

NEW OVERTIME REGULATIONS CREATE OPPORTUNITIES AND RISKS FOR EMPLOYERS.

Significant changes to federal regulations governing overtime for “white-collar” employees raise risks, opportunities and human resources issues for employers. Sweeping changes to these regulations went into effect in August 2004, and to date, attempts in Congress to nullify those regulations by adopting new legislation have failed. Given the re-election of President Bush and control of both houses of Congress by the Republican Party, any change to the new regulations is unlikely. Therefore, managers must become conversant in these changes in order to ensure that their organizations comply with law.

Failure to fully comply with the new requirements exposes employers to unwanted litigation. A court may order an employer to pay back pay and liquidated damages to an employee who was improperly denied overtime. It may also assess to employers the fees of attorneys who successfully represent employees or former employees in overtime lawsuits. Further, the new changes represent an opportunity for employers to control personnel costs by not paying overtime to employees who may be legally exempt from overtime.

What Hasn't Changed

Understanding the changes and their impact may be easier by starting with a quick review of what has not changed. The new regulations have no effect on “blue collar” or “pink collar” employees. These employees – such as tellers, clerks, maintenance personnel and entry-level customer service representatives – remain eligible for overtime, or in the jargon of the federal law, “non-exempt” from legal overtime requirements. Non-exempt employees, with the exception of very rare circumstances, must be paid overtime based upon 1½ times their regular hourly rate of pay, for all time worked over forty hours in a workweek. However, the requirement to pay overtime may be calculated only on actual hours worked. For instance, an

employer need not include paid time off for vacation or a holiday, if the employee does not actually work on that day. Additionally, there is no legal requirement that time worked beyond eight hours per day or on weekends must be paid at an overtime rate.

What Has Changed – The Key Exemptions

Federal law recognizes a number of categories of employees that may be “exempt” from the requirement to pay overtime. If an employer meets the requirements described in this section, it has no obligation to pay overtime to “exempt” employees, despite the number of extra hours an employee actually works. Four categories are most likely to apply to most employers: “executive”, “administrative”, “professional” employees and computer systems analysts.

Under the new regulations, the “executive”, “administrative” and “professional” classifications all require that the employee be paid a minimum salary of \$455.00 per week, regardless of the number of hours the employee actually works. If, however, the employee performs no work at all in a workweek, then he or she need not be paid for that week. As described later in this article, an employer may lose the right to claim an exemption if it improperly docks an employee’s pay for certain types of absences.

If an employee makes less than \$23,660.00 per year (\$455.00 per week), then that employee is automatically considered “non-exempt” and is eligible for overtime. In that instance, whether an employee meets the other standards for the “executive”, “administrative” or “professional” exemption is irrelevant.

“Executive” employees are likely to be limited to the Chief Executive Officer of the employer. Under the new regulations, an “executive” must meet the following standards to be exempt from overtime:

- 1) Be paid a salary of \$455.00 per week or more;

- 2) Be primarily responsible for managing the entire organization or a department;
- 3) Regularly direct at least two other full-time employees or their equivalent; and
- 4) Have the authority to hire and fire other employees, or effectively recommend the hiring, firing or promotion of other employees.

The most common exemption is usually for “administrative” employees. This category frequently overlaps with the “professional” employee classification. Employees who meet the standards for both may be exempted under either classification. Because the new regulations have relaxed the standards for the “administrative” classification, employees who were eligible for overtime under the old regulations may now be lawfully exempted from overtime. Therefore, managers should carefully review the job descriptions and actual job duties of “middle managers” to see if they qualify for exemption from overtime. Significantly, “administrative assistants” who previously were eligible for overtime may now be exempt. A case-by-case analysis must be made for the actual job duties for each position. Job titles alone do not suffice.

An “administrative” employee is exempt from overtime if he or she meets all of the following standards:

- 1) Is paid a salary of \$455.00 per week or more;
- 2) The primary duty is to perform office or non-manual work;
- 3) That work is directly related to management or general business operations; and
- 4) The employee must exercise discretion and independent judgment regarding significant matters.

“Professional” employees are exempt if they use a four-year college degree in performing their job. For example, a Controller would be exempt if he or she regularly applied a bachelor’s degree in accounting. However, a loan officer would not be exempt as a “professional” if he or

she had a bachelor's degree in geology since those skills are not applicable to the job. (The loan officer may be exempt as an "administrative" employee). Further, an employee who uses skills learned through on the job training that is the equivalent to a four-year degree may be exempt as a "professional" employee.

Employees who apply skills obtained while earning an associates' degree or less than four years of college do not qualify as a "professional" employee. Again, depending on the nature of their duties, they may be exempt as an "administrative" employee.

In addition to having a job-related four-year degree or the functional equivalent of on the job training, "professional" employees must meet the following standards:

- 1) Be paid a salary of \$455.00 per week or more;
- 2) The primary duty is to perform work requiring advanced knowledge;
- 3) The "advanced knowledge" must be in a field of science or learning; and
- 4) The "advanced knowledge" must be normally acquired in a prolonged course of specialized instruction.

Computer systems analysts may be exempt under either the "administrative" or "professional" exemption. Additionally, they may be also exempt if they are paid \$27.63 per hour, or at least \$455.00 per week. To meet this exemption, computer employees must have as their primary duty:

- 1) Analysis of computer systems procedures and techniques;
 - 2) Design, development, analysis or testing of computer systems;
 - 3) Design, testing or modification of computer programs for machine operating systems,
- or
- 4) A combination of any of these duties.

Improper Docking – A Trap for Employers

Employers may inadvertently lose the right to claim that an employee is exempt from overtime if they improperly "dock" an employee's pay. In that instance, the employee is no longer treated as a salaried employee because they are docked for absences.

A major change to the docking rules is that credit unions may now dock a salaried employee and issue an unpaid suspension for serious misconduct, such as sexual harassment or substance abuse. However, docking may only occur (without losing the overtime exemption) if the employer has a written policy advising salaried employees that they may be docked for serious misconduct. It is unclear how broadly "serious misconduct" will be defined by the courts.

The other significant change is to allow employers to limit potential exposure for overtime liability if they make improper deductions. In the past, improper deductions exposed employers to potential overtime liability for all employees in the job classification, not just the employee who was docked.

Credit unions should evaluate their payroll practices to determine if they dock salaried employees and, if so, if that docking procedure complies with law.

Conclusion

Prudent managers will review the changes in the overtime regulations and evaluate whether their organizations are in full compliance. Payroll practices, employee handbooks and categorization of employees as "exempt" or "non-exempt" should also be reviewed. Failure to do so may result in overtime liability; taking the time to conduct a self-audit may result in significant cost savings.