

## New FairPay Rules Affect Overtime Eligibility

The new Fair Labor Standards Act (FLSA) regulations, the “FairPay Rules,” officially went into effect on August 23, 2004. Employers may wish to take this opportunity to review their compliance with what is commonly called the federal wage and hour law, particularly given the recent changes in the FairPay Rules. Revisions to an employer’s wage and hour practices may not always be prudent, since the changes may suggest the employer is admitting to have erred in the past. The new changes in the FLSA provide employers an opportunity to implement necessary changes in their employment practices occasioned by the employer’s analysis of those practices in light of the new regulations.

The substance of the new regulations was extensively analyzed at Duane Morris’ Employment, Benefits and Immigration Practice Spring Seminar, “Developments in Workplace Law and Practice.” At that time, we had the pleasure of welcoming Tammy McCutcheon, the United States Department of Labor’s Wage and Hour Division Administrator, who reviewed the regulations and answered questions as to their real world application.

### Changes in Exemption Requirements

The new FairPay Rules, like the former Rules, provide exemptions from overtime pay for employees employed in bona fide executive, administrative, professional and outside sales positions. However, there are some significant changes in the exemption requirements, as highlighted below:

The Minimum Salary Threshold has been raised from \$250 to \$455 per week.

Deductions may be made from the compensation of exempt, salaried employees for full-day disciplinary suspensions or for major safety rule infractions, without loss of exempt status.

Highly Compensated Employees, *i.e.*, those making at least \$100,000 annually, are exempt if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee.

Executive Exemption: Along with having a primary duty of managing the business and customarily directing the work of two or more employees, in order to be considered an Executive for purposes of the exemption, the employee must also have the authority to hire or fire other employees or have significant input into such a decision.

**Administrative Exemption:** While the “position of responsibility” language was removed from the definition of an Administrative employee for purposes of the Administrative Exemption, a requirement was added that an Administrative employee must exercise “discretion and independent judgment as to matters of significance.”

**Professional Exemption (Learned Professional):** The requirement that the employee consistently exercise discretion and judgment is no longer part of the test to determine whether an employee is subject to the Professional Exemption.

**Outside Sales Exemption:** The new Rules do not require the 20 percent limitation on non-exempt work imposed on outside sales employees under the old Rules.

In addition, the new Rules provide a “safe harbor” for employers who inadvertently make deductions that are quickly corrected. Under that provision, exempt status will not be lost where the employer corrects its error, has a clearly communicated policy prohibiting improper deductions that includes a complaint mechanism, and makes a good faith commitment to future compliance.

For a more comprehensive review of the new FLSA Regulations, click on the link below:

[http://www.duanemorris.com/alerts/static/A\\_EBI043004.pdf](http://www.duanemorris.com/alerts/static/A_EBI043004.pdf)

## **What Employers Should Do to Comply with the New Regulations**

If they have not already done so, employers may wish to review the status of their employees as soon as possible to ensure compliance with the FairPay Rules. As noted above, the publication of the FairPay Rules provides employers with an opportunity to re-examine their job classifications in general. A good place to start is with job descriptions.

Job descriptions may be updated to include terms or descriptions found in the new regulations. For example, the job duty of hiring/firing other employees, or making recommendations for such action, could be expressly listed in the job descriptions of employees who fall within the Executive Exemption to meet the requirements under the new Rules.

Also, employers may wish to review employee salaries. Employees with salaries of less than \$455 per week who were exempt under the old Rules may now be non-exempt. Unfortunately, even though one of the stated purposes of the new Rules is to make them clearer and easier to understand, many ambiguities remain, and, in a number of instances, the application of the new Rules must be derived from reading the voluminous set of examples that accompany the Rules.

Of course, most federal employment laws do not pre-empt state or local laws that may provide employees with greater protections, and employers must comply with all applicable state and local laws.

## For Further Information

We can help you deal with the implications of these new regulations on your wage and hour practices. We routinely assist employers in developing compensation and related employment policies, in drafting job descriptions and in auditing compliance with wage and hour laws. If you have any further questions regarding these new regulations or how they will impact your business, please contact one of the members of the Employment, Benefits and Immigration Practice Group or the lawyer in the firm with whom you are regularly in contact.

## Duane Morris

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