

DAVIS MALM & D'AGOSTINE P.C.

A T T O R N E Y S A T L A W



25 YEARS ON THE LEGAL FRONTIER

≡ Employment Law Client Alert ≡

JULY 2004

COMPREHENSIVE CHANGES IN FEDERAL OVERTIME PAY AND MINIMUM WAGE REQUIREMENTS Full Compliance Required by August 23, 2004

On April 23, 2004, the United States Department of Labor (“DOL”) issued far-reaching regulations under the Fair Labor Standards Act (“FLSA”). These regulations, which are now expected to become effective on August 23, 2004, revise the standards under which employees in executive, administrative, professional, outside sales and computer positions are exempt from federal overtime pay and minimum wage requirements. In many cases, employees once classified as not exempt from overtime pay will now be exempt. In other cases, the reverse will be true. For most employers, full compliance with the new regulations will take some time, but will provide insurance against employee claims and save money that is now paid out in overtime pay. This Client Alert provides an overview of the new regulations, which will profoundly affect nearly all of our clients’ pay policies.

Action Steps For Clients: The FLSA requires that employees not exempt from overtime pay requirements be paid one and one-half times their regular hourly pay for all hours worked over 40 hours in a week. It also requires that employees be paid a legislatively mandated minimum rate of pay. Penalties for non-compliance are extremely onerous, and include back pay, penalties, interest and attorneys fees. Thus, while compliance with the new regulations may involve some cost, we recommend that each of our clients takes the following actions well prior to August 23:

1. Know the new regulations. We are happy to provide you with a copy of the regulations and are available to assist you in understanding and implementing them. Please call us at any time. In addition, the DOL web site has helpful Fact Sheets for your review. Go to DOL.gov and click on “FairPay Overtime Rules” on the right side of the page. There you will find a link to “FairPay Fact Sheets.” The DOL also provides an on-line seminar summarizing the regulations.
2. Review with counsel all job classifications to ensure compliance. Even as to employees not in the classifications dealt with in the new regulations, this is the time to correct misclassifications.
3. Be certain as well that you are in compliance with state laws, as they will continue to apply to the extent they provide more comprehensive protection for employees.
4. Take advantage of the new “Safe Harbor” rule in the regulations. More on this below.
5. Create a system under which you will review FLSA and state law compliance prior to establishing any new job classification and make certain managers are knowledgeable as to these new regulations. We are available to conduct management seminars on this topic for you.

Overview: In general, employees are exempt from the FLSA overtime and minimum wage requirements if 1) they earn more than \$455 a week (\$23,660 annually) and are paid on a salary basis; and 2) they meet a “duties test” for their job. Please note that most employees earning over \$100,000 are considered exempt if they perform “office or non-manual work” and they “customarily and regularly perform” any one or more of the exempt duties set forth in the regulations for an executive, administrative or professional employee.

1. Salary Level and Salary Basis: To meet this test, the employee must earn at least \$455 per week (\$23,600 annually) and regularly receive a predetermined amount of compensation each pay period, which cannot be

reduced due to variations in the work performed. Moreover, the employee must be paid full salary for any week in which work is performed. (Administrative and professional employees may be paid on a fee basis.) Unless the employer has taken advantage of the "Safe Harbor" provision, if an employer has made improper deductions it will lose exempt status for all employees in the same job classification who are working for the person making the deductions. Under "Safe Harbor," the exemption will not be lost if the employer has a clearly communicated policy prohibiting improper deductions, which includes a complaint procedure, the employer reimburses employees for improper deductions and the employer uses good faith in complying with the FLSA. Please note that most employees earning over \$100,000 per year will be considered exempt if they perform "office or nonmanual work" and "customarily and regularly perform" any one or more of the exempt duties of an executive, administrative or professional employee as set forth in the regulations.

2. Job Duties Test: The old regulations contained confusing "long" and "short" tests to determine whether an employee was exempt. They also contained strict percentage regulations as to primary duties for some classifications. Now, there is one test for each classification and no percentage regulations, as set forth in summary below:

A. Executive Employee: An executive employee manages the enterprise in which he or she is employed or a department thereof, customarily directs the work of two or more other employees and has authority to hire or fire other employees or whose recommendations as to hiring, firing, advancement, etc. are given particular weight. Additionally, the term includes any employee who owns at least 20% equity in the enterprise.

B. Administrative Employee: An administrative employee's primary duty is to perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and whose primary duty includes the exercise of discretion and independent judgment as to matters of significance. Examples include insurance claims adjusters, financial analysts, project managers, certain executive assistants who have been delegated authority regarding matters of significance, human resources managers and purchasing agents.

C. Professional Employee: A professional employee's primary duty is the performance of work

requiring knowledge of an advanced type in a field of learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Here, the regulations are very specific as to which professions are included and which are not. For example, certified public accountants are included but accounting clerks and bookkeepers are not. Chefs and sous chefs with academic degrees are included, but cooks are not. Journalists are included, but not reporters who merely rewrite press releases or who write standard recounts of public information.

D. Computer Employee: Computer systems analysts, computer programmers, and software engineers are exempt if their primary duty consists of applying systems analysis techniques and procedures to determine functional specifications, they design, test or modify systems or programs based on user or system specifications or they perform a combination of these duties, the performance of which requires the same level of skills. Those who repair or manufacture computer hardware and related equipment are not exempt, nor are employees who use computers but are not primarily engaged in computer systems analysis and programming. In order to be exempt, computer employees must be compensated on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour.

E. Outside Sales Employee: These employees are exempt when their primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the customer and they are customarily and regularly engaged away from the employer's place of business in performing this duty. Note that the salary requirements do not apply to outside sales employees.

If you need help understanding these regulations or implementing changes to comply with them, please do not hesitate to call us. ♦

Employment Law Group

Judith Ashton	(617) 589-3873
Gary M. Feldman	(617) 589-3874
David Rapaport	(617) 589-3812
♦♦♦♦♦	
Laurie Alexander-Krom	(617) 589-3867
David M. Cogliano	(617) 589-3812

DAVIS MALM & D'AGOSTINE P.C.

ATTORNEYS AT LAW

Should you have questions about this article, please contact :

Jeanie Griggs (617) 589-3895 or jgriggs@davisalm.com • One Boston Place • Boston, MA 02108