



SMITH
ANDERSON

2004 Mid-Term Employment Law Update



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**Fair Labor Standards Act -
Understanding the New FLSA Regulations:
What Employers Should Do Now**



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New “White Collar” Exemptions, the “FairPay” Rules

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ACTION ITEMS FOR RESPONDING TO NEW OVERTIME RULES

- 1. Review current classifications of exempt and non-exempt employees**
- 2. Review current pay practices. Determine that: calculating regular rates correctly; recording time worked correctly; and paying for all time worked**



ACTION ITEMS FOR RESPONDING TO NEW OVERTIME RULES

- 3. Determine whether any employees currently classified as exempt are being paid annual salaries of less than \$23,660 or weekly salaries of less than \$455. If so, consider increasing salaries or re-classifying employees**



ACTION ITEMS FOR RESPONDING TO NEW OVERTIME RULES

- 4. Review job descriptions and actual duties of exempt, executive employees for determination of whether employee's primary duty includes the "authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." Consider modifying job duties and job descriptions if appropriate**



ACTION ITEMS FOR RESPONDING TO NEW OVERTIME RULES

- 5. Consider whether any current, non-exempt employees who make more than \$455 per week might satisfy requirements for exemption**

- 6. Implement a “clearly communicated policy prohibiting improper deductions” from exempt employees’ salaries. Policy should describe the seven exceptions to the “no-docking” rule, include a complaint procedure, and provide for reimbursement of improper deductions**



To Qualify For an Exemption, the Employee Must:

- **Meet or exceed the requisite Salary Level;**
- **Be paid on a Salary Basis; and**
- **Satisfy the Job Duties for the particular exemption**



Minimum Salary Level: \$455 Per Week

- **Generally, the minimum salary level required for exemption is \$455 per week (\$23,660 per year)**
- **The \$455 per week may be paid in equivalent amounts for periods longer than one week:**
 - **Biweekly: \$910**
 - **Semimonthly: \$985.83**
 - **Monthly: \$1,971.66**
- **Computer employees may be paid not less than \$27.63 an hour**



Special Exemption for the Highly Compensated Employee

- **Total annual compensation of at least \$100,000**
- **At least \$455 per week paid on a salary or fee basis**
- **Performs office or non-manual work**
- **Customarily and regularly performs any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions**



Highly Compensated Employee

“Total Annual Compensation”

- **Total annual compensation includes:**
 - **Commissions**
 - **Nondiscretionary bonuses**
 - **Other nondiscretionary compensation earned during a 52-week period**
- **Total annual compensation does not include:**
 - **Credit for board, lodging or other facilities**
 - **Payments for medical or life insurance**
 - **Contributions to retirement plans or fringe benefits**



Highly Compensated Employee

“Final Payment & Pro-Rating”

- **If an employee’s total annual compensation does not equal \$100,000 by the end of the year:**
 - **The employer may, within one month after the end of the year, make one final payment to reach the \$100,000 level; or**
 - **The employee will be tested for exemption under the standard duties tests**
- **The \$100,000 may be pro-rated for employees who do not work the full year**
- **The employer may use any 52-week period as the year**

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Exempt Employees Must Be Paid on a Salary Basis

- **Regularly receives a predetermined amount of compensation each pay period**
- **The compensation cannot be reduced because of variations in the quality or quantity of the work performed**
- **Must be paid the full salary for any week in which the employee performs *any* work**
- **Need not be paid for any workweek when no work is performed**



Payment on a Salary Basis

- **Generally no deductions from salary are permitted; no “pay-docking”**
- **Seven exceptions from the “no pay-docking” rule:**
 1. **Absence from work for one or more full days for personal reasons, other than sickness or disability**
 2. **Absence from work for one or more full days due to sickness or disability if deductions are made under a bona fide plan, policy or practice which provides wage replacement benefits for these types of absences**



Payment on a Salary Basis

- **Seven exceptions from the “no pay-docking” rule (con’t):**
 - 3. To offset any amounts received as payment for jury fees, witness fees, or military pay**
 - 4. Penalties imposed in good faith for violating safety rules of “major significance”**
 - 5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules – e.g. harassment**
 - 6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment**
 - 7. Unpaid leave taken pursuant to the Family and Medical Leave Act**

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Executive Exemption

- **Primary duty is management of the enterprise or of a customarily recognized department or subdivision;**
- **Customarily and regularly directs the work of two or more other employees; and**
- **Authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight.**



Executive Exemption

“Primary Duty”

- **The principal, main, major or most important duty that the employee performs.**
- **Factors to consider include, but are not limited to:**
 - **Relative importance of the exempt duties;**
 - **Amount of time spent performing exempt work;**
 - **Relative freedom from direct supervision; and**
 - **Relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work.**



Executive Exemption

“Primary Duty”

- **Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement**
- **However, the regulations do not *require* that exempt employees spend more than 50% of time performing exempt work**
- **Time alone is not the sole test**



Executive Exemption

“Management”

- **Interviewing, selecting, and training employees**
- **Setting and adjusting pay and work hours**
- **Maintaining production or sales records**
- **Appraising employee productivity and efficiency**
- **Handling employee complaints and grievances**
- **Disciplining employees**
- **Planning and apportioning work among employees**

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Executive Exemption

“Management”

- **Determining the techniques to be used; the type of materials, supplies, machinery, equipment or tools to be used; or the merchandise to be bought, stocked and sold**
- **Providing for the safety and security of employees or property**
- **Planning and controlling the budget**
- **Monitoring or implementing legal compliance measures**



Executive Exemption

“Department or Subdivision”

- **A “customarily recognized department or subdivision” must have a permanent status and continuing function**
 - **Need not be physically within the employer’s establishment, and may move from place to place**
 - **Continuity of the same subordinate personnel is not essential to the existence of a recognized unit.**
 - **The employee in charge of each branch establishment is in charge of a recognized subdivision**
- **Does not include a mere collection of employees assigned from time to time to a specific job**



Executive Exemption

Supervises “Two or More” Employees

- **The phrase “two or more other employees” means two full-time employees or the equivalent**
- **Full-time generally means 40 hours per week**



Executive Exemption

“Particular Weight”

- **Factors include, but are not limited to:**
 - **Whether it is part of the employee’s job duties to make suggestions and recommendations**
 - **The frequency with which suggestions and recommendations are made or requested**
 - **The frequency with which the employee’s suggestions and recommendations are relied upon**



Executive Exemption

“Particular Weight”

- **Suggestions and recommendations may be reviewed by a higher level manager**
- **The exempt executive need not have authority to make the ultimate decision**
- **Making an occasional suggestion regarding a change in status of a co-worker does not meet the “particular weight” standard**



Executive Exemption

“20% Owner Executives”

- **The executive exemption also includes employees who:**
 - **own at least a bona fide 20-percent equity interest in the enterprise; and**
 - **are actively engaged in management of the enterprise.**
- **The salary level and salary basis requirements do not apply to 20% equity owners.**



Administrative Exemption

- Whose primary duty is the performance of 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 with respect to matters of significance.



Administrative Exemption

“Management or General Business Operations”

- **Refers to the type of work performed by the employee**
- **Work must be directly related to assisting with the running or servicing of the business**
- **Does not include working on a manufacturing production line or selling a product in a retail or service establishment**



Administrative Exemption

“Discretion and Independent Judgment”

- **The comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered**
- **Must be exercised with respect to “matters of significance,” which refers to the level of importance or consequence of the work performed**
- **Decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed**

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Administrative Exemption

“Discretion and Independent Judgment”

- **Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices**
- **Whether the employee carries out major assignments in conducting the operations of the business**
- **Whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business**



Administrative Exemption

“Discretion and Independent Judgment”

- **Whether the employee has authority to commit the employer in matters that have significant financial impact**
- **Whether the employee has authority to waive or deviate from established policies and procedures without prior approval**
- **Whether the employee has authority to negotiate and bind the company on significant matters**
- **Whether the employee provides consultation or expert advice to management**

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Administrative Exemption

“Discretion and Independent Judgment”

- **Whether the employee is involved in planning long- or short-term business objectives**
- **Whether the employee investigates and resolves matters of significance on behalf of management**
- **Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances**



Learned Professional Exemption

- The employee's primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction



Learned Professional Exemption

“Advanced Knowledge”

- **Predominately intellectual in character**
- **Includes work requiring the consistent exercise of discretion and judgment**
- **The advanced knowledge is generally used to analyze, interpret or make deductions from varying facts or circumstances**
- **Not work involving routine mental, manual, mechanical, or physical work**



Learned Professional Exemption

“Prolonged Course of Specialized Intellectual Instruction”

- **Specialized academic training is a prerequisite for entering the profession**
- **Best evidence that an employee meets this requirement is possession of the appropriate academic degree**



Learned Professional Exemption

“Customarily”

- **Exemption is also available to employees in learned professions who:**
 - **Have substantially the same knowledge level and**
 - **Perform substantially the same work as the degreed professionals,**
 - **But attained the advanced knowledge through a combination of work experience and intellectual instruction**
- **Examples:**
 - **Lawyer who did not attend law school**
 - **Chemist who does not have a chemistry degree**



Creative Professional Exemption

- **The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor**



Creative Professional Exemption

“Recognized Field of Artistic or Creative Endeavor”

- **Music**
 - Musicians, composers, conductors, soloists
- **Writing**
 - Essayists, novelists, short-story writers, play writers
 - Screen play writers who choose their own subjects
 - Responsible writing positions in advertising agencies
- **Acting**
- **Graphic Arts**
 - Painters, photographers, cartoonists

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Creative Professional Exemption

“Invention, Imagination, Originality or Talent”

- **A creative professional must perform work requiring invention, imagination, originality or talent**
- **Exempt status is determined on a case-by-case basis, depending on the extent of the invention, imagination, originality or talent exercised**



Action Plan Recap

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