



Recent Developments In Employment Law

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**FINAL REVISIONS TO THE WHITE COLLAR EXEMPTIONS
FROM OVERTIME ARE HERE (FOR NOW)**

After much delay and controversy, the Department of Labor (“DOL”) released its final revisions to the regulations exempting executive, administrative, professional, outside sales and computer employees from overtime pay under the Fair Labor Standards Act. The rules are effective on August 23, 2004, but whether they will, in fact, take effect on this date is uncertain. On May 4, 2004, the U.S. Senate voted to block implementation of the revised rules. By itself, the Senate’s vote is insufficient to stop the rules from taking effect, but it could be the start of additional action by Congress, so stay tuned. In the meantime, employers should audit their employees to make sure they are in compliance with the changes contained in the new rules, the most significant of which are discussed below.

Minimum Salary Level; Highly Compensated Employees. The new rules significantly increase the minimum salary that executive, administrative and professional employees must earn to qualify for the exemption from \$155 per week (\$8,060 annually) to \$455 per week (\$23,660 annually). Thus, white collar employees who earn less than \$23,660 annually will typically become entitled to overtime pay, regardless of their duties. The DOL estimates that this increase will result in 1.3 million currently exempt white collar workers becoming eligible for overtime pay.

The new rules also create a new test for exempting highly compensated employees. Under the rules, employees with total annual compensation of at least \$100,000 are deemed exempt, provided they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative or professional employee. Originally, the DOL had proposed exempting employees who earned more than \$65,000, but backed off this proposal in response to intense criticism. Under the rules, if at the end of the 52 week period, the employee has not been paid \$100,000, the employer may make a make-up payment to reach the required level on the last pay day or within one month after the end of the 52 week period. Any payment made after the end of the 52 week period may only be applied toward the prior’s year compensation.

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In other words, a make up payment made after the end of the 52 week period cannot be counted twice. Finally, the rules specify that this exemption does not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy.

Standard Duties Test. The existing regulations require employees to perform certain duties to qualify for the white collar exemptions. These regulations contain a long duties test for employees earning \$155 per week (\$170 per week for professional employees) and a short duties test for employees earning \$250 per week (\$13,000 annually). Given the low minimum salary, employers rarely use the long duties test. The new rules eliminate the long and short duties tests and replace them with a single standard duties test for each category of the executive, administrative and professional exemptions.

Executive Employee Exemption. For executive employees, the new regulations, like the old short duties test, require employees to have management as their primary duty and to regularly direct the work of two or more employees. The new regulations also retain the requirement, found in the old long duties test, that employees must either have the authority to hire or fire other employees or their recommendations about the hiring, firing, advancement, promotion or any other change of status are given particular weight. For nearly all employers, this is a new requirement because they have not had to use the long duties test for many years.

The regulations provide a non-exclusive list of factors to consider when determining if an employee's suggestions and recommendations are given "particular weight." These factors include whether the employee's job duties include making such suggestions and recommendations; the frequency with which the employee makes such suggestions and recommendations; and the frequency with which management relies on the employee's suggestions and recommendations. An employee's suggestions and recommendations may still have particular weight, even if a superior's recommendation has more importance and/or the employee does not have authority to make the ultimate decision about the employee's change in

status. In contrast, an employee whose few recommendations are never followed would not meet this requirement.

The new regulations also eliminate the provision in the long duties test prohibiting executives from spending more than 20 percent of their time performing nonexempt work. The new regulations specify that employees can concurrently perform exempt and nonexempt work without losing their exemption, provided they otherwise meet the executive exemption's requirements.

Administrative Employee Exemption. Like the old short duties, the new regulations require administrative employees to perform, as their primary duty, office or non-manual work directly related to the management or general business operations of their employer or their employer's customer.

Significantly, the new regulations also preserve the requirement that administrative employees exercise discretion and independent judgment. The proposed regulations had dropped this provision, a move supported by employers. This requirement, however, was reinserted into the final regulations, even though the DOL acknowledged that this standard has caused confusion and unnecessary litigation. The new regulations add, however, the requirement that this exercise of discretion and independent judgment must be with respect to matters of significance. Finally, the regulations provide a non-exclusive list of factors to determine whether an employee exercises discretion and independent judgment. Employees who meet two or three of these factors will typically be deemed to exercise discretion and independent judgment.

Professional Employee Exemption. The professional employee exemption did not change significantly. As before, to qualify for this exemption, employees' primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (or requiring invention or originality in a field of artistic or creative endeavor). The proposed regulations dropped the requirement that professional employees

must consistently exercise discretion and judgment, but added the requirement back in the final regulations in the definition of “work requiring advanced knowledge.” Under the new regulations, this phrase means work which is predominantly intellectual, and which includes the consistent exercise of discretion and judgment. Finally, the new regulations provide a list of jobs which do and do not meet the professional exemption.

Disciplinary Deductions, Safe Harbors. The new rules continue to require executive, administrative and professional employees to be paid on a salaried basis and continue to prohibit employers from making certain deductions from employees’ salaries, such as deductions because of variations in the quality or quantity of the work performed. The new rules do permit employers to suspend exempt employees one or more days without pay for violating workplace conduct rules. The suspension must be imposed pursuant to a written disciplinary policy applicable to all employees. The comments to the new regulations also note that this provision is limited to conduct, not performance or attendance issues. The comments also note that this provision is limited to serious workplace misconduct like sexual harassment, violence or drug or alcohol violations.

The new regulations contain a “safe harbor” provision for employers who make improper deductions from their employees’ salary. To qualify for the safe harbor provision, employers must: (1) have a clearly communicated policy that prohibits improper pay deductions and contains a complaint mechanism; (2) reimburse employees for improper deductions; and (3) make a good faith commitment to comply in the future. Employers who meet the requirements of the safe harbor provision do not lose the exemption for any employees, regardless of the reason for the improper deduction, unless they willfully violate their policy by continuing to make improper deductions after receiving employee complaints. Although not required, we strongly recommend that employers put this policy in writing and distribute it to all of their employees, such as in an employee handbook or an employer Intranet.

In the end, in the final regulations, the DOL dropped or changed the most controversial revisions

to the white collar exemptions. Even so, the final regulations represent a significant improvement over the existing regulations, which all employers should welcome. To view the time regulations, go to www.dol.gov and follow the link to fair pay overtime rules.

EEOC PROPOSES REGULATION TO ALLOW COORDINATION OF RETIREE HEALTH BENEFITS

During a public meeting on April 22, 2004, the Equal Employment Opportunity Commission approved a proposed regulation concerning the coordination of retiree health benefits with Medicare and similar health benefits. Coordination of health benefits for retirees had been common and longstanding until 2000 when a federal appellate court ruled that the Age Discrimination in Employment Act (ADEA) required eligible retirees to receive health benefits of equal type and value, both before and after they became eligible for Medicare.

According to the EEOC, the intention of this regulation is to ensure that employers are not discouraged from providing health benefits to retirees because of a fear of violating the ADEA. No law requires employers to provide health benefits to any workers or retirees. Employers can provide health benefits to incumbents and provide no health benefits to retirees.

The proposed regulation is being submitted to other federal agencies for final review and comment, with the final rule then to be issued.

PRESIDENT BUSH SIGNS PENSION FUNDING EQUITY ACT OF 2004

President Bush signed the Pension Funding Equity Act of 2004 on April 10. The Act is of high importance for employers who sponsor defined benefit pension plans because it substitutes weighted average corporate bond interest rates for the obsolete 30-year treasury rates used by defined benefit plans to determine the value of current plan liabilities. This change will lower the current funding requirements for many plans. The IRS has issued

guidance on calculating weighted average corporate bond interest rates in Notice 2004-34.

COURTS ENFORCING SHORTENED LIMITATIONS PERIODS

As discussed in our Winter 2001 issue, courts are beginning to enforce shortened limitations periods based on language set forth in an employment application if the time period is reasonable. A shortened limitations period is reasonable if: 1) The claimant has sufficient opportunity to investigate and file an action; 2) The time period is not so short as to work a practical abrogation of the right of action and; 3) The action is not barred before the loss or damage can be ascertained. *Timko Oakwood Custom Coating, Inc.*

In the three years since the issuance of the *Timko* opinion, the Court of Appeals has issued several unpublished opinions disposing of various arguments made by tardy claimants. These include arguments that:

- 1) Language in an application for employment should not be enforceable because it is not signed by the employer and/or because the agreement lacks consideration. The court ruled an employer's agreement to consider the individual's application was sufficient consideration. *Krusinski v. Daimler Chrysler*.
- 2) The language shortening the limitations period was not prominent enough or the claimant did not read or understand the language used. There is no requirement that the language be in bold or oversized printed or capital letters. *Wells v. ABC Warehouse*.
- 3) The claimant's and employer's bargaining positions were unequal and/or six months was too short a period so the agreement was inherently unreasonable. The *Timko* court rejected these arguments.
- 4) The application was signed before the *Timko* court ruled that shortened limitations periods were enforceable. The same was true of the claimant in *Timko*.
- 5) The language of a shortened limitations period conflicted with other language in the application that the employer complied with the law because the Civil Rights Act provides a

three year limitations period. The *Wells* court ruled the language was not inconsistent with the law.

- 6) Language in an employment application was superseded by an employee's collective bargaining agreement (which did not contain a shortened limitations period) after he became subject thereto or that the shorter period did not apply to federal law claims. The court in *Hofer v. DaimlerChrysler Corp.* noted that the plaintiff offered no factual or legal support for these arguments and summarily rejected them.

Because employers otherwise face limitation periods of three to six years for most claims, employers should give serious consideration to including a shortened limitations period in their employment applications.

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We are distributing RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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