

FAIR LABOR STANDARDS ACT

OVERVIEW OF UPCOMING CHANGES

(Editor's Note: On May 4, 2004 the U.S. Senate voted 52 to 47 to adopt an amendment to block the new FLSA regulations discussed below. That amendment, however, was attached to an unrelated corporate tax bill and the House would have to pass that tax bill in order to derail the changes. Meanwhile, the President has promised to veto any such attempt. As an override would require a two-thirds vote of both the Senate and House, it is likely that the new regulations will remain intact. All employers, therefore, including cities and towns, would do well to examine all positions in light of the new definitions to be assured of proper classification and overtime pay handling.)

The long awaited updates to the Fair Labor Standards Act (FLSA) were published by the U.S. Department of Labor (DOL) in late April and are slated to go into effect on August 23, 2004. (See also "Fair Labor Standards Act: Sixty-five Year Old Law Faces Changes" in the September 2003 *VLCT News*.)

Although the FLSA governs the federal minimum wage level, record keeping and child labor laws, the focus of the changes is the regulation of overtime pay requirements for workers – specifically which employees may be classified as exempt from the requirement that for all hours worked over 40 in a workweek, workers must be paid at a rate of time and one-half the regular rate of pay. This is the first major overhaul of FLSA in more than 50 years and represents an attempt to provide clearer guidance to employers, including examples and dollar amount requirements which are more relevant to current workplace standards.

The Department of Labor refers to the new regulations as FairPay rules and asserts that 1.3 million low-wage workers, who were denied overtime pay under the old rules, will now receive overtime protection. To qualify as exempt from the rules, a "white collar" employee must earn more than \$455 per week (\$23,660 annually), be paid on a salaried basis, and additionally meet tests regarding specific job duties. Anyone earning less than the preceding figure (which is higher than the originally proposed regulations) is automatically protected by FLSA overtime pay requirements.

The enactment of the new regulations offers municipalities an opportunity to review job descriptions and re-evaluate all positions as to whether they should be classified as exempt or non-exempt. Help is available through the Department of Labor's "FairPay" Web site at www.dol.gov. It provides fact sheets and tutorials regarding all of the provisions and defines the terms used (such as "primary duty," "particular weight," and "discretion and independent judgment"); also provided are links to actual regulatory text. The site permits employers to submit direct questions and to sign up to receive regulatory updates. There is also a toll-free help line at 866/4US-WAGE (866/487-8243).

In addition to the increase in minimum salary here is a brief synopsis of the new regulation content:

I. Deductions from Pay

The rules on deductions from exempt employees pay remains largely the same in that the predetermined weekly wage cannot be reduced due to variations in the quality or quantity of the employee's work. For any week in which the employee performs no work, pay is not required. The list of permissible deductions of less than a full week is expanded to include full day suspensions for disciplinary reasons previously not applicable to exempt employees.

II. Primary Duties Test

The "long" and "short" tests no longer exist, nor does the calculation of whether 20 percent of an employee's time is spent on non-exempt tasks. Rather, there are simplified tests for each of the exemptions based on "primary duties."

Bear in mind that, in addition to the salary requirements noted above, *all* of the listed items in the test must be met in order to qualify for the particular exemption.

Executive Exemption.

The primary duty must be managing the enterprise or customarily recognized department or subdivision thereof; the employee must customarily and regularly direct the work of at least two other full-time employees or equivalent; the employee must have authority to hire or fire; 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.

Administrative Exemption. The primary duty must be office or non-manual work directly related to the management or general business operations of the employer or employer's customers; the primary duty includes the exercise of discretion and independent judgment regarding matters of significance.

Professional Exemption. The "Learned Professional's" primary duty must be performing work requiring advanced knowledge (predominantly intellectual and requiring consistent exercise of discretion and judgment) in a field of science or learning and acquired by a prolonged course of specialized intellectual instruction. The "Creative Professional's" primary duty must be performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

There are also exemptions defined for computer professionals and outside sales employees not outlined here but spelled out on the DOL Web site.

III. Highly Compensated Employees

An exemption has been created for those whose salaries are at least \$100,000 per year (this is much higher than the original proposal) and who perform office or non-manual work as well as one or more of the duties of the exemptions outlined above.

IV. Blue Collar Workers

The above exemptions apply only to "white collar" employees who meet both the salary and duties tests. "Blue collar" workers are considered to be those who perform work involving repetitive operations with their hands, physical skill and energy. Non-management employees in production, maintenance, construction, and similar positions are non-exempt no matter how high their pay.

V. Police, Fire Fighters, Paramedics and Other First Responders

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, correctional officers, parole/probation officers, fire fighters, paramedics, emergency medical technicians, ambulance personnel and similar workers, regardless of rank or pay level who perform work such as: preventing controlling or extinguishing fires; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections of violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports or similar work.

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