

New FLSA Regulations for Corporations and Their Federal PACs

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The Federal Election Commission's (FEC) regulations permit corporations to use the Fair Labor Standards Act (FLSA) and associated Department of Labor (DOL) regulations as a "guideline" in determining which non-shareholder employees are in the corporation's "restricted class" and are thus solicitable for the company's federal PAC.

Although the FEC has warned in Advisory Opinion 1993-16 that the definitions under the FLSA are not determinative as a matter of campaign finance law, recent changes to the DOL's regulations merit investigations as to what employees are "exempt" and "non-exempt" for PAC purposes, as well as for overtime and other labor law reasons. The final regulations were issued on April 20, 2004 and become effective in late August unless Congress intervenes legislatively. See 69 Fed. Reg. 22,121 (April 23, 2004). A summary description of the changes affecting white-collar workers follows below.

Overview

In addition to raising the salary threshold (the salary level below which workers automatically qualify for overtime) for exempt employees from \$8,060 to \$23,660 annually, the "duties" tests for the white-collar exemptions have been significantly updated and simplified. While the new rules continue to apply a three-part analysis—a salary level, salary basis and duties test—these standards include some critical changes that every employer will need to know and understand.

Salary Level Test

In addition to raising the salary threshold to \$455 a week, the revised rules generally exempt from overtime requirements those white-collar employees who earn a "total compensation" of more than \$100,000 per year provided they perform "office or non-manual work" and "customarily and regularly perform" any one or more of the exempt duties of an executive, administrative or professional employee.

Duties Test

For white-collar employees who earn between \$23,660 and \$100,000 to be exempt under the FLSA from the overtime requirements, they will have to meet the duties tests of the executive, administrative, professional or outside sales exemption or some combination thereof. The "long test" and "short test" have been replaced by a single set of tests for each exemption. Obsolete references to "legmen" and "straw bosses" have been

replaced by detailed rules covering medical technologists, paralegals and other modern occupations. The new rules also clear up the question of "discretion and independent judgment," a hallmark of white-collar occupations and a source of considerable confusion and past litigation. In addition, the new rules provide explicit guidance on which occupations involve sufficient discretion to qualify as exempt.

Executive Exemption Duties

As before, an employee will meet the duties test for the executive exemption if his or her "primary duty" is management of the enterprise or of a customarily recognized department or subdivision, and if he or she "customarily and regularly" directs the work of two or more full-time employees. Under the new rules, the employee must also have the authority to hire or fire other employees or make recommendations that are given particular weight with respect to such personnel decisions. For "working supervisors," concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from exemption, but exempt executives generally decide when to perform nonexempt duties while nonexempt employees generally are directed by a supervisor to perform exempt work for defined time periods. Significantly for some retail employers, the new rules eliminate the "sole charge" exception, but include a concurrent duties exception aimed at store managers and assistant managers.

Administrative Exemption Duties

An employee will meet the duties test for the administrative exemption if the employee's 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 such duty includes the exercise of "discretion and independent judgment" with respect to matters of significance. The test is largely the same as the long-standing administrative exemption test, as the proposed language on "position of responsibility" and "high level skill or training" has been eliminated. The new rules provide extensive examples of the types of duties within each job that indicate that the job is related to management or general business operations.

Professional Exemption Duties

"Learned professionals" will continue to be exempt if their primary duty is the performance of work requiring "advanced knowledge" in a "field of science or learning" that is customarily acquired by a "prolonged course of specialized intellectual instruction." The regulations now make it clear that an employee need not necessarily obtain a degree in this field and that work experience can potentially substitute for some purely academic instruction. The new rules are again instrumental to employers and employees alike by providing extensive and updated examples of duties and definitions.

Outside Salesperson Exemption Duties

The outside salesperson rules have been revamped so that the percentage of time limitations on non-outside sales work no longer render an employee nonexempt so long as his or her primary duty remains making outside sales.

What This Means for Employers

While the rules are likely to face numerous legal challenges in the months ahead, the rules should go a long way in meeting the concerns of employers who argued that the half-century-old rules failed to address the

modern workplace. The new rules should also reduce the number of class-action lawsuits that have proliferated in the courts. According to DOL Secretary Elaine Chao, "there are more class action complaints against companies over overtime pay than there are about harassment." While the changes will require employers to understand and apply a number of significant changes to the regulations, the new rules go a long way in clarifying which employees are eligible for overtime. An employer can now readily perform an audit of job responsibilities to avoid litigation landmines that have become all too commonplace under the FLSA. Finally, in the realm of election law, corporate employers have a new guide to assist them in determining who is in the "restricted class" of a connected federal PAC.

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