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RE: New Fair Labor Standards Act Regulations

New regulations took effect August 23, 2004, that change who is entitled to overtime pay. As a service to our clients, this letter summarizes the major changes in the regulations.

In General.

The new regulations have three main components to determine whether someone is exempt from overtime: 1) The salary basis test; 2) The salary level test; and 3) The duties test. An employee must meet all three of these tests to be exempt from overtime.

Job titles do not determine whether an employee is exempt from overtime. Employees cannot waive their right to overtime, and generally cannot be paid "comp" time in lieu of pay. An employer's policy requiring advance approval of overtime, or prohibiting overtime, will not overcome an employee's right to overtime pay.

Highly compensated employees, those earning \$100,000 or more per year, are exempt from overtime if they perform at least one of the exempt duties below. "Blue collar" workers, who perform work involving repetitive operations with their hands, physical skill and energy, must receive overtime. The same is true for non-management employees such as plumbers, electricians, construction workers, and laborers.

The New Tests.

1. Salary Basis Test.

The employee's pay must be based on a salary. He or she must be entitled to a predetermined amount of weekly pay each pay period. The amount cannot be subject to fluctuation.

2. Salary Level Test.

The salary level test has undergone the biggest change. The current salary levels are as low as \$155 a week, and had not been adjusted since 1975, when the federal minimum wage was just \$2.10 an hour. In other words, until August 22, 2004, a person earning as little as \$8,060 can be exempt from overtime.

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Beginning August 23, 2004, the new salary level test is \$455 a week, or \$23,660 a year. An employee must make at least this much to be exempt. If the employee's annual salary is \$23,659.99 or less, he or she cannot be exempt, and must be paid overtime.

3. The Duties Tests.

The duties test requires that the employee's duties meet the standards of one of five revised duties-based exemptions, summarized below. These have changed somewhat from prior law. While one of the goals of the new regulations may have been reduction in litigation, I expect that these new regulations will spawn additional lawsuits as employers try to take advantage of the new rules to reduce their overtime pay obligations.

a. Executive Exemption.

The employee's duties must be managing the enterprise, or a customarily recognized department or subdivision of the enterprise. The employee also must regularly supervise two or more other full-time employees, or their equivalent. He or she must have the authority to hire, fire, and promote employees, or his or her recommendations must carry particular weight.

b. Administrative Exemption.

Primary duties must be office or non-manual work directly related to management or business operations, and must include discretion and independent judgment regarding matters of significance to the employer.

c. Professional Exemption.

There are two types of professionals under the new regulations: "learned professionals" and "creative professionals."

A learned professional's primary duties must be performing work which requires advanced knowledge, meaning it is primarily intellectual in character and which requires consistent exercise of discretion and judgment. The advanced knowledge must be in science or learning from a prolonged course of specialized intellectual instruction, or instruction plus work experience.

A creative professional must perform work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

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d. Computer Employee Exemption.

Computer employees must make a salary equivalent to at least \$455 per week, or be paid at least \$27.63 per hour, if paid on an hourly basis.

Only computer systems analysts, computer programmers, software engineers, and similar skilled computer workers are eligible for this exemption. These skills are defined in the regulations. Employers should take care to assure the employees fit the definitions before

e. Outside Sales Exemption.

The employee's primary duty must be making sales away from the employer's place of business. The salary requirements do not apply to this exemption.

Potential Problems.

The duties test has changed the focus of the law. Under current law, the focus is on how much time an employee spends on exempt versus non-exempt tasks. The new regulations look instead to the primary duties of the employee.

This will take some fleshing out by the courts. For example, under current law, an assistant store manager may be responsible for supervising employees, ordering merchandise, and managing the budget. But if he or she spends at least 50% of his or her time running the cash register, he or she would have to be paid overtime. Under the new law, because the assistant manager's primary duties are executive or administrative, he or she may be exempt from overtime. This will be a case-by-case decision, which I believe creates a new area for litigation.

Another problem area is executives who do not have any significant influence over hiring and firing. In many companies, this is taken care of by a personnel department, which may or may not heed the recommendations of an executive. Some employees who now are executives may not be exempt from overtime under the revised regulations.

One other problem area will be nonmanagement blue collar employees, such as carpenters who perform carpentry work and supervise other employees. The regulations say these workers must be paid overtime, but at what point does a carpenter become an administrative or executive employee? Apparently, the answer is when he stops working as a carpenter, but this too will have to be construed by the courts.

Specific Questions.

This is only a general discussion of the new overtime regulations. The penalties for violating the overtime laws can be severe. Employees can recover twice the back pay due plus attorney fees and costs; if the cases are brought as class actions, this can be tens or hundreds of thousands of dollars. Repeated violations also can result in civil penalties of \$1,000 per violation.

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If you need further information, or want to know if specific employees must be paid overtime, please call us at (325) 655-4889.

Very truly yours,

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