

Local Experts Offer Advice on New Overtime Rules

New overtime regulations effective Aug. 23, 2004 should prompt employers to review their pay practices but are not a cause for alarm, according to local experts.

The most significant change in the new regulations, part of the Fair Labor Standards Act (FLSA), is the increase in minimum salary (to \$455 per week) for employees exempt from overtime pay. Other required exemption tests have changed as well.

For example, under the new regulations, exempt administrative employees must regularly exercise "discretion and independent judgment with respect to matters of significance," according to employer resources published by the Department of Labor. The new law also abolishes certain percentage-based duties tests formerly required for some exemptions.

Kelly Woodford, assistant professor at the University of South Alabama's Mitchell College of Business, said the new regulations reflect how federal courts had interpreted the old regulations.

"There were some issues that were being litigated a lot, and the courts were coming down essentially the same way in all of the cases," Woodford explained.

Employers hoping for clearer guidance from the new regulations may be a bit disappointed, however. According to Wade B. Perry, an attorney with the Mobile law firm Johnstone, Adams, Bailey, Gordon & Harris LLC, the new law "has not provided a redline litmus test" for determining overtime exemptions.

"It's still a case-by-case analysis and calls for the application of factors to particular job descriptions and duties," said Perry. "The only thing that has become

easier is that a salaried employee making less than \$455 a week will never be exempt."

Publicity surrounding the new regulations has also focused employer attention on pay practices, and that's a good thing, according to Perry.

"We're encouraging employers, even without the advent of the new regulations, to take a look at their determinations of exemption annually," said Perry. "Job descriptions tend to change over time, and the tendency is not to re-examine whether that employee is exempt."

Woodford, who is also special counsel to Mobile law firm Jackson Myrick LLP, agreed. "My advice has been for clients to go ahead and review their pay practices because it's not a bad idea to do it anyway," Woodford said.

Indeed, the new regulations are prov-

ing educational for some business owners.

"Many employers apparently believed that the only test for an overtime pay exemption was the 'salary test'; that is, as long as you paid an employee the minimum salary required for the exemption, the employee was exempt from overtime," said Paul Myrick, a partner with Jackson Myrick LLP. "That was never the law." Employees must meet both the "duties test" and the "salary test" to be exempt, Myrick explained.

Employers needing a quick primer on overtime exemption can click "FairPay Overtime Rules" on the Department of Labor's Web site, www.dol.gov. "FairPay" resources include a side-by-side analysis of the old and new exemption tests, a video training seminar and frequently asked questions on the new rules.

Overtime Security for the 21st Century Workforce

COMPARING THE TESTS FOR EXECUTIVE EMPLOYEES

Short Test Before 8/23/2004

Salary Level: \$250 per week

Primary Duties: Consist of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and includes the customary and regular direction of two or more other employees.

Standard Test Effective 8/23/2004

Salary Level: \$455 per week

Primary Duties: Consist of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; who customarily and regularly directs the work of two or more employees; and who has 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.

COMPARING THE TESTS FOR COMPUTER EMPLOYEES

Short Test Before 8/23/2004

Salary Level: \$250 per week or, if paid hourly, 6 x \$4.25 (i.e., \$27.63 an hour)

Primary Duties: Performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming and software engineering, and employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer software field, as provided in section 541.303, which includes work requiring the consistent exercise of discretion and judgment.

Section 541.303(b): Whose primary duty consists of one or more of the following:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

Standard Test Effective 8/23/2004

Salary Level: \$455 per week or \$27.63 an hour

Primary Duties: Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption, but only if the employee's primary duty consists of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

COMPARING THE TESTS FOR ADMINISTRATIVE EMPLOYEES

Short Test Before 8/23/2004

Salary Level: \$250 per week

Primary Duties: Consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and includes work requiring the exercise of discretion and independent judgment.

Standard Test Effective 8/23/2004

Salary Level: \$455 per week

Primary Duties: Consists of 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 includes the exercise of discretion and independent judgment with respect to matters of significance.

COMPARING THE TESTS FOR PROFESSIONAL EMPLOYEES

Short Test Before 8/23/2004

Salary Level: \$250 per week

Primary Duties: Consists of 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 and study; and includes work requiring the consistent exercise of discretion and judgment; or the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

Standard Test Effective 8/23/2004

Salary Level: \$455 per week

Primary Duties: Consists of the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

COMPARING THE TESTS FOR OUTSIDE SALES EMPLOYEES

Short Test Before 8/23/2004

Salary Level: No minimum salary required

Primary Duties: Who is employed for the purpose of and who is customarily and regularly engaged away from the employer's place or places of business in making sales; or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and who does not devote more than 20 percent of the hours worked in the workweek by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations.

Standard Test Effective 8/23/2004

Salary Level: No minimum salary required

Primary Duties: Making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.