

## Changes in Overtime Regulations - Serious Business

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Recent changes to the Fair Labor Standards Act (FLSA) are serious business and will go into effect August 23, 2004. This is the first major overhaul of the FLSA in more than 50 years. The changes are significant and of such magnitude that I cannot cover them all in this article. Here are some high points:

- Employees making less than \$455 per week (\$23,660/year) *cannot* qualify for overtime exemption regardless of job duties. The old salary threshold was \$8,000 annually.
- Employees making more than \$100,000 per year *cannot* qualify for overtime pay regardless of job duties.
- Exempt categories and tests have changed. For certain positions, the 20 percent of duties clause has been replaced by a “primary duties” clause. Considered a “relaxation” of standards by some, the meaning of “primary” will likely be defined in the courts on a case-by-case basis. Don’t be the test case!

Exempt category *changes*, in addition to the new minimum salary requirements, are:

- *Executive exemption*: Now, must “manage the enterprise,” direct the work of two or more employees and have the authority to hire/fire other employees or, at a minimum, make suggestions that carry particular weight with superiors. “Managing the enterprise” is new terminology and “carry particular weight” will take significant proof if a complaint is filed.
- *Administrative exemption*: This also included the exercise of “discretion and independent judgment.” Such judgment must now apply to “matters of significance.” This is another phrase yet to be defined. It probably doesn’t mean deciding when or where to buy office supplies.
- *Professional exemption*: There is no big change to the wording but it now appears that anyone in this category should have an appropriate advanced degree or the equivalent in work experience.
- *Computer Professional exemption*: This is a new and separate exempt category applicable to those who primarily perform computer systems analysis, programming, software engineering and other such computer-related tasks. The hourly wage requirement for this exemption is \$27.63 per hour – much, much higher than the \$455 a week requirement. This exemption won’t apply to that sharp person in the company who knows how to make your e-mail work unless they have substantially more responsibility for your computer applications and, most likely, some type of specialized training or degree.
- *Outside Sales exemption*: Previously, these employees could spend up to 20 percent of their time in non-sales related work. The new definition reads “primarily” makes sales or obtains orders/contracts for services. It remains to be seen how the word “primarily” will be defined.

I have written several articles about overtime and the FLSA. However, I still receive calls from employers who think that simply paying a straight salary is enough to disqualify an employee for overtime pay. A persistent belief remains that employers can dock a salaried person’s pay for absence or other trivial reasons. **That was not true before and it is certainly not true now!**

The FLSA is administered by the Department of Labor (DOL) and enforced by the Wage and Hour Division (WHD) of the DOL. Disgruntled employees often call the DOL first and, in pay issues of any sort, will be referred to the WHD. It only takes one call to get you on the WHD audit list and they are very proud of their record of “recovery” of wages. In fact, the industries listed as audit targets include restaurants, retail stores and AGRICULTURE. Many of you are on that list for two out of three! Do I have your attention?

What should you do next?

A salary review is obvious. Any salaried person making less than \$455 per week (\$11.38 per hour or \$23,660 per year) must be paid overtime for any hours they are “suffered or permitted” to work – including lunch hours if they eat at their desk. If they take work home, that counts – even if you don’t request it or condone it. Identify any such employees and consider if they meet the exemption test and whether or not a salary increase is warranted. Otherwise, put them on the clock.

Next, review the exemption tests as if you were an auditor from the WHD. Do your salaried employee’s duties fall under an exemption test? Be very critical of yourself. Don’t stretch the facts to make them work. If you cannot honestly place an employee’s job duties in an exempt category, rearrange the job or put the person on the clock.

If you have an employee handbook, review it for any section(s) dealing with pay, docking of pay and overtime provisions. Pay attention to anything related to pay for training or other outside work-related activities. The new regulations state that *if you have a handbook, this information is required*. If you haven’t dealt with it before, you must do so now.

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**NOTE: Overtime exemptions for salespeople, certain mechanics/technicians and parts personnel in agriculture and car dealerships have not changed. Visit the I-NEDA reference library at [www.ineda.com](http://www.ineda.com) for a good article on this subject.**

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For more information on the new overtime rules, go to [www.dol.gov](http://www.dol.gov). Click on “By Audience” on the homepage and you will find information for employers and employees.

I will be available to assist you with any specific situations/questions you may have. You may always **call me on the HR Help Line at 800-683-3440.**