

# CLIENT ALERT

## DOL Issues Final Regulations on FLSA Exemptions

Aug.23.2004

The Wage and Hour Division of the Department of Labor has published its final regulations amending the “white collar” exemptions to the Fair Labor Standards Act. The regulations implement major changes to these exemptions, in the first comprehensive overhaul of these rules in nearly 50 years. They also include several revisions from the original proposal to revise the Part 541 regulations, in response to the flood of comments received during the rulemaking proceedings.

### Highlights of the Final Regulations

#### Salary Requirements

The regulations increase the minimum salary level for the FLSA’s executive, administrative and professional exemptions to \$455 per week. This is a \$30 per week increase over the proposed regulations and a \$300 increase over the existing regulations.

The regulations provide a new exemption for “highly compensated” employees, who earn at least \$100,000 per year, provided they “customarily and regularly” perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. The proposed regulations had defined a highly compensated employee as someone making \$65,000 per year. DOL acknowledges in the preamble that it will be relatively easy for employees who satisfy this salary test to meet the “duties test” requirement of the new exemption.

#### Scope of the Exemptions

In response to comments from critics of the proposed regulations, the final regulations specify that the exemptions do not apply to individuals engaged in manual labor or other ‘blue collar’ occupations. Section 541.3(a) explicitly excludes from exempt status non-management production-line employees and non-management employees in maintenance, construction and similar occupations. The exemptions likewise do not apply to police officers, fire fighters, correctional officers, park rangers, paramedics, ambulance personnel, rescue workers, and similar public safety employees. Section 541.3(b) specifies that, irrespective of rank or pay level, public safety workers do not satisfy any of the three principal white collar exemptions. These clarifications are intended, in part, to address critics’ claims that DOL is intending to deny the protections of the FLSA to such employees by expanding the definitions of the white collar exemptions.

#### The Duties Tests

The regulations impose major changes in the “duties tests” under the principal white collar exemptions.

**Executive Exemption** - The employee’s primary duty must be “the management of the enterprise or a recognized department or subdivision thereof.” The employee must “customarily and regularly” direct the work of two or more other employees. The employee must also have the “authority to hire or fire other employees, or whose suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.” The

regulations include a lengthy, but not exhaustive list of illustrative “management” responsibilities. The preamble notes that, as with current law, these determinations will be made on a case-by-case basis.

**Administrative Exemption** - The regulations define the administrative exemption to cover employees whose primary duty is “office or non-manual work directly related to the management or general business operations of the employer or its customers,” and whose primary duty includes the exercise of “discretion and independent judgment with respect to matters of significance.” In an evident compromise, DOL retreated from the definition contained in the proposed regulations, which would have established a new job content test for administrative employees of whether the employee holds a “position of responsibility,” either by performing work of substantial importance, or by performing work requiring a high level of skill or training. The regulations continue the dichotomy under current law between production and staff functions. Section 541.201 defines “directly related to management or general business operations” with an illustrative, non-exhaustive list of functional areas that may qualify for the exemption. Section 541.203 provides a list of examples of jobs that are likely to satisfy the exemption.

**Learned Profession Exemption** - The regulations require a showing that the employee’s primary duty consist of office/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.” DOL abandoned a controversial provision in the proposed regulations that would have permitted certain employees be exempt professionals by virtue of an “equivalent combination of intellectual instruction and work experience.” The preamble states that DOL has no intent to delete the “discretion and judgment” aspect of the duties test for learned professionals, and that DOL has no intention to expand the definition of this exemption. The regulations discuss the treatment of a number of problematic occupations under the new standard.

**Other Exemptions.** The regulations set forth new definitions for creative professionals, computer employees and outside sales employees.

### **Other Issues**

The regulations address a variety of salary issues. In addition to increasing the minimum salary requirements, the regulations address various aspects of permissible salary deductions. To replace the current “window of correction” regulations, the regulations provide a new “safe harbor” provision for employers who improperly make deductions from the pay from otherwise-exempt employees. Under the regulations, employees only lose an exemption status if the employer has an actual practice of improper deductions for employees in the same job classification who are working for the same manager responsible for the impermissible deduction. The regulations also provide guidance for the payment of a minimum guarantee plus extra compensation

Absent a legal challenge or Congressional action, the regulations will take effect 120 days from the date of publication in the Federal Register.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

#### **Thomas P. Gies**

Partner – Washington, D.C.

Phone: +1 202.624.2690

Email: [tgies@crowell.com](mailto:tgies@crowell.com)

**Glenn D. Grant**

Senior Counsel – Washington, D.C.

Phone: +1 202.624.2852

Email: [ggrant@crowell.com](mailto:ggrant@crowell.com)

**Andrew W. Bagley**

Senior Counsel – Washington, D.C.

Phone: +1 202.624.2672

Email: [abagley@crowell.com](mailto:abagley@crowell.com)