

Proposed White Collar Exemptions Mostly Good for Public Sector

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As you are no doubt aware, the Department of Labor has recently proposed new regulations outlining what it will take to qualify as an exempt executive, administrative, or professional employee who is not entitled to overtime pay. The period for public comment has recently been completed and the House of Representatives was unable to muster sufficient votes to overturn the proposed regulations. We are now awaiting the final regulations. While many of the rules will remain the same, there are a few substantive changes that we believe will be approved by the DOL.

The two biggest changes relate to the salary test and the duties test. On the salary side of the equation, the minimum salary that qualifies for exemption is \$425 per week (\$22,100 per year) and employees who earn more than \$65,000 per year are automatically exempt so long as they perform office or non-manual work and perform at least one function that is identifiable as administrative, executive, or professional. On the duties side, the exemption will be tied to the employee's primary duty. Discretion and independent judgment are now replaced by simply holding a position of responsibility. This will clearly impact administrative positions that support key managers and executives. Professional positions will no longer require knowledge acquired by a prolonged course of specialized study and can now include employees who have a combination of work experience and education.

As before, an employer is free to pay overtime to exempt employees if it so chooses. However, employees who are non-exempt must be paid overtime regardless of their previous status or their willingness to be treated as exempt.

What you need to do now

Employers should do two things now:

1. Review all jobs that are currently "Exempt" to make sure that they will not become "Non-Exempt" under the new rules.
2. Review all "Non-Exempt" jobs and see if any could be deemed "Exempt" under the new rules.

Once you have identified any potential impact, you can then evaluate the cost implications. Obviously, jobs that are now exempt but could become exempt will potentially result in increased cost to you as an employer. Strategies should be developed to determine whether the job duties can or should be changed and, if so, whether the incumbent employee is qualified to perform the new duties that would be added in order to maintain the exemption.

For positions that will become exempt, strategies will be needed relative to whether overtime pay will cease or whether you are obligated to continue paying overtime because of labor agreements, civil service rules, or other past practices. If you are going to have to pay overtime in the future, should you re-evaluate the base salary level of the job that, in

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most cases, was designed to reflect the lack of eligibility for overtime.

What will you need to do later

While the new rules will not become effective until late 2003 at the earliest,

* If currently non-exempt jobs become eligible for exemption, you will likely need to meet and confer or negotiate with any applicable employee bargaining units over this issue.

* For jobs that are currently exempt but will become non-exempt, you will need to contact each affected employee, as well as their immediate supervisor, to discuss implications for this change. This could affect job content, as well as how the work is performed. Issues related to authorizing overtime will need to be addressed and employee perception and status issues will need to be resolved.

How We Can Assist Your Organization:

We understand how to apply the Fair Labor Standards Act to thousands of diverse government jobs. We can offer valid and reliable analyses for determining the exempt or non-exempt status of your jobs that will save you time, money, and frustration. It may also prevent the kind of trouble the City of Houston recently found itself in:

Late in 2001, the plaintiffs in Daley v. City of Houston (paramedics) successfully convinced the 5th U.S. Circuit Court of Appeals that, prior to the adoption of a 1999 clarifying FLSA amendment by Congress, they were not fire protection workers eligible for a partial exemption from the act's overtime pay provisions and therefore should have been paid premium wages on the basis of a 40-hour week. The City of Houston lost the case, which will cost them between \$60 and \$65 MILLION DOLLARS!

For the past 8 years, we have been working with some of the largest and some of the smallest public and private sector organizations throughout the country to review and recommend classification, compensation, job evaluation and performance appraisal systems. We analyze thousands of jobs each year and advise our clients on the correct application of FLSA status.

So, if you would like help reviewing FLSA status of your organization's jobs, consider our offer. We can be reached at 800-383-0976. Press 12 for Jim or 20 for Bruce.