



White-Collar Exemption Revisions

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Special Report

HIGHLIGHTS

- ◆ \$23,660 Salary Minimum
- ◆ Highly Compensated Professionals
- ◆ “Discretion, Independent Judgment” Remains
- ◆ “Retail Supervisor” vs. “Working Supervisor”
- ◆ Pay Deductions for Disciplinary Reasons
- ◆ Contemporary Workplace Examples
- ◆ August 20, 2004 Effective Date

Department of Labor revises white-collar exemption rules

THE U.S. DEPARTMENT of Labor (DOL) has revised the “white-collar” exemptions to the Fair Labor Standards Act (FLSA) with the unofficial publication on April 20, 2004 of new regulations defining the executive, administrative, and professional exemptions under the federal wage-hour law. The revisions address the criteria for determining which employees are exempt from the law’s minimum wage and overtime pay provisions. The revised rules most likely will be published in the *Federal Register* on Friday, April 23, 2004. They will take effect 120 days following publication, around August 20, 2004.

The DOL issued its proposed revisions in March 2003; a 90-day comment period followed. The final rules unofficially released yesterday differ substantially from those originally proposed, reflecting input received from public comments. The DOL had received more than 75,000 comments in response to the proposed rules. The final rules are scaled back considerably from those initially proposed.

The rulemaking is the most ambitious DOL regulatory initiative on the issue since 1940. The revisions clarify the definitions for professional exemptions, providing examples of jobs and job duties that better reflect the contemporary workplace. They also “codify” to some extent the caselaw that has developed over past decades.

While the rules proposed in March 2003 had looked to be a comprehensive

overhaul of the white-collar definitions, in particular the “duties tests” for exemption status, the rules as unofficially released look more like the prior rules than like the revisions as first proposed. Despite this partial retreat, opponents of the rule revisions (including organized labor and congressional Democrats) remain skeptical. They intend to continue their efforts to prevent the revisions from taking effect.

OVERVIEW

The FLSA requires covered employers to pay their employees at least the federal minimum wage and overtime pay of time-and-one-half the regular rate of pay for all hours worked over 40 in a workweek. There are a number of exemptions from the minimum wage and overtime requirements. Section 13(a)(1) of the Act exempts from both minimum wage and overtime pay provisions “any employee employed in a bona fide executive, administrative, or professional capacity or in a capacity of outside salesman.”

The statute does not define the terms “executive,” “administrative,” or “professional.” Instead, the DOL has developed several tests to define these exemptions. The new white-collar regulations modify these tests, and they triple the minimum salary floor under which employees cannot be defined as exempt. They also alter slightly the “duties tests” that must be satisfied to classify an employee as exempt.

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Comment: *Exempting certain white-collar employees from the FLSA's protections was premised on the theory that the type of work they performed was difficult to standardize to any timeframe and could not easily be divided among several workers if it took more than 40 hours to complete within a week. It was also presumed that exempt workers earn salaries well above the minimum wage, and that they enjoy other benefits, such as above-average fringe benefits, greater job security, and better opportunities for advancement, that set them apart from workers entitled to overtime pay. Over the years, however, the number of employees falling within the white-collar exemptions has risen, to the extent that reality often belies these presumptions. The ongoing dispute over the rule changes comes down to a central disagreement over whether the revisions are likely to increase or reduce the number of U.S. workers who are protected by the Act.*

Why change the rules?

Making changes to the FLSA or the regulations enforcing the statute has always been a controversial, partisan affair. This partisanship has led to virtual paralysis with respect to updating the Act to reflect the modern workplace. The basic "duties" tests were originally established in 1938 and revised in 1940. They were last modified in 1949 and have remained essentially unchanged since that time. The "salary basis" test has not changed since 1954. Salary levels required for exemption were most recently updated in 1975, and the amounts adopted at that time were intended as an interim adjustment.

As a result, definitions and examples contained in the old regulations did not

adequately address issues that many employers currently face. As the U.S. economy has moved away from manufacturing to a service economy, many of today's jobs did not exist when the regulations were last changed, and jobs highlighted in the old regulations no longer exist.

Moreover, the white-collar exemptions have caused a great deal of con-

The DOL estimates that 6.7 million additional U.S. workers will enjoy overtime protections based on the revised salary minimum.

fusion over the years regarding who is, and who is not, exempt. A sharp increase in FLSA "collective" or class actions has made employers particularly vulnerable to this confusion. On the whole, the most striking feature of the new white-collar rules is their attempt to clarify the previous tests and expand their explanations, which the DOL believes will lead to improved compliance—and reduced litigation.

Comment: *The final rules clearly differ from the proposed rules in several significant ways, but employer and employee groups will most certainly fail to agree on the likely consequences of the changes. The business community generally was pleased with the revisions as originally proposed. In contrast, organized labor had been strongly opposed. Both sides will need to review the final rules in greater depth before registering truly informed opinions either way.*

Organizational changes

The text of the new rules is consolidated and streamlined; the number of words is sharply reduced. The DOL

minimized redundancies and made the rules more understandable and easier to decipher when applying them to particular factual situations.

In addition, the prior rules made a distinction between "regulations" and "interpretations." The new regulations eliminate the distinction, thereby increasing the level of deference to be accorded the interpretations.

REVISED SALARY MINIMUM

The new rule raises the "salary level test," the threshold under which white-collar workers automatically qualify for overtime pay. The minimum salary level to qualify for exemption from the FLSA minimum wage and overtime requirements as an executive, administrative, or professional employee has been increased to \$455 per week (from \$155 per week), or \$23,660 annually (previously \$8,060 annually). The wage levels were last raised in 1975, and the previous minimum salary had amounted to \$3.88 per hour—sharply lower than the current minimum wage rate.

The salary level test has been part of the exemption criteria since the original regulations of 1938. Employees paid below a minimum salary level defined by the rules are not exempt from the FLSA, irrespective of their job duties and responsibilities. Salary levels were once viewed as being the best indicator of exempt status. Today, however, salary level tests are of little help in distinguishing exempt employees from nonexempt workers, even with the increased salary floor.

IMPACT: *The DOL estimates that 6.7 million additional U.S. workers will enjoy overtime protections based on the revised salary minimum. This figure includes 5.4 million workers who, according to the DOL, are already nonexempt, but whose overtime rights would now be guaranteed and unambiguous under the new rules. The rules*

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as initially proposed had set a \$22,100 salary floor, which would have given 1.3 additional workers overtime protection, by the DOL's projection. (Opponents had estimated the number of newly protected employees to be closer to 700,000 under the salary floor first proposed.)

The new, higher salary floor no doubt reflects at least to some degree the pressure put on the Bush Administration by opponents of the rule. Since the proposed rules were first released, the White House received more than 1.5 million letters, emails or faxes urging withdrawal of the revised rules, resulting in part from a highly orchestrated initiative by organized labor.

No more “short” and “long” tests

The previous rules included a “short test” and a “long test” for determining exempt status. To qualify for exemption under the old regulations, an employee must have earned a minimum salary of \$155 per week for the executive and administrative exemptions, and \$170 per week for the professional exemption. Employees paid above these minimum salary levels would also have to meet a “long” duties test to qualify for the exemption. Those paid above a higher salary rate of \$250 per week were exempt if they met only a “short” duties test. The short test contained fewer requirements and was less burdensome to meet.

The new regulations do away with the “short” and “long” tests. The minimum salary level is referred to as the “standard test,” and the “short test” and “long test” terminology has been eliminated. (The higher salary-level test for professional employees also has been removed.)

Comment: *Because of its outdated salary level, the long test has, as a practical matter, been inoperative for many years. Here, the agency is conforming its regulations to economic*

Implementing the rules: The employer “to do” list

The rule changes will have an impact on virtually all employers. Here's what employers will need to do to get up to speed:

- ✓ **Identify employees who earn less than \$23,660.** Evaluate whether payroll costs will be best controlled by raising their salaries to retain their exempt status (provided they still meet the duties test), or budgeting your organization's overtime needs.
- ✓ **Identify employees who earn \$100,000 or more.** Chances are, these employees will already be classified as exempt. But previously nonexempt high earners may likely be exempt now.
- ✓ **Conduct job analyses.** Conduct comprehensive job analyses to determine which employees perform administrative, professional, and executive duties as defined by the new white-collar rules.
- ✓ **Revise job descriptions.** Following comprehensive job analyses, revise position descriptions accordingly. Make sure the descriptions truly reflect the work performed and skills required.
- ✓ **Work closely with payroll.** Make sure the payroll system is updated to accurately reflect exempt/nonexempt classifications, and that overtime is paid accordingly.
- ✓ **Revise your discipline policy.** Ensure your disciplinary policies reflect the changes to the no-docking rule, if you elect to take advantage of this new option.
- ✓ **Develop a communications strategy.** You have some fairly sensitive news to convey to employees. Collaborate with your corporate communications team; how well you craft the message will be critical.
- ✓ **Honor union contracts.** Although some employees will be newly exempt from overtime, your organization still must comply with the terms of any bargaining agreement in effect, including overtime clauses.
- ✓ **Avoid overtime overkill.** Employers may now be able to require overtime from certain employees without having to compensate the extra hours. But they should keep in mind the strong business reasons not to impose excessive overtime demands upon their workforce.
- ✓ **Don't forget the status issue.** Some workers will shift from exempt to nonexempt under the new rules. On paper, they should be delighted by the prospect of overtime eligibility; instead they may simply feel demoted. Be sure to convey how valuable and integral these employees remain to your organization.
- ✓ **Don't drop your guard.** Employers surely want to believe the rule revisions will ring in a new era of reduced wage-hour litigation. That's unlikely to be the case. It's safe to assume that FLSA litigation will be a key weapon in the plaintiff lawyer's arsenal for at least the near future.

reality, while simplifying unduly complex dual exemption tests.

“Highly compensated” professionals

The revised regulations introduce a new provision under which a “highly compensated employee” may more readily be classified as exempt. If the employee earns at least \$100,000 per year (under the proposed rules, this figure was \$65,000) and performs office or non-manual work, the employee will be considered exempt if he or she “customarily and regularly” performs exempt duties. The DOL esti-

mates that 107,000 currently nonexempt workers will lose their overtime protections under this new provision.

“SALARY BASIS” REMAINS

To be classified as exempt, an employee must be paid on a salary basis, that is, at a fixed, predetermined salary “without regard to the quality or quantity of work performed.” This definition distinguishes salaried employees from hourly workers. The salary basis principle reflects the notion that those employees have discretion to manage their time and are not answerable for

OLD vs. NEW: A comparison of key provisions

(The chart below reflects the white-collar categories with the most significant changes.)

EXECUTIVE EMPLOYEES

	Current Short Test	Proposed Test
Salary Test	At least \$250 per week	At least \$455 per week
Duties Test	The employee's primary duty must be management-related. AND The employee must "customarily and regularly" direct "the work of two or more employees."	The employee's primary duty must be management-related. AND The employee must customarily and regularly direct the work of two or more employees, including the "authority to hire or fire" other employees, or the employee must be in a position to make "suggestions and recommendations as to the hiring, firing, advancement, promotion or another change of status of other employees" that will be given particular weight. (Employees earning at least \$100,000 must satisfy only one of the requirements.)
Salary Basis Test	Must be paid on a salary basis	Must be paid on a salary basis

ADMINISTRATIVE EMPLOYEES

Salary Test	At least \$250 per week	At least \$455 per week
Duties Test	The employee's primary duty must be "directly related to management policies or general business operations." AND The employee's work must require "the exercise of discretion and independent judgment."	The employee's primary duty must consist of "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." AND The employee's primary duty includes "the exercise of discretion and independent judgment with respect to matters of significance." (Employees earning at least \$100,000 must satisfy only one of the requirements.)
Salary Basis Test	Must be paid on a salary basis	Must be paid on a salary basis

PROFESSIONAL EMPLOYEES

Salary Test	At least \$250 per week	At least \$455 per week
Duties Test	The employee's primary duty must involve "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, as distinguished from a general academic education or apprenticeship, and from training in the performance of routine mental, manual or physical processes." AND The employee's work must "require the consistent exercise of discretion and judgment."	The employee's primary duty must require "knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." OR The employee's primary duty is "the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." (Employees earning at least \$100,000 must satisfy only one of the requirements.)
Salary Basis Test	Must be paid on a salary basis	Must be paid on a salary basis

the number of hours worked or the number of tasks performed. Salaried employees are not paid by the hour or task, but for the general value of services performed.

The new rules keep the salary basis test essentially intact. The DOL has added several key modifications intended to give employers more flexibility over their disciplinary

practices and enhanced protection from inadvertent liability.

Disciplinary deductions

An exempt employee generally is entitled to his or her full salary for any week in which he or she performed any work, regardless of the number of days or hours worked. This principle limits the employer's ability to withhold pay from exempt employees for disciplinary reasons, including suspensions. Under the old regulations, deductions could only be made as penalties imposed for infractions of safety rules of major significance and for one or more full workweeks.

The new rules allow an employer to suspend an exempt employee without pay for serious conduct violations such as sexual harassment or workplace violence. Partial-week suspensions are now permissible as appropriate to respond to the misconduct. Such deductions will not jeopardize the employee's exempt status.

"Safe harbor"

Making improper deductions from an exempt employee's guaranteed pay can result in the employer's surrendering not just the individual employee's exemption, but also the exempt status of an entire class of employees. Depending on the facts, improper deductions could indicate that there was no intention to pay the employee on a salary basis. The new regulations include a "safe harbor" provision to minimize the liability impact of improper deductions. If an employer has a clearly communicated policy prohibiting improper pay deductions, including a complaint mechanism, reimburses employees for any improper deductions, and makes a good-faith commitment to comply in the future, then that employer would not lose the exemption for any employees. An employer would only incur liability if it repeatedly and willfully violates its

own policy, or if it showed an “actual practice” of noncompliance across a department or division.

REVISED “DUTIES” TESTS

“Discretion and independent judgment” test remains

The proposed rules had set out to eliminate the job duties requirement that an exempt employee exercise “discretion and independent judgment,” an element that is present in some form across all white-collar categories. However, the DOL retained this language in the final version of the rules, noting that caselaw precedents that would help predict exemption status would be lost if the language was removed.

However, the DOL did eliminate, with the demise of the long test, its requirement that exempt employees in all white-collar categories devote no more than 20 percent of their work time to activities that are not directly and closely related to exempt work. (Within retail or service establishments, more than 40 percent nonexempt work was restricted.)

IMPACT: *Under the rules as initially proposed, organized labor had estimated that 8 million people stood to lose overtime pay protection as a result of the revised duties tests. The DOL in turn had said 644,000 hourly workers would lose overtime. Under the final version of the rules, however, the DOL says that aside from those earning more than \$100,000 a year, very few workers would lose overtime protection. Opponents have yet to “crunch the numbers” on the final revisions.*

Executive exemption

The new standard duties test provides that an exempt executive employee must:

- have a primary duty of managing the enterprise in which the employee is employed or one of its customarily recognized departments or subdivisions;
- customarily and regularly direct the work of two or more other employees;
- have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees.

The new rules allow an employer to suspend an exempt employee without pay for serious conduct violations such as sexual harassment or workplace violence.

In determining whether an employee’s suggestions and recommendations are given “particular weight,” such factors as whether it is part of the employee’s job duties to make suggestions and recommendations; how often the recommendations are made or requested; and how often those recommendations are relied upon, are to be considered.

Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the employee otherwise meets the salary and duties requirements.

The new rules distinguish supervisors of retail establishments from other “working supervisors.” Working supervisors in non-retail settings like manufacturing establishments perform the same work carried out by their subordinates, such as ordinary production work or repetitive tasks. These individuals are nonexempt even though they have some supervisory

duties. In contrast, supervisors in retail establishments are exempt employees, despite the fact that they carry out the same duties as subordinates, so long as they schedule employees, assign work, manage inventory, or perform other management functions.

Comment: *The “concurrent duties” revisions are a clear benefit to retail employers. This provision for retailers helps to offset the new salary floor, which will have an especially significant impact on retail establishments. In addition, retail as an industry was particularly hard-hit by the wage-hour lawsuit deluge of the past several years.*

Equity owner. An executive employee who owns at least a 20 percent interest in the enterprise in which he or she is employed, and is actively engaged in its management, is exempt under the new rules. Such employees do not have to meet the salary basis and salary level requirements.

Administrative exemption

The new administrative exemption rule is closer in substance to the prior rule than to the earlier proposed rule. A comparison of the DOL’s proposed rule with the final rule reveals several significant differences:

- The final rule retains the longstanding requirement that administrative employees must exercise “discretion and independent judgment” to be classified as exempt.
- The final rule eliminates the proposed “position of responsibility” test, which had been roundly criticized as being vague after it was initially introduced.
- The final rule eliminates the proposed “high level of skill or training” standard under the administrative exemption.

To meet the administrative employee exemption under the new

rule, an employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of an employer or the employer's customers.

The term "primary duty" means the principal, main, major or most important duty that the employee performs. A determination of an employee's primary duty must be based on the facts of a particular case. Employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.

Moreover, the employee's primary duty must include the exercise of discretion and independent judgment with respect to "matters of significance." This term refers to the level of importance or consequence of the work performed. (This language had appeared only in interpretive guidelines under the previous rules; now it is present in the regulation itself.) However, the fact that an employer may experience financial loss if an employee fails to perform his or her job properly does not raise an activity to a matter of significance.

IMPACT: *Based on the significant changes made to the final version of the administrative duties test—essentially returning the test to its earlier form—the DOL has concluded that the new administrative exemption test will mean very few, if any, workers will lose their right to overtime under this category.*

Professional exemption

The new regulations pertaining to the professional employee exemption make changes similar to those for the executive and administrative exemptions. The separate short and long tests for learned professionals, artistic professionals, and teachers have been

eliminated, and a single, standard duties test for each is now in place.

Learned professionals. To qualify for the learned professional exemption, an employee's primary duty must:

- involve the performance of work requiring advanced knowledge;
- the advanced knowledge must be in a field of science or learning; and
- the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

"Work requiring advanced knowledge" means work that is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.

The DOL notes that, with regard to some professions, advanced knowledge may also be acquired by an equivalent combination of intellectual instruction and work experience. However, it toned down the language in its proposed rule which suggested that more employees would be exempt under the learned professional provision.

IMPACT: *Employee advocates had feared the proposed learned professional rule would shift the greatest number of employees from nonexempt to exempt status. The DOL insisted that opponents overstated its impact. Here the agency sought to encompass within the learned professional exemption such professions as engineering, where degreed professionals labor side-by-side with colleagues trained largely on the job doing the same kind of work. It sought to correct the incongruity resulting from the prior rule, where one of these employees would be exempt and the other nonexempt. The DOL continues to maintain it had never intended to depart from the long-standing educational requirements of the professional exemption. The agency says the final rule is at least as protective as the existing rule.*

Creative professionals. The new standard test applies the creative professional exemption to any employee with the primary duty of "performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." This includes such fields as music, writing, acting, and graphic arts. The language of the new regulations was not intended to make any material changes from the prior regulations.

EFFECT OF OTHER LAWS

The revised rules contain an express statement about the effect of other laws on FLSA compliance. In reality, states had always been free to legislate in the area of wages and hours, as the FLSA has never preempted such activity. The FLSA rules now make clear that the FLSA provides minimum standards that may be exceeded at the state or municipal level, but may not be waived or reduced.

The inclusion of this statement is noteworthy in light of the fact that Illinois had already passed legislation on the issue earlier this month. Illinois Senate Bill 1645 took effect immediately upon signing by Governor Rod Blagojevich. It maintains the pre-March 2003 status quo as to the duties tests for employees within the state, while allowing the increased salary floor in the new DOL rule to take effect there.

The rules also remind employers that they are not precluded from entering into union contracts that afford greater protections; in addition, nothing in the rules relieve them from complying with their contractual obligations under bargaining agreements.

WHO WINS, WHO LOSES?

The net effect of the rule changes means that some employees will gain, and some will lose, the right to overtime pay. Moreover, certain employers will find the new duties tests advantageous, while those with a large number of lower-paid workers will likely incur added payroll costs.

FLSA: A two-minute history

A QUICK OVERVIEW of the origins of the FLSA provides a useful backdrop from which to evaluate the likely impact of the DOL's white-collar rule changes. The Depression-era legislation was enacted in 1938 to serve two functions:

- To spread employment across the largest possible span of available workers;
- To alleviate oppressive work conditions, including excessive hours worked.

Congress intended that the statute would increase jobs and reduce the drearily high unemployment rate by limiting the hours each individual employee could work before employers would be forced to pay them extra compensation. It created an explicit financial disincentive to deter employers from forcing workers to work excessive hours. The law simultaneously reduced excess work hours of individual employees, a seminal issue among labor activists of the day who sought to shorten the length of the workday and week. These were the purposes of the Act.

Do the rule changes further these statutory goals?

The answer depends largely on whether the revisions widen or narrow the scope of exemptions. Approximately 20 percent of the U.S. workforce were classified as exempt under the old rules. Will this percentage grow under the new rules? A standard principle of statutory construction is that exemptions from their coverage should be narrowly construed. What is the proper percentage of workers that should be covered under the Act?

Do the purposes of the FLSA still resonate today?

The DOL celebrated the release of the proposed rules by noting it was modernizing the FLSA to conform to the 21st century workplace. One employer group urged that the rules be updated or the Act eliminated altogether. Indeed, perhaps the side one stands on in the white-collar rule debate turns on whether one believes the FLSA itself still has a place in the contemporary global economy.

The DOL's estimates of the cost of compliance in the form of one-time implementation costs and recurring incremental payroll costs are significant. One-time costs to employers are estimated to be about \$700 million. Those industries most likely to bear the payroll costs are not necessarily the industries most likely to receive the benefits.

IMPACT: *Which employees will be affected? On balance, lower-paid workers will enjoy the benefits of the rule revisions, while higher-paid salary workers are more likely to lose overtime eligibility. The final rules expressly state that exemptions do not apply to certain workers, including manual laborers or other "blue collar" workers who perform repetitive work with their hands, physical skill and energy. They also state that the exemptions do not apply to police officers, fire fighters, paramedics, EMTs and other "first responders." (Opponents of the initial proposed rules had been vocal about their concerns about the*

impact on these workers in particular.) The final rules also state that no workers would be made exempt based upon veteran status—another issue that stirred opponents of the rules as proposed.

Why do unions care? Labor has mobilized intense opposition to the rules. Many union contracts have express terms granting overtime to unionized employees, even those who would be classified as exempt under the old rules. The rule changes do not eliminate the employers' obligation to live up to the terms of any bargaining agreement that is in effect. However, when those contracts come up for negotiation, labor's bargaining power may be greatly diminished if, as unions assume, their rank-and-file lose the overtime protection of the FLSA.

A LOOK AHEAD

Which side is right?

Will workers suffer the gloom and doom forecasted by organized labor?

Or will the rosier outlook of the Bush Administration prevail? On balance, many employers wisely waited until the new framework was finalized to update job descriptions or to reclassify their workforce. It will likely be quite some time before the economic data reflects exactly which outlook comes close to the final reality.

What happens next?

Will the new rules mean an end to the class-action lawsuit frenzy? Employers certainly hope so, but the jury, so to speak, is still out. Moreover, regardless of how they are classified under the new rules, employees still have two years to sue (or three years, in cases of willfulness) if they were misclassified under the old exemption rules.

Were the changes made by the DOL in the final rule sufficient to take the wind out of the sails of opponents? Will congressional Democrats continue to seek legislative avenues to derail the new rules? What will be the ultimate impact on the workforce?

Stay tuned.

Are journalists exempt or nonexempt under the FLSA?

REPORTERS FREQUENTLY WORK more than 40-hour weeks as they cover breaking news and provide analysis to put the issues of the day in context for their readers. Does the law entitle them to overtime compensation for these efforts?

Determining the exempt status of journalists is one of the thornier white-collar exemption challenges, and the issue has spurred a fair amount of litigation. It turns mainly on whether the duties they perform would make them “creative professionals.” Under the old rules, the answer was usually “no.” (In fact, an employer-side advocacy group cited the nonexempt status of journalists under the old rules, and the failure of the rules to recognize journalists as

professionals, as one absurd example of just how very outdated the rules had become.) Under the new rules, the vast majority of journalists will almost certainly be classified as exempt.

Creative professionals perform work that requires “invention, imagination, or talent” in a recognized field of artistic endeavor. Under the old rules, reporters were not perceived as creating original content, but rather, simply relayed an objective account of events as they saw them. As such, theirs was not a creative pursuit, or so went the reasoning under the old regulations.

Investigative reporters, news analysts, and editorial or opinion column writers would qualify as exempt profes-

sionals. The new rules expressly identify functions such as conducting interviews, reporting or analyzing public events as exempt duties. Notably, if a journalist’s primary duty involves performing on the air in radio, television or other electronic media, he or she would qualify as an exempt creative professional.

Work that primarily involves collecting and recording routine facts or data is still not exempt work, even under the new rules. Newspaper reporters who merely rewrite press releases or who write standard recounts of public information, and reporters whose work product is subject to substantial control by their employer, are not likely to be regarded as exempt creative professionals.

About CCH Human Resources and Employment Law Experts

CCH INCORPORATED HAS been reporting on the FLSA and analyzing cases on the white-collar exemptions since 1938. Our attorney experts have been carefully tracking the white-collar rule changes and evaluating their impact on employers and employees. CCH analysts have an extensive background in wage-hour law and human resources, and can provide expert analysis and perspective on this important and timely issue.

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