

## **LEGISLATION UNLIKELY TO AFFECT NEW OVERTIME RULES**

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As the clock ticks down to Election Day, the House of Representatives has passed a bill to block the Department of Labor overtime regulations which went into effect August 23, 2004. Congress watchers recognize this bill as an attempt to influence the election. There is almost no chance that a House and Senate conference committee could schedule a bill for final vote and send it to the President before Election Day. Members who voted for the bill can go back to their districts and tell voters they opposed a cut in overtime without actually voting to block the regulations.

Employers covered by the new regulations are still asking, "What happened?" In broad terms, the minimum salary for white collar exemptions went up to \$455 weekly or about \$22,750 annually. This minimum salary does not apply to teachers or people who practice law or medicine. The other change everyone noticed is that executives, administrators, professionals, computer professionals, and outside sales people can be exempt even if they spend more than 20% of their time (40% for retail) on duties such as running a punch press or typing. Before declaring working foremen and secretaries exempt, wise managers are reviewing all the regulations.

The first hurdle for employers is Maryland law. Maryland requires overtime pay, and the rule is this. Whatever law, state or federal, is most favorable to the employee will be enforced. Under Maryland regulations, an executive must exercise discretion and independent judgment in management of all or part of an enterprise "as a primary function of [his] job". The same "primary function" language is in the administrative and professional exemption. Does "primary function" under Maryland law mean 80% of the time? No one is sure because up to now, federal law was more favorable to employees. Will Maryland require overtime pay when federal law does not? We will find out some time in the future.

Under federal law, all employees in the United States (with exceptions too few to consider) are entitled to time and one half for overtime. That's right, everyone. Here is the actual language from the statute:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is

engaged in commerce ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [40 hours] at a rate not less than one and one half times the regular rate at which he is employed. 29 USC § 207.

To avoid paying overtime, an employer must prove an exemption.

### **The Employer Must Prove Overtime Exemptions**

Most overtime cases begin with a complaint from a salaried employee who has been fired. The employer will say, "The shift supervisor in my hamburger stand has the authority to hire and fire." The shift supervisor will say, "I never hired or fired anyone, the boss did that." Based on these two statements, the employer will lose. Remember, it is up to the employer to prove an employee is exempt. In addition to proving job duties, the employer must prove the employee is paid on a salary basis. Payment on a salary basis means no docking for a ½ day of sickness and no layoffs for part of a week (as well as some other things). The new regulations now permit "unpaid disciplinary suspensions of one or more days" pursuant to written policy applicable to all employees.

The exempt categories under the new regulations remain the same. They are executive, administrative, professional, computer professional and outside sales. The following is a broad view of the new exemptions.

#### **Executive**

One requirement under the old test was that an executive spend 80% of his or her time (60% in retail) on management or related duties. The 80% requirement meant that shipping dock foremen, mail room supervisors, office managers, and nursing supervisors (who spent most of their time working along side the people they supervised) were not exempt. Under the new rule, the 80% requirement is eliminated. If an employee's "primary duty" is the management of an enterprise or recognized department, the employee may be exempt. The executive must still supervise two or more full time equivalent employees. The new rule also exempts executives who own 20% of the enterprise regardless of how paid. Before an employer switches any employees to exempt, the employer should note that the new regulations devote substantial space to defining "management", "department or subdivision", "two or more employees", and "particular weight." Remember that the employer must prove the employee is exempt under the regulations.

#### **Administrative**

Like the executive test, the new administrative test eliminates the 80% of time rule. The new administrative test raises a host of interesting questions. Is the branch manager's secretary, who spends 80% of his or her time typing and filing, and 20% purchasing supplies and equipment or planning the management meeting, exempt? Is the

payroll clerk who spends 20% of his or her time developing benefit plans and writing the employee handbook exempt? In the past, these employees would almost certainly have been nonexempt because 80% of their work was routine. The new regulations say, "An executive assistant ... to a ... senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance." The term "matters of significance" refers "to the level of importance or consequence of the work performed." Can reasonable people disagree about whether something is a "matter of significance"? Absolutely. And remember, the employer has the burden of proof.

## **Professional**

The old test required that the professional spend 80% of his or her time performing work that was "predominantly intellectual and varied in character..." The new test eliminates the 80% rule. Now the "primary duty" must require knowledge of an advanced field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The "primary duty" can require, in the alternative, invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. In the past, nurses were not exempt. Now the regulations say, "Registered nurses ... generally meet the duties requirement for the learned professional exemption." In the past news photographers and reporters have been non-exempt. Whether they will now be exempt is an open question. The regulations say journalists may satisfy the duties requirement unless they rewrite press releases or recount public information.

## **Computer Employees**

Under the old test, computer employees making less than \$27.63 hourly were not exempt unless their "primary duty" required highly specialized knowledge of computer systems analysis, programming, and software engineering. Under the new test, if an employee meets the \$455 weekly earning requirement, he or she may be exempt if "primary duties" consist of:

1. The application of systems analysis techniques ... to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs ...
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the duties in one, two, and/or three.

## **Outside Sales**

Under the old test, the salesperson could not spend more than 20% of work time on duties "not incidental to and in conjunction with the employee's own outside sales or solicitations." This rule meant that soft drink drivers could not be sent to other driver's

stores to build displays. The 20% test has been eliminated from the new rule. Prior to the new rule, case law had settled most outside sales issues. The new regulations will undoubtedly be the basis for a number of new law suits.

### **\$100,000**

Under the new regulations, anyone who makes \$100,000 or more is almost certainly exempt. The regulations say, "A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties.

### **What the Future Holds**

The next three years will be full of confusion about which employees are exempt. The tests for exemption are subjective. Almost certainly Department of Labor investigators will interpret them differently than employers. At the end of the confusion period, many jobs will change from non-exempt to exempt. Working foremen, fast food shift supervisors, and many computer jobs will be exempt. Administrative assistants and nurses will join the ranks of exempt employees. Savvy employers will watch the news for recognized shifts before transferring their own employees to the exempt payroll.