

LABOR & EMPLOYMENT REPORT

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New, Watered-Down Overtime Regulations are Finally Ready

INTRODUCTION

On April 20, 2004, the United States Department of Labor (“DOL”) issued their long-awaited new regulations governing overtime exemption status for white collar employees under the Fair Labor Standards Act. The revisions, essentially the first since 1954, have been in the works for over a year and have been subject to intense public scrutiny and debate.

The new regulations are very different, both from the current regulations and those proposed in March of 2003. The DOL received 75,280 comments during the 90-day comment period from representatives of both employers and employees. One particular “hot button” issue was the threshold earnings ceiling, above which employees would lose the right to overtime if they performed any exempt duties. This issue was so hotly contested that Senator Tom Harkin, an Iowa Democrat, proposed an amendment blocking the entire set of regulations pending a change in the threshold amount.

The following is a list of the major aspects of the regulations that were changed between the first proposed revisions in March, 2003, and those that are finally proposed:

- Employee guaranteed overtime rate changed from \$22,100 to \$23,660.
- Ceiling over which employees lose significant overtime protection raised from \$65,000 to \$100,000.
- The number of employees that could lose overtime protection due to changes from the proposed regulations decreased from 644,000 employees to 107,000 employees under the final revised rules.
- Workers in the blue-collar trades, police, firefighters, public safety, licensed practical nurses, and veterans will not lose overtime protection under the final revised rules.

On the next page is a chart comparing the current regulations, the first proposed revisions from March, 2003, and the newly proposed regulations, awaiting implementation in 120 days:

Continued on page 2

PLEASE JOIN US!!

Labor & Employment Law Seminar

Tuesday, May 18, 2004

DoubleTree Hotel

St. Louis Park, Minnesota

8:00 A.M.-11:45 A.M.

Complimentary Breakfast Served.

Join us for an informative seminar on how to make the new **Wage & Hour Regulations** work for you—A Step By Step Guide. Don't miss out on this timely seminar.

MAY 18 AGENDA HIGHLIGHTS:

- An Overview of the New Wage & Hour Regulations
- The Administrative Exemption—How to Make the Most of the Changes
- A Review of other changes to White Collar Exemptions, and 'Salary' Text Modifications
- Practical Advice in Implementing the New Regulations—Job Descriptions, Handbooks, Timesheets, & Other 'Real Life' Issues
- Open Forum—Come prepared to discuss your workplace issues with Felhaber Attorneys

Log on to www.felhaber.com for more information and to register. Thank you for registering by Tuesday, May 11, 2004. Please note: This seminar was originally scheduled for April 21; it was postponed because the new regulations were not released.

REGISTER EARLY-SPACE IS LIMITED

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A Comparison Of The Current & Proposed Regulations

Executive Exemption

	Current Short Test	2003 Proposed Standard Test	Final Standard Test
Salary	\$250 per week	\$425 per week	\$455 per week
Duties	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p>	<p>Primary duty of the management of the enterprise or of a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p>	<p>Primary duty of the management of the enterprise or of a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p>

Administrative Exemption

	Current Short Test	2003 Proposed Standard Test	Final Standard Test
Salary	\$250 per week	\$425 per week	\$455 per week
Duties	<p>Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p>	<p>Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.</p> <p>Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.</p>	<p>Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.</p> <p>Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</p>

Note: The newly proposed regulations back away from the controversial element of defining an administrative position as "a position of responsibility" as had been proposed in the first set of proposed revisions in March.

Learned Professional Exemption

	Current Short Test	2003 Proposed Standard Test	Final Standard Test
Salary	\$250 per week	\$425 per week	\$455 per week
Duties	<p>Primary duty of performing 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.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.</p>	<p>Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.</p>

The major change, present in both the proposed and final version regulations, is that an employee may substitute some of the intellectual instruction for experience received on the job. Discretion and independent judgment remains in the professional landscape as well and as administrative exemption.

Computer Professional Exemption

	Current Short Test	Section 13(a) (17) Test and Proposed Standard Test	Final Standard Test
Salary	\$250 per week	\$27.63 an hour or \$425 per week	\$27.63 an hour or \$455 per week
Duties	<p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) 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; or (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skill.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) 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; or (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skill.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>

This section mirrors the statutory language from the FLSA, thus was not substantively changed. The proposed regulations included a requirement that the employee consistently exercise discretion and independent judgment, but this requirement was deleted from the final version. Both the proposed regulations and the final version explain that specific job titles of exempt computer employees would not be supplied, due to the tremendously rapid pace of significant changes occurring in the information technology industry. The final version, and to some extent the proposed regulations, allow for a blended computer professional exemption for those computer employees that also perform executive or administrative functions.

Salary Test

As indicated in the charts above, the new weekly minimum salary requirement for an employee to qualify as exempt is now \$455.00. The DOL considered the lowest 20% of wages to determine this figure. Any employee earning less than \$455.00 per week, with some limited exceptions for outside sales and part-owner employees, must be paid overtime for hours worked over 40 in any week.

Highly Compensated Employees

Both the proposed regulations and the final version include an additional exemption for highly compensated employees. The proposed regulations required the employee earn at least \$65,000 per year to qualify for the exemption, while the final version applies only to those employees earning over \$100,000 per year. There was much heated debate regarding this requirement, particularly by organized labor. Some particulars of the pay requirement are as follows:

- Employees must earn at least \$455.00 per week, paid on salary or fee basis;
- Compensation may include non-discretionary bonuses and commissions;
- The employer may make up short-falls in employee earnings by making a final payment within one month after the end of the year;
- The amount can be prorated for employees who do not work a full year; and
- The amount does not include credits for board, insurance and retirement contributions, and fringe benefits.

The highly compensated employee must customarily and regularly perform office or non-manual work. The exemption expressly excludes non-management production-line workers and non-management employees in maintenance, construction, carpenters, electricians, mechanics, plumbers,

iron workers, craftsmen, operating engineers, longshoremen, laborers and other employees engaged in work involving repetitive operations with their hands, no matter how highly paid they might be.

Definitions

Both the proposed and final versions include definitions to commonly used terms, such as "primary duty," "directly and closely related," and "customarily and regularly." These definitions are conveniently located at the end of the section, instead of interspersed throughout the regulations, as is the case with the current version.

CONCLUSION

There is clearly more to the final version regulations than can be discussed in this article. There will also likely be litigation, requiring the courts to more clearly define the contours of the final version. At least one state, Illinois, has already outright rejected the new regulations and has amended their statutes to require adherence to the current version.

Obviously, some employers will rejoice over these revisions, and some employees will too. Others, both employers and employees, will cry foul. There is also the strong possibility that these regulations will undergo substantial revision again if Democratic nominee John Kerry wins the race for the White House, or if the Democrats gain greater footing in Congress.

In any event, these regulations will go into effect 120 days after they have been published in the Federal Register. This publication was slated to occur this Friday, April 23, 2004, giving us an enactment date of August 21, 2004, for the final version regulations.



Dennis J. Merley
612.373.8434
dmerley@felhaber.com



Janet C. Ampe
612.373.8431
jampe@felhaber.com

Join Us For A Complimentary Client Seminar

Join us for one of our upcoming seminars, with timely discussions on a variety of legal topics. The seminar presenters include our firm attorneys who have expertise in the seminar subject matter. Most seminars include a complimentary continental breakfast or lunch.

Felhaber was recently named an HRCI (Human Resource Certification Institute) Approved Provider for a three year period.

HRCI is an affiliate of the **Society for Human Resource Management**. What does this mean

to Felhaber and its clients? For upcoming seminars with presentations that "add to a certified professional's knowledge of the HR field" the firm is eligible to determine PHR and SPHR recertification hours to its seminar attendees. We will post on www.felhaber.com our firm seminars and note those that will offer HRCI accreditation hours.



Here is a listing of some of our upcoming seminars. Let us know if you are interested in receiving a seminar invitation by emailing Karen Dyck, Marketing Director, at kdyck@felhaber.com. State your name and address with the name of the seminar you wish to attend. Log on to www.felhaber.com for on-line registration. available approximately three weeks ahead of the seminar date.

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A Professional Association – Attorneys at Law

2004 SEMINAR DATES:

Association Management

Thursday, May 6, 2004

Labor & Employment Seminar

Tuesday, May 18, 2004

Multiemployer Benefits

Tuesday, May 25, 2004

Health Law Seminar

Thursday, September 24, 2004

Builder/Developer Seminar

Wednesday, October 6, 2004

Labor & Employment Seminar

Friday, October 29, 2004

LABOR & EMPLOYMENT SECTION

Janet C. Ampe
jampe@felhaber.com
612.373.8431

Robert L. Bach
rbach@felhaber.com
612.373.8408

Richard A. Beens
rbeens@felhaber.com
612.373.8419

Brian T. Benkstein
bbenkstein@felhaber.com
612.373.8538

Edward J. Bohrer
612.373.8430
ebohrer@felhaber.com

Stephen J. Burton
sburton@felhaber.com
612.373.8423

James J. Cronin
jcronin@felhaber.com
612.339.6321

James M. Dawson
jdawson@felhaber.com
612.373.8422

Jan D. Halverson
jhalverson@felhaber.com
612.373.8424

Donald G. Heeman
dheeman@felhaber.com
612.373.8524

Daniel R. Kelly
dkelly@felhaber.com
612.373.8512

Lee A. Lastovich
llastovich@felhaber.com
612.373.8433

Harold P. LeVander, Jr.
hlevander@felhaber.com
651.312.6005

Sara Gullickson McGrane
smcgrane@felhaber.com
612.373.8511

Dennis J. Merley
dmerley@felhaber.com
612.373.8434

H. Le Phan
hphan@felhaber.com
612.373.8407

Penelope J. Phillips
pjphillips@felhaber.com
612.373.8428

Marnie E. Polhamus
mpolhamus@felhaber.com
612.373.8405

Eric Riensche
eriansche@felhaber.com
612.373.8539

Karen G. Schanfield
kschanfield@felhaber.com
612.373.8417

Thomas R. Trachsel
ttrachsel@felhaber.com
612.373.8432

Paul J. Zech
pzech@felhaber.com
612.373.8436

We Want to Hear From You

Let us know what would serve you best

The *Labor & Employment Report* is a service to Felhaber's clients and friends. Our goal is to write articles you will read, learn from, and enjoy. Let us know what would serve you best: Practice tips? Answers to questions submitted by readers? A funny case or strange ruling from time to time (like the North Dakota judge who recently ruled that fear of snakes is not a disability under the ADA)?

Please contact editor Dennis Merley with your suggestions.



Dennis Merley
612.373.8434
dmerley@felhaber.com

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Dennis Merley ■ Editor
612.373.8434
dmerley@felhaber.com

The *Labor & Employment Report* is an update on legal developments. It is not intended to be legal advice and should not be relied on without consulting counsel.

Felhaber Larson Fenlon & Vogt

OUR NEW OFFICE LOCATIONS Effective December 2003

MINNEAPOLIS
220 South Sixth Street | Suite 2200
Minneapolis, MN 55402-4504
612 339 6321 | Fax 612 338 0535
1 800 989 6321

ST. PAUL
444 Cedar Street | Suite 2100
St. Paul, MN 55101-2136
651 222 6321 | Fax 651 222 8905
1 800 229 6321

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Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

220 South Sixth Street | Suite 2200
Minneapolis, MN 55402-4504