulting in employers misclassifying employees as exempt. In the new regulations, the DOL simplified these tests, making major changes in how employees are classified.

The final regulations, which differ significantly from the regulations initially proposed a year ago, are scheduled to go into effect on August 23, 2004.

## MOST SIGNIFICANT CHANGES

### SALARY BASIS TEST

To qualify for most of the exemptions from overtime under the new regulations, an employee must be paid on a “salary basis” – as opposed to by the hour – at the rate of \$455 per week (or \$23,660 annually). This minimum salary represents a significant increase from the former salary floor of between \$155 and \$250 per week, depending upon which exemption applied.

Certain computer employees and outside sales employees are excluded from the salary basis requirement.

The new rules ensure eligibility

for overtime pay to all employees earning less than \$455 per week regardless of the duties they perform.

### Highly Compensated Employees

The new regulations create an automatic exemption for “highly compensated employees.” If an employee is “highly compensated,” or paid at least \$100,000 per year, the employee must “customarily and regularly” perform only one of the primary duties of an exempt administrative, executive or professional employee in order to be exempt from overtime requirements.

### Deductions from Salary

The revised regulations also expand an employer’s right to reduce pay for disciplinary suspensions without jeopardizing the salary basis status. Previously, exempt employees could not be suspended for less than a week except for “infractions of safety rules of major significance.” Under the new regulations, exempt employees may be suspended for one or more full days for violating written workplace rules, such as sexual harassment or workplace violence policies.

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## EMPLOYEE REFERENCE BILL BECOMES LAW IN MINNESOTA

On March 22, 2004, Governor Pawlenty signed the Employer Reference Immunity Bill, which will take effect on August 1, 2004. This bill seeks to afford employers additional legal protection for providing employment references. Currently, most employers respond to a request for references with only the most basic of information, providing dates of employment, job title and sometimes ending salary. Despite that employers *should* not be liable for providing references unless they give false and defamatory information, the fear of litigation has led many employers to limit what they say about former employees. The lack of information available about a prospective employee can lead to poor and uninformed hiring decisions. It also results in *good* references not being given even when they are deserved.

The Employer Reference Immunity Bill seeks to change the status quo by limiting employer liability for disclosing certain information. Under the new Act, an employer may now disclose documented acts of violence, theft, harassment and illegal conduct by a former employee that resulted in disciplinary action, provided the employer does so in writing and contemporaneously copies the employee. In addition, the employer can release information regarding an employee's written performance appraisals and written disciplinary actions – if the employee consents in writing. The bill does not prevent liability for intentionally “false and defamatory” statements by an employer that harm the employee.

Will this law change the way that employers handle reference requests? This law will probably make employers less reluctant to disclose to a prospective employer serious acts of misconduct by an employee. And, given the new protections for doing so, an employer who fails to provide information regarding known risks posed by the former employee will increase its own risk of liability for failing to provide the reference if the employee later commits misconduct. Aside from the disclosure of misconduct, however, the law will not likely have much practical effect. An employer always has been free to obtain a release from a former employee to provide an employment reference. Accordingly, the ability to provide references with the employee's written approval is nothing new. Perhaps, however, the bill will serve as a reminder to employers that they can provide those references – good or bad – without the risk of liability if they simply obtain the written consent of the former employee.

**EMPLOYER TIP:** Develop an internal practice regarding the provision of employment references, particularly identifying a primary source responsible for reference requests in order to ensure consistency in the form and nature of information released.

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The new regulations also address the effect of improper deductions from salary, which in the past could destroy the exempt classification. Now, an improper deduction from salary will not render an exempt employee nonexempt unless the employer makes an "actual practice" of inappropriate deductions.

The rules create a new "safe harbor" provision, which provides that if an employer has a clearly communicated policy that prohibits improper pay deductions, includes a complaint mechanism and reimburses employees for any improper deductions, the employer will not lose the exemption for any employee unless the employer willfully continues to make improper deductions after receiving employee complaints.

### PRIMARY DUTIES TESTS

In addition to the salary basis requirement, the FLSA requires that the employee's duties fall under one of the exempt classifications to be exempt from overtime requirements. The new regulations focus on a "primary duty" test rather than the former maze of salaries, duties, short and long tests. The new primary duty tests are as follows:

#### Executive Exemption

To qualify for the executive employee exemption, an employee must be paid a salary of at least \$455 per week and:

- (1) the employee's primary duty must

be managing the enterprise, or managing a department or subdivision of the enterprise;

- (2) the employee must customarily and regularly direct the work of at least two or more other full-time employees; and
- (3) 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."

Any employee who owns at least a bona fide 20% equity interest in the business and is actively engaged in the management of the business is automatically classified under the executive exemption. The new regulations provide that an employee's concurrent performance of both exempt and non-exempt work does not alone disqualify that employee from the exemption.

#### Administrative Exemption

To qualify for the administrative employee exemption, the employee must be paid a salary of at least \$455 per week and her primary duties must include:

- (1) the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (2) the exercise of discretion and independent judgment with respect to matters of significance.

Although the administrative exemption was arguably the test most in need of clarification, the new language remains virtually unchanged from the current regulations. How-

ever, the new regulations provide the examples of jobs that generally satisfy the administrative exemption:

- Insurance claims adjusters if they conduct claims investigations, make recommendations and negotiate settlements.
- Financial services employees if they perform financial planning and similar functions and do not have as their primary duty selling financial products.
- Team leaders if their function is to lead employees assigned to "complete major projects," even if they do not have supervisory responsibility over team members.
- Executive and administrative assistants if they have been "delegated authority regarding matters of significance."
- Human resources managers if they develop or implement policies.

#### Professional Exemptions

There are two categories of exempt "professional" employees – learned professionals and creative professionals.

**Learned Professionals.** To qualify for the learned professional employee exemption, the employee must earn at least \$455 per week and perform work:

- (1) that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment; and
- (2) that requires knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

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## AFFIRMATIVE DEFENSES IN SEXUAL HARASSMENT/CONSTRUCTIVE DISCHARGE CASE

Last month the U.S. Supreme Court took up the question of whether a constructive discharge brought about by a supervisor's harassment prevents the employer from asserting affirmative defenses currently available in a sexual harassment claims. Under the law, in response to a claim of sexual harassment by a supervisor where the employee was not subject to "tangible employment action" such as termination or demotion, the employer can defend itself on the basis that it exercised reasonable care to prevent and correct the sexually harassing behavior, but that the employee unreasonably failed to take advantage of those corrective opportunities to avoid the harassment. Some courts had held, however, that if the harassment was severe enough to cause an employee to quit, the harassment was tantamount to an adverse employment action precluding the affirmative defenses and subjecting the employer to strict liability.

In *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004), the Supreme Court rejected this argument. The Court held that while an employer is precluded from asserting affirmative defenses when a supervisor's official act (involving the exercise of company authority) causes the constructive discharge, absent such a tangible employment action, the affirmative defenses are available to an employer whose supervisors are accused of harassment, even when the employee quits due to the harassment.

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**Creative Professionals.** To qualify for the creative professional employee exemption, the employee must earn at least \$455 per week and primarily perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

The most significant revision to the learned professional exemption is the emphasis on advanced knowledge. This knowledge must typically be obtained through a specialized academic degree and not only on-the-job training.

The new regulations provide examples of positions that generally would and would not satisfy one of the professional exemptions:

- Nurses – Registered nurses are generally exempt, while licensed practical nurses are not.
- Accountants and CPAs are generally exempt, while accounting clerks and bookkeepers are not.
- Editorial writers and on-air journalists are generally creative professionals, while reporters, even with four-year journalism degrees, are not exempt under either professional exemption.
- Paralegals are generally not exempt learned professionals unless they possess advanced specialized degrees in other professional fields and apply that advanced knowledge of that field in the performance of their duties.

**Outside Sales Exemption.** To qualify for the outside sales employee exemption, the employee's primary duty must be making sales or obtaining contracts from customers; and the employee must be

customarily and regularly engaged away from the employer's place of business. There are no minimum salary requirements for the outside sales exemption.

**Computer Employee Exemption.** To qualify for the computer programming employee exemption, the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field, and must primarily perform specific analytic or developmental duties set forth in the regulations. Qualifying computer employees are excluded from the salary basis requirement, but must be paid at least \$27.63 per hour if they are not salaried.

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