WAGE & HOUR REVISITED

BY DIANE FAULKNER, ACC, SPHR

After nearly 30 years, the U.S. Department of Labor is attempting to update the Fair Labor Standards Act to bring it into the digital age. According to the DOL, the new rules are supposed to clarify the old rules and make them easier to administer. The changes, if passed, would add overtime protection to 1.3 million low-earning minimum salaried workers, strengthen overtime protection for an additional 10.7 million hourly workers and enhance economic growth by reducing regulatory red tape, cut litigation costs and stimulate economic growth.

Enacted during the Depression in 1938, the act was last updated in the 1970s. If any labor act is going to get an employer into trouble, it's going to be FLSA. Last year wage-and-hour class-action lawsuits of those claiming unpaid overtime were more common than discrimination suits.

Why has this act been so difficult to follow? How will the change in direction affect position classification?

THE BASIS NIGHTMARE

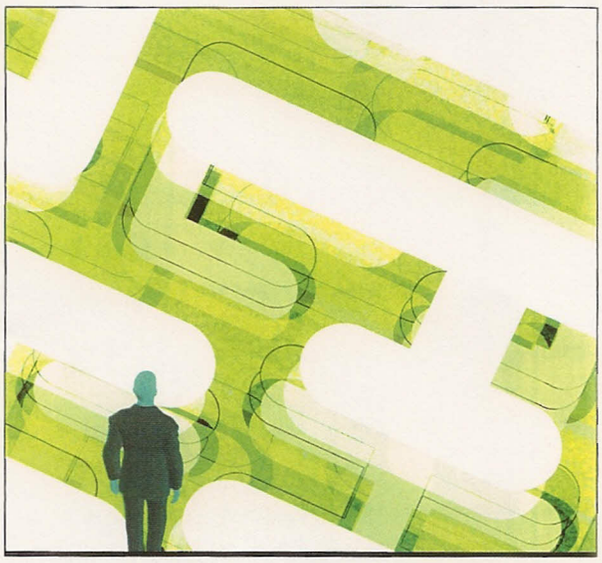
Much of the confusion in the FLSA comes from the salary basis test. The test lists duties for various "exempt" positions (see examples, p. 52), not subject to overtime pay. And the test sets a sort of minimum wage for those positions.

The test requires that exempt, white-collar workers be paid a constant amount, every week, without regard to the quality or quantity of the work performed. But there are two tests, a "long" and a "short," each with different minimum salary levels. Under the long test, an exempt employee makes a minimum of $155 a week. Under the short test it is a minimum of $250.

Why are there two sets of tests? The short test was supposed to be a time-saver, sort of a short-hand test that HR could quickly scan. If there was a question, the long test was consulted. Employers are supposed to use both tests, but ultimately each job is to meet the the long test.

The tests have remained unchanged since 1954 with salary levels that were last updated in 1975. The DOL's proposed regulations raise the salary threshold to $425 a week (about $22,100 a year), and the changes will consolidate the two tests, eliminating some of the confusion.

The $270 increase would be the largest since the act's passage in 1938. The new minimums were figured at the lowest 20 percent of salary ranges reported in the Bureau of Labor Standards' year 2000 Current Population Survey Outgoing Rotations Data Set. If the rules go through, employers will either have to pay overtime to more workers, or increase those workers' salaries to meet the new minimum standard.



Navigating current FLSA regulations can be like getting lost in a maze. Will the proposed changes help?

The update also introduces a "super salary test" for employees who make at least $65,000. These highly compensated personnel would qualify for the Executive, Administrative or Learned Professional exemptions if they:

- perform office or non-manual work;
- are guaranteed total annual compensation of at least $65,000 (base salary, commissions and non-discretionary pay, including bonuses, may be used in the calculation); and
- perform one or more of the exempt duties in one of these three classifications. (See sidebar on p. 52.)

Some of these highly compensated workers are currently considered non-exempt and thus earn overtime. Under the new regulations, they won't.

DETERMINING EXEMPTIONS

The subjective phraseology in the tests results in frequent misclassification by employers and inconsistent application of the exemptions by investigators and the courts.

Titles do not mean anything when determining exemptions. The work performed is what counts. Some short-hands for determining if work is exempt or non-exempt include:

- Anything repetitive is non-exempt.
- If the work requires creativity, it is exempt, but if the work requires use of hands and/or back, it is non-exempt.
- Exempt employees make their jobs; non-exempts fill theirs.

According to Robin Midulla, labor law attorney with Constangy, Brooks &

Smith (*www.constangy.com*), Tampa, Fla., the Administrative exemption is the most frequently misapplied of all the exemptions in this respect.

In her 2003 Labor and Employment Law Workshop, held in April at Ponte Vedra Beach, Fla., Midulla explained that courts "often apply what is known as the 'administrative/production dichotomy' in determining whether the primary duties of the employee's position qualify for the exemption. The test involves distinguishing between those employees whose primary duties include administering the business affairs of a company vs. those employees whose primary duties involve producing the goods or services that are sold by the business."

Production gets interpreted too narrowly by employers to reflect end product, rather than routine activities. The phrase, "administering the business affairs of a company," gets translated in such a way as to include clerical positions as exempt when just the opposite is true. This is an important point, as secretaries and other administrative assistants are often misqualified as exempt.

ROUTINE TASKS

Midulla points out that "an employee performing routine clerical duties, although exercising independent judgment and discretion to a certain extent, is not performing duties directly related to the management of the business."

Think of this in terms of an accounting manager preparing a board report, the format of which is repeatedly used, only updated, and not created. The calculations are prescribed macros in a spreadsheet, not created, and numbers can be plugged in at a non-exempt level. Interpretation of and projections from the information gathered is the only exempt work in updating such a report, and that work is generally done by a CFO. Multiply the number of standard reports used by managers, factor in the time spent on the non-exempt tasks, and it becomes clear how the current rules disqualify many managers' exemption.

Exempt employees are allowed to perform some repetitive tasks, but the time spend on those tasks can't exceed a certain percentage (20 percent or 40 percent in retail).

Under the current rules, this limitation on time spent performing non-exempt tasks plays a key role in determining when a position remains exempt, switches to non-exempt or fractures into multiple jobs.

This provision was included in the original act to discourage employers from overloading exempt positions with non-exempt work. If an exempt employee is performing over the allowed 20 percent on non-exempt work (such as routine reports), that position should either be re-classified as non-exempt (and then eligible for overtime) or split into two positions, one exempt and a new, non-exempt position to do the repetitive tasks.

This provision forces employers to recognize when overloading positions (and thus increasing overtime) is costlier than creating new positions. But the proposed regulations offer no such standard. So in effect, employers could load up exempt workers' duties with routine tasks to avoid paying overtime to the non-exempts who would normally perform those tasks. This is one reason labor groups have opposed the proposed changes.

Another way to determine exempt status is defined by a key phrase, "discretion and independent judgment ... [that] must be real and substantial, [and] must be exercised with respect to matters of consequence." Midulla explains that for human resources this means that prescreening and rejecting applicants according to predefined standards is not exercising independent judgment and discretion, but hiring, firing and solving problems on one's own is both independent and directly related to managing the business.

FINDING SAFE HARBOR

Another key change involves pay docking for exempt employees.

Basically, under the current rules, exempt vacation deductions may be recorded/deducted as week-long intervals. Anything less puts the position in danger of losing its exemption. Exempt employees who work shorter or longer than 40 hours are to realize no deduction or increase in pay. Answer an e-mail on Monday, and the exempt person, under the current law, must be paid for a full week. The employers may set policies that allow full workday deductions (such as vacation), but in no way may the pay decrease.

If an employer does dock an exempt employee's pay for any portion of a workday, whether for variations in the quantity of work performed—especially when hourly increments are at issue—or for discipline, absence or tardiness, including partial day deductions from leave time, that position loses its exemption across the board. Such a loss means backtracking payroll records to find when improper deductions began, estimating lost overtime to be paid to *all* employees in the same job classification, and then continuing to pay the formerly exempt positions as non-exempts until pay classifications are reviewed. (This is a good reason to have an annual review that includes reviewing position responsibilities).

The new rules describe a "safe harbor," which would amend this to employees in the same classifications under the same *manager* making the error from the time the improper deductions began until they ended.

The new safe harbor, if approved, would protect the exempt status if:

- the employer has a written policy prohibiting pay deductions;
- employees are notified of the policy; and
- the employer doesn't repeatedly and willfully (pattern and practice) violate the policy or continue to make improper deductions after receiving employee complaints.

Then pay docking would be allowed only:

- when an exempt employee is absent from work for a full day for personal reasons other than sickness or disability (The phrase 'personal reasons other than sickness or disability' historically includes vacation time, but this is not specifically spelled out in the proposed changes.);
- for absences of a full day or more

occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing pay for salary loss for sickness or disability;

- when an exempt employee violates safety rules of major significance;
- when, in good faith, an exempt employee is suspended for a full day or more for infractions of workplace conduct rules;
- for initial and terminal weeks of employment; and
- when an exempt employee takes unpaid leave under the Family & Medical Leave Act.

Additionally, the money employees receive as jury fees, witness fees or military pay for any particular week may be offset without exemption loss as long as there are no deductions for absences.

TRANSLATING TRICKY PHRASES

The current regulations contain a number of confusing phrases and terminology. Here we'll describe them and explain what the proposed rules would do.

For example, the Administrative Employees test (see sidebar below) uses the phrase "position of responsibility," which means employees will customarily perform work of "substantial importance" or work "requiring a

LEARNED PROFESSIONAL EMPLOYEES

	Long Test	Short Test	Proposed Standardized Test
$	$170/week	$250/week	$425/week
DUTIES	Primary Duty: Performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. • Consistently exercises discretion and judgement. • Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time. • Does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work. *"Advanced knowledge" requirement is satisfied through academic instruction rather than knowledge gained through work experience.*	Primary Duty: Performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. • Consistently exercises discretion and judgment	Primary Duty: Performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. • *To recognize that areas covered by the learned professional exemption "are expanding," a provision notes that whenever a specialized degree becomes a standard job requirement, that particular occupation can then be considered a "learned profession."* *"Advanced knowledge" is acquired through a combination of formal college-level education, training and work experience.*

ADMINISTRATIVE EMPLOYEES

	Long Test	Short Test	Proposed Standardized Test
$	$155/week	$250/week	$425/week
DUTIES	Primary Duty: Performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers. • Customarily and regularly exercises discretion and independent judgment. • Regularly and directly assists a proprietor, or exempt executive or administrative employee; OR performs specialized or technical work requiring special knowledge under only general supervision; OR executes special assignments under only general supervision. • Does not devote more than 20% (40% in retail or service establishments) of time to activities that are not directly and closely related to exempt work.	Primary Duty: Performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers. • Customarily and regularly exercises discretion and independent judgment.	Primary Duty: Performing office or non-manual work directly related to management or general business operations of the employer or the employer's customers. • Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing a high level of skill or training.

high-level of skill."

The "substantial importance" phrase in the new test has actually been part of the interpretive guidelines since 1950. This kind of work is defined to mean work that "by its nature or consequence affects the employer's general business operations or finances to a significant degree." Examples of this activity included in the proposed changes include:

- formulating, interpreting or implementing management policies,
- providing consultant or expert advice to management,
- making or recommending decisions that will have a substantial impact on general business operations or finances,
- analyzing and recommending changes to operating practices,
- planning long- and short-term business objectives,
- analyzing data, drawing conclusions and recommending changes,
- handling complaints, arbitrating disputes or resolving grievances, and
- representing the employer during important contract negotiations.

"Work requiring a high level of skill or training" is defined as work requiring specialized knowledge or abilities or advanced training that can be acquired through academic instruction or advanced on-the-job training. This is a reversal of the DOL's previous view that using a reference manual indicated performing non-exempt duties. If the changes are approved as published, use of a manual that contains highly technical, scientific, legal, financial or similarly complex information that can be interpreted only by those with advanced training or specialized knowledge or skills will be regarded as exempt work.

The DOL solicited comments from employers regarding the changes, ending June 30. The next step is for the changes to be approved by Congress.

Resources

The full law, explanations, and proposed Creative Professional exemption update can be viewed at *www.dol.gov* along with briefs on the progress of passage. Constangy law updates can be seen at *www.constangy.com*.

Find more salary basis tests on line at *www.cumanagement.org*. Click on "September 2003" in the pull-down menu at the bottom.

"Until changes are made," Midulla warns, "employers should be aware that the plaintiff's bar has finally realized the fertile feeding ground that lies in wage and hour class action suits. Employers must be diligent to annually review pay classifications and seek labor counsel advice to ensure that employees are properly classified as exempt."

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