REDEFINING THE FLSA'S WHITE COLLAR EXEMPTIONS FOR THE 21ST CENTURY

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INTRODUCTION

The Fair Labor Standards Act (FLSA or Act) originally enacted in 1938, requires employers engaged in interstate commerce to pay employees a minimum wage and overtime pay for hours worked in excess of 40 per work week at a rate of one and one-half times the employee's "regular rate" of pay.[1] However, under section 13(a)(1) of the Act, workers employed as executive, administrative, professional, and outside sales employees are exempt from the minimum wage and overtime pay requirements of the statute.[2] Congress, however, did not define the meaning of these exemptions and instead delegated to the Secretary of Labor the power to define these "terms of art" through notice and rulemaking.[3] In turn, some 50 years ago, the U.S. Department of Labor (DOL) created duties and salary tests to determine whether an employee was exempt under the FLSA.

On April 23, 2004, the DOL published long-awaited final regulations redefining the so called "white collar" exemptions in an effort to modernize and update them.[4] This was long overdue as the duties test had not been changed since 1949 and the salary-levels test had not been updated since 1975.[5] A thorough review of these new regulations reveals that a few significant changes, and a host of nuanced and subtle modifications have been made to revamp the regulatory framework for exempt status by simplifying it, discarding ambiguities, and updating definitions to make the "white collar" regulations relevant in today's technological and service-oriented economy. The final regulations are set to go into effect on August 23, 2004, unless Congress votes to disapprove them or amends the FLSA.

In redefining the "white collar" exemptions for the 21st Century workplace, the DOL also sought to stem the growing tidal wave of lawsuits and collective (class) actions arising under the FLSA, which often involve the misclassification of workers as exempt and/or violations of the "salary basis" method of payment, required to preserve exempt status. Collective actions brought under the FLSA have increased from 71 in 2000, to 91 in 2002, to 121 in 2003.[6] In fiscal year 2003, DOL's Wage and Hour Division collected over $212 million in back wages—a 21% increase from fiscal year 2002.[7] For example, as The Wall Street Journal reported, Wal-Mart Stores Inc. faces 30 overtime-related suits, having already settled one in Colorado with hourly workers for $50 million in overtime, and Radio Shack settled a suit in California state court, in 2002, with more than 1,000 managers for $30 million.[8] Just recently, the DOL and Siemens Building Technologies Inc. reached an agreement stipu-

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EXHIBIT 1

Earnings and the Duties Test

Earnings	Existing Regulations	Final Regulations
Less than $155/week	Guaranteed Overtime	Guaranteed Overtime
$155 to $249.99/week	Long Duties Test	Guaranteed Overtime
$250 to $454.99/week	Short Duties Test	Guaranteed Overtime
$455/week to $100,000/year	Short Duties Test	Standard Duties Test
$100,000/year or more	Short Duties Test	Highly Compensated Test

lating that the company pay $1.2 million in overtime back pay to 52 employees for alleged FLSA violations.[9] In part, therefore, the new regulations are designed to elucidate a complex regulatory framework by creating brighter lines so that Employers and workers alike understand their obligations.

What follows is an analysis of the major substantive changes made by the new regulations.[10] Employers who fail to come into compliance with their legal obligations under the FLSA risk costly lawsuits and DOL investigations. Employers must also be aware that State or local laws may establish higher standards for exempt status and, accordingly, in those States, must comply with those requirements as the FLSA does not preempt stricter State standards.

DOL REVISES SALARY THRESHOLDS IN NEW STANDARD DUTIES TEST

The most significant change in the new regulations is the raising of the minimum salary level for exemption from $155 per week ($8,060 annually) to $455 per week ($23,660 annually).[11] Employees earning less than $455 per week, who were previously tested for exemption under either the "long" or "short" duties tests, will now be guaranteed overtime protection, *regardless* of their job duties. The new regulations, therefore, create a bright-line test and afford non-exempt status to any employee earning less than $23,660 annually. Employees earning between $455 per week and $100,000 per year will now be tested for exemption pursuant to a streamlined "Standard Duties Test" which is akin to the old "short" test. The "long" test has, thankfully, been eliminated.

In addition, the final regulations have created a new exemption for "highly compensated" employees earning at least $100,000 annually.[12] Any employee who performs office or non-manual work, is paid at least $455 per week on a salary or fee basis, and whose total compensation (including commissions, non-discretionary bonuses, and other non-discretionary compensation) is at least $100,000, will be exempt, provided that he or she "customarily and regularly performs" at least one of the functions or duties that appear in the tests for executive, administrative, or professional employees. [13]

Exhibit 1[14] summarizes these changes.

Thus, for example, an employee earning $120,000 annually who customarily and regularly directs the work of two or more other employees will qualify as a highly compensated executive employee, regardless of whether s/he meets the remaining criteria to satisfy the executive exemption test.

EXEMPTION CARVE-OUTS

The new regulations specifically carve-out from exempt classification status two broad categories of workers who remain overtime eligible even if they meet the $100,000 threshold for highly compensated employees. Thus, non-management "blue-collar" workers such as those in construction (carpenters, electricians, mechanics, iron workers, plumbers, for example), longshoremen, production-line workers or other employees who work with their hands or whose work involves physical skill and energy are not subject to the statutory exemptions identified in section 13(a)(1) of the Act, "no matter how highly paid they might be." [15]

The DOL also included a broad carve-out from exempt status for most public safety employees. Specifically, the new exemptions do not apply to: police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level. All these employees remain overtime-eligible so long as they perform work such as: preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or

EXHIBIT 2

Primary Duties Test

Duties * This chart uses information from Table 2-2 in the DOL's Economic Report	Primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and Who customarily and regularly directs the work of two or more other employees.	Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; Who customarily and regularly directs the work of two or more other employees; and Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.[16]

However, this carve-out does not mean that all police officers or fire fighters are overtime-eligible. Some few high-level police and fire officials may be exempt executives or administrative employees, in limited situations, if they satisfy the pertinent requirements of the applicable exemption (such as directing the work of two or more employees as required for the executive exemption), and have as their primary duty the performance of managerial tasks more in line with administering the affairs of the department or general business operations, as opposed to investigation.

THE EXECUTIVE EXEMPTION

Under the new regulations, an exempt employee is one:

1. Who is compensated on a salary or fee basis[17] at a rate of not less than $455 per week;
2. Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
3. Who customarily and regularly directs the work of two or more other employees; and
4. Who has the *authority to hire or fire* other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.[18]

NEW DEFINITION OF "PRIMARY DUTY"

The new regulations define "primary duty" as the principal, main, major or most important duty that an employee performs.[19] As stated in the Preamble,[20] the major determinant is the character of the employee's job as a whole.[21] The new regulations describe several factors that should be considered to determine the primary duty of an employee, including: (i) the relative importance of the exempt duties as compared with other types of duties; (ii) the amount of time spent performing exempt work; (iii) the employee's relative freedom from direct supervision; and (iv) the relationship between the employee's salary and the wages paid to other employees for the same kind of non-exempt work.[22]

The new definition of *primary duty* differs somewhat from that in the current regulations, which focuses on the percentage of time an employee spends performing non-exempt work - i.e., spending more than 50% of the time performing non-exempt work typically defeats exempt classification status. Under the new regulations, employees who spend less than 50% of their time performing exempt work can still be exempt so long as their primary duty satisfies the standard duties test for exemption. While the amount of time spent performing exempt work is still "a useful guide in determining whether exempt work is the primary duty of an employee,"[23] it will no longer be so central a factor if the employee's principal duties are exempt. Hence, after August 23, 2004, an assistant manager in a retail establishment who performs executive work such as supervising and directing the work of employees, ordering merchandise, and authorizing purchases, will have management as a primary duty, even if the assistant manager spends more than 50% of her time running the cash register or restocking the shelves. Concomitantly, if employees spend 50% or more of their time performing exempt work, they are exempt from overtime requirements.

AUTHORITY TO HIRE AND FIRE OR HAVE "PARTICULAR WEIGHT" GIVEN TO RECOMMENDATIONS

The new regulations adopt from the former "long" test the requirement that to be an exempt executive, the employee must have the

EXHIBIT 3

Administrative Employees Duties Test

	Current Short Test	New Standard Test
Salary Level	$250 per week	$455 per week
Duties * This chart uses information from Table 2-3 in the DOL's Economic Report	Primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and Which includes work requiring the exercise of discretion and independent judgment.	Primary duty consists of the performance of office or non-manual work directly related to the management or general business operations of his employer or his employer's customers; and Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

authority to hire or fire other employees, or make suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status[24] of other employees, and those suggestions and recommendations must be given "particular weight." Unlike the old regulations, the new regulations include a list of factors gleaned from federal case law to illustrate what it means to be given "particular weight."

Among the factors to be considered are: (i) whether making such suggestions and recommendations are part of the employee's duties; (ii) the frequency with which the employee makes suggestions or recommendations; and (iii) the frequency with which the employee's suggestions are relied upon.[25] In addition, the executive employee's suggestions and recommendations generally must relate to employees whom the executive customarily and regularly directs. Finally, a manager's suggestions and recommendations may still be deemed to have particular weight even if that manager lacks the ultimate authority to change an employee's status.[26]

NEW ILLUSTRATIONS OF "MANAGEMENT" DUTIES

Whether or not an employee's primary duty involves management of the enterprise or a department is perhaps the most important criterion under the executive exemption and requires a fact-intensive inquiry. The new regulations expand the list of illustrative management duties and make clear that such duties are not limited to traditional responsibilities such as supervising. Rather, management includes activities such as: interviewing, selecting and training employees; setting and adjusting employee pay rates and work hours; directing employees' work; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning work and determining the techniques to be used; apportioning work among employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; providing for the safety and security of employees or property; controlling the flow and distribution of materials, merchandise and supplies; planning and controlling the budget; and monitoring or implementing legal compliance measures.[27]

The new regulations have adopted from federal case law the long-accepted view that concurrent performance of exempt and non-exempt work will *not* disqualify an employee from the executive exemption *provided* the employee otherwise meets the salary and duties requirements. For example, assistant managers in a food service or retail establishment who perform non-exempt work, such as cooking food, running the cash register, stocking shelves, cleaning, or serving customers, may qualify for the executive exemption, so long as their primary duty is still management (*i.e.*, supervising employees, directing the work of other employees, scheduling employees). On the other hand, an employee who primarily performs non-exempt work but occasionally fills in as a relief manager will not become exempt as a result of those sporadic periods spent managing. This, again, illustrates the emphasis placed by the Department of Labor in determining an employee's primary duty, as opposed to focusing on how much time the employee spends performing exempt and non-exempt tasks.

THE ADMINISTRATIVE EXEMPTION

Under the new regulations, an employee satisfies the administrative exemption if:

1. She is compensated on a salary or fee basis at a rate of not less than $455 per week; and

2. Her *primary duty* is the performance of office or non-manual work *directly related to the management or general business operations* of the employer or of the employer's customers; and

3. Her primary duty includes the exercise of *discretion and independent judgment* with respect to *matters of significance*.[28]

The new standard duties test maintains the terminology of the current test with seemingly minor variations. Significantly, however, while the requirements found in the current regulations are retained, their meanings are clarified by incorporating interpretations found in federal court decisions. In addition, the final regulations identify a number of occupations that are presumed to qualify for the administrative exemption *provided* the discretion/independent judgment standard is met. Such occupations include insurance claims adjustors; computer network, Internet, and database administrators; and a variety of workers in the financial services industry.

WORK DIRECTLY RELATED TO THE MANAGEMENT OR GENERAL BUSINESS OPERATIONS OF AN EMPLOYER

To be classified as administratively exempt from overtime requirements, an employee's primary duty must be the performance of office or non-manual work "directly related to management or general business operations."[29] This phraseology found in the new rules is virtually identical to that in the current "old" regulations, albeit with a nuanced, yet significant revision. Whereas the existing regulation requires that employees perform work directly related to management *policies*, the new regulations drop the reference to "policies." It will now be sufficient that the work relates to management. As the DOL explained in the Preamble, there are many other functions that support management of a business beyond those administrators who perform work related to management policies.[30]

The crux of the administrative exemption is that the employee perform work related to the running or servicing of the business, in contrast to work performed on a production-line or sales work performed in a retail or service establishment. In order to help provide additional guidance to employers, the new regulations include specific examples of the types of functional areas that are typically administrative in nature. This list includes work such as: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations and government relations.[31] In addition, the final regulations added the functional areas of: (i) computer, network, Internet and database administration; and (ii) legal and regulatory compliance, to address the needs of the changing 21st Century workplace. Keep in mind that inclusion of a job duty on the list does not automatically exempt the position from overtime eligibility since the employee must still satisfy the other criteria to fall within the administrative exemption, including the discretion/judgment test.

REDUCED EMPHASIS ON PRODUCTION VS. STAFF DICHOTOMY

Under the current regulations and interpretations, many court decisions have placed a strong emphasis on the difference between employees performing "production" work, which is non-exempt, and "staff" who perform administrative work more likely to be exempt. This production vs. staff dichotomy has been the focus of much litigation over the last decade as court decisions often turned on whether the exempt worker was performing work directly related to management policies or to the production operations of the employer. Often, notwithstanding the employee's exercise of discretion, courts found that the exemption was misapplied to employees performing production work who did not assist in the running of the business. Needless to say, the DOL was inundated with many comments addressing this issue. The new regulations, while not eliminating the distinction entirely, make clear that the dichotomy should not be a dispositive test for exemption. According to the DOL, this dichotomy is only one analytical tool in answering the ultimate question and is only determinative in those cases where the work clearly falls on the production side of the equation.

CLARIFYING THE EXERCISE OF DISCRETION AND INDEPENDENT JUDGMENT

The definition of "discretion and independent judgment" has not changed significantly in the new regulations. An assessment is still required as to whether the employee compares and evaluates possible courses of conduct, and acts or makes decisions after considering various possibilities, as distinguished from using skill in applying well-established techniques, procedures or specific standards.[32] The new regulations emphasize, moreover, that such

"discretion and independent judgment" must be made independently, free from immediate direction, and with respect to "matters of significance."[33] In actuality, this phrase is synonymous with the current requirement (found in the DOL's interpretive guidance) that the administrative exemption is limited to persons who perform work of substantial importance to the management or operation of the business.[34]

Significantly, employers are now provided with a host of factors to consider in evaluating whether an employee exercises "discretion and independent judgment," including whether the employee: (i) has authority to formulate, affect, interpret, or implement management policies or operating practices; (ii) carries out major assignments in conducting the operations of the business; (iii) performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; (iv) has authority to commit the employer in matters that have significant financial impact; (v) has authority to waive or deviate from established policies and procedures without prior approval; (vi) has authority to negotiate and bind the company on significant matters; (vii) provides consultation or expert advice to management; (viii) is involved in planning long- or short-term business objectives; (ix) investigates and resolves matters of significance on behalf of management; and (x) represents the company in handling complaints, arbitrating disputes, or resolving grievances. [35] Further, the DOL opined, generally, that employees who meet at least two or three of these factors are exercising "discretion and independent judgment," although a case-by-case analysis is required.[36]

The final regulations also contain a new provision that allows employees to use manuals, guidelines, or other established procedures - without forfeiting exempt status - so long as the manuals contain highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by employees with advanced or specialized knowledge or skills. The regular use of manuals to apply well-established techniques or to identify specific directions for use in routine circumstances will, however, defeat exempt status. As a result, this new provision permits highly trained administrative employees, such as those in computer-related fields, to refer to complex and technical manuals to help solve unique or dynamic problems, without defeating their exempt status.

EXAMPLES OF EXEMPT ADMINISTRATIVE EMPLOYEES

In its effort to update the regulations to meet the needs of the modern workplace, the DOL devoted an entire section of its new regulations to a discussion of particular jobs that are likely to meet the test for the administrative exemption.[37] Among the jobs identified were those in financial services, insurance claims adjustors, team leaders, and executive assistants.

Turning to financial services employees who may qualify for the administrative exemption, the DOL explained that those whose *primary duty* is selling financial products are *not* exempt.[38] However, financial services workers may qualify for exemption if their primary duty includes work such as: collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; or marketing, servicing or promoting the employer's financial products.

For example, employees who spend the majority of their time "servicing existing customers" and perform duties including "promoting sales, advising customers, adapting policies to customer's needs, deciding on advertising budget and techniques, hiring and training staff, determining staff's pay, and delegating routine matters and sales to said staff" may be exempt, even though they also sell insurance products directly to customers.[39] A neighborhood insurance agent likely meets the administrative exemption when his responsibilities include recommending products and providing claims help to customers, using his own personal sales techniques to promote and close transactions, and representing his employer in the market.[40] Employees who exercise discretion in deciding which products to promote, identify the interests of their various agents, and analyze product trends to determine how to best compete with the company's competitors are typically "representing the company" and "promoting sales" and therefore exempt.[41] However, the administrative exemption is likely not available for loan originators who have a "primary duty to sell [the company's] lending products on a day-to-day basis" directly to consumers, or follow strict guidelines and operating procedures without authority to approve loans

EXHIBIT 4

Professional Employees Duties Test

	Current Short Test	New Standard Test
Salary Level	$250 per week	$455 per week
Duties * This chart uses information from Table 2-4 in the DOL's Economic Report	Primary duty consists of the performance of 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; and Which includes work requiring the consistent exercise of discretion and judgment. -OR- Primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	Primary duty is the performance of work requiring 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- Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

because this is ordinary production work.[42]

The new regulations for the first time explicitly provide that a *team leader* may be an exempt administrative employee if s/he leads a team of other employees assigned to complete major projects for the employer,[43] such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements.

Assistants to business owners or senior executives of a large business (so-called administrative or executive assistants) are generally exempt where they work without specific instructions or prescribed procedures, and have been delegated authority regarding matters of significance. Human resource managers generally meet the duties requirement where they formulate, interpret or implement employment policies. Management consultants generally meet the duties requirement where they study the operations of a business and propose changes in organization. Purchasing agents may meet the duties test where they have the authority to bind the company on significant purchases.[44]

In an effort to draw some bright lines, the DOL also described job functions likely to be non-exempt based on the employees' primary duty. In this category, DOL included: employees who sell financial products; personnel clerks who screen applicants for minimum qualifications, but do not set the minimum standards or interview applicants; inspectors who rely on standard techniques and procedures, either catalogued in manuals or acquired by special training or experience, and who have little (if any) discretion; employees who examine or grade product quality, or employees who grade lumber; and public sector inspectors or investigators who apply prescribed procedures and whose work does not directly relate to management or general business operations.[45]

THE PROFESSIONAL EXEMPTION

Under the new rules, an exempt professional employee is one:

1. Who is compensated on a salary or fee basis at a rate of not less than $455 per week; and
2. Whose primary duty is the performance of work:
   A. Requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
   B. Requiring invention, imagination, originality or talent in a "recognized field of artistic or creative endeavor."[46]

"LEARNED PROFESSIONALS"

The new professional exemption differentiates between "learned" and "creative" professionals. The test for learned professionals is essentially identical to that in the current regulations. Specifically, it consists of work requiring "knowledge of an advanced type" that is predominantly intellectual in nature and requires the consistent exercise of discretion and judgment. Advanced knowledge cannot be obtained at the high school level, and is generally used to analyze, interpret or make deductions from various facts or circumstances.

Although the exemption is limited to professions where specialized academic training is a standard prerequisite, the new regulations make clear that in limited circumstances, advanced knowledge may be acquired by an equivalent combination of intellectual instruction

and work experience. As a result, the learned professional exemption could be available to the occasional chemist, for example, who does not possess an advanced degree in chemistry.[47]

In addition to licensed or certified lawyers and physicians,[48] the final regulations provide numerous examples of "learned" occupations, generally considered by DOL as exempt, including: (i) Registered Nurses who are licensed by the appropriate state examining board; (ii) Dental Hygienists who have completed four years of pre-professional and professional study; (iii) Physician Assistants who have completed four years of pre-professional and professional study; (iv) Certified Public Accountants as well as accountants who are not CPAs but perform similar duties (however, accounting clerks, bookkeepers, and other employees who perform a great deal of routine work will not qualify as exempt); (v) Chefs who have attained a four-year degree in a culinary arts program, though limited to truly "original" chefs such as those who work in 5-star restaurants or whose primary duty requires invention, imagination, originality, or talent; (vi) Athletic trainers who have completed four years of pre-professional and professional study; and (vii) Funeral directors and embalmers who are licensed by and working in a state that requires the completion of four years of pre-professional and professional study, including an accredited college of mortuary science.[49] Teachers who are employed and teaching in an educational establishment, generally, meet the duties test without regard to the salary tests.[50]

"CREATIVE PROFESSIONALS"

The test for creative professionals has broadened what used to be considered the "artistic" professional exemption to include "creative" endeavors involving the performance of work requiring originality.[51] The requirement of invention, imagination, originality or talent distinguishes the creative professions from work relying primarily on intelligence, diligence and accuracy.[52] Examples of creative professionals include most actors, musicians, composers, conductors, soloists; painters who at most are given the subject of their painting; cartoonists who are told only the title or underlying concept of the cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers, screenplay writers who choose their own subjects and hand in a finished piece of work; and writers holding positions of responsibility in advertising agencies. The exemption does *not* generally apply to copyists, animators, or photograph retouchers, as this work is not considered creative.[53]

In particular, the final regulations focus on journalists, who may qualify as exempt creative professionals *if* their primary duty involves work requiring "invention, imagination, originality or talent." The less creativity and originality involved in their efforts, and the more control exercised by the employer, the less likely it is that the journalist will qualify as exempt. Exempt journalists include those who are "on the air" in electronic media, conduct investigative interviews, analyze or interpret public events, write editorials, opinion columns or other commentary, or act as narrators or commentators.[54]

Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation, analysis, or perspective to a news product.[55] Thus, newspaper reporters who merely rewrite press releases or who write standard accounts of public information by gathering facts on routine community events are not exempt, nor are reporters whose work product is subject to substantial control by the employer. The new regulations are meant to reflect the status of current federal case law[56] and are not intended to create an across-the-board exemption for journalists. Unfortunately, federal case law itself is unsettled and ambiguous in this area. Thus, the final regulations fail to adequately address whether other "creative" employees in the news or media industries (particularly producers, editors, directors or other similar positions) could be considered exempt professionals.

COMPUTER EMPLOYEES

Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption as professionals under Section 13(a)(1) and Section 13(a)(17) of the FLSA pursuant to statutory amendments enacted in 1990 and 1996.[57] The Section 13(a)(1) exemption applies to any computer employee paid at least $455 per week whereas the Section 13(a)(17) exemption applies to any computer employee paid at least $27.63 per hour.

The new regulations are substantially similar to the current computer professional standard. To qualify for exemption as a computer professional, an employ-

ee's primary duty must consist of: (i) the application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications; (ii) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs based on and related to user or system design specification; (iii) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (iv) a combination of the above duties, the performance of which requires the same level of skill. [58]

One minor change to the computer employee exemption is the removal of the current additional regulatory requirement, not contained in section 13(a)(17) of the FLSA, that an exempt computer employee must *consistently exercise discretion and judgment*. The elimination of this requirement does not strip overtime rights from any employees, but rather brings the new regulations in line with the Congressional definitions and rules as set forth in 29 U.S.C. § 213(a)(17) of the Act. Likewise, the "highly compensated" test does not apply to computer professionals because it would not be consistent with the Congressional amendments to the Act.[59]

Computer employees (many of whom may not fit within the scope of this professional exemption) may well exercise executive or administrative duties that qualify them for exemption. Employees who work in computer-functional areas may be exempt so long as their primary duty is directly related to management or general business operations of the employer or its customers and includes the exercise of discretion and independent judgment with respect to matters of significance. Thus, for example, many Network, LAN, and database analysts and developers, internet and network administrators, and other employees with similar duties are likely exempt under the administrative exemption, rather than the computer professional exemption. For example, systems analysts and computer programmers who plan, schedule, and coordinate activities required to develop systems to solve complex business, scientific, or engineering problems of the employer or its customers may qualify for the administrative exemption. Likewise, a senior programmer placed in charge of a unit of two or more other programmers and whose recommendations as to hiring, firing, or promotion are given particular weight may satisfy the executive exemption.[60] Notably, as discussed earlier, the use of manuals containing highly technical, scientific, or complex information will not necessarily defeat exemption.[61]

THE SALARY BASIS TEST

One of the most confusing but important components for determining exempt status is the "salary basis" test. To qualify for exempt status from overtime requirements, an employee must not only satisfy the minimum salary requirements and duties test as a bona fide executive, administrative or professional employee, s/he must also be paid on a "salary basis." The new regulations preserve the "salary basis" test and make one significant modification.

Underlying the "salary basis" test are two fundamental principles set forth in the regulations: (i) the employee must receive, each pay period, a predetermined amount of compensation; and (ii) that amount cannot be subject to reduction because of variations in the quality or quantity of work performed.[62] While exempt employees need not be paid for any workweek in which they perform no work, they must be paid their fixed amount of compensation each pay period, irrespective of the number of days or hours worked. Generally, so long as the employee is ready, willing, and able to work, deductions may not be made when work is not available.

As a general rule, the exemption is forfeited, if deductions are made for: (i) partial day absences; (ii) absences caused by jury duty, attendance as a witness, or temporary military leave in less than a full workweek; (iii) disciplinary penalties of less than a full week's duration unless meted-out for serious workplace misconduct (see below); and (iv) absences occasioned by the employer (*e.g.*, where the employee is sent home early due to lack of work).

Historically, the DOL has recognized six exceptions for which an employer could make deductions in pay in less than full-week increments without defeating the employees' exemption. These exceptions, each of which has been retained in the new regulations, allow docking: (i) for absences from work for a full day or more (in daily increments) for personal reasons, other than sickness or disability; (ii) for absences of a full day or more (in daily increments) occasioned by sickness or disability, in accordance with a bona fide plan, policy or practice providing wage replacement benefits in the event of sickness or disability; (iii) to offset jury or witness fees or military pay received by the employee; (iv)

for penalties imposed in good faith for infractions of "safety rules of major significance;" (v) for hours not worked in the first or last weeks of employment; or (vi) for hours taken as unpaid leave under the Family and Medical Leave Act ("FMLA").[63]

The final regulations add a new exception for "unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules."[64] "Workplace conduct," as used in the new regulations, refers to serious workplace misconduct, not to performance or attendance issues, and it should *not* be construed expansively.[65] According to the DOL, the purpose of this new exception is to enable employers to suspend exempt employees (in full-day increments that need not be a full week in duration) for sexual harassment, workplace violence, or other similar serious misconduct. As a further limitation, the workplace conduct exception only applies if the suspension is pursuant to a *policy* that is generally applicable to all employees. The policy *must* be in writing and should place employees on notice that particular types of misconduct could result in an unpaid disciplinary suspension.[66]

Upon closer scrutiny, however, this exception is not all that, at first blush, it appears to be given the circumstances it contemplates. *First*, in a case of sexual harassment, when an individual is disciplined for engaging in such conduct, the stated cause in the disciplinary notice may avoid a direct reference that the employee committed sexual harassment of a co-worker. Careful employers often refrain from papering the personnel file with a disciplinary notice accusing the employee of sexual harassment to avoid defamation claims and because it might be used against the Company as an admission that sexual harassment had actually occurred. Instead, the discipline is typically couched in terms of "poor judgment," "managerial indiscretion," "violations of policy," etc. Moreover, exempt employees found to engage in sexually harassing behavior are frequently terminated. In reality, therefore, the circumstances where an employer would suspend an employee for two days without pay for sexually harassing an employee are few. Where the evidence is disputed (e.g., "he said vs. she said") or other factors color the incident, an employer is better off suspending the misguided supervisor for a full week for poor judgment rather than lose the sexual harassment lawsuit on account of an admission.

Second, in cases of violent conduct, those employees are generally terminated - not suspended for two days - particularly in today's atmosphere where suits for negligent retention and negligent supervision abound.

Finally, when it comes to "serious misconduct," employers are generally advised to give suspensions of a full week's duration, if not terminate the offending employee. One or two day suspensions are typically for minor infractions, not serious workplace misconduct.

Notwithstanding these limitations, many employers will amend their written policies or employee handbooks in order to take advantage of this new provision, as there may be a few circumstances where a day or two disciplinary suspension without pay for an exempt employee makes sense.

NEW SAFE HARBOR RULE

Under the "salary basis" test, an exemption is lost where an employer makes improper deductions from salary. The new regulations preserve the "window of correction" which provides that isolated or inadvertent deductions will not defeat the exemption *so long as* the employee is reimbursed. If, on the other hand, an employer has an "actual practice" of making improper deductions, the exemption will be lost.

Significantly, the final regulations create a new "safe harbor" to mitigate the risk that improper deductions from pay will destroy the FLSA exemption. Under this "safe harbor," the exemption is *not* lost if the employer demonstrates a good-faith effort to comply with the statute by: (i) having a "clearly communicated" policy (preferably in writing and distributed to all employees) that prohibits improper pay deductions; (ii) having a complaint mechanism in place; (iii) reimbursing employees for any improper deductions; and (iv) making a good-faith commitment toward future compliance.[67]

Most importantly for employers, compliance with this rule allows the exemption to be retained with no further liability to the employer other than reimbursing the worker. It is anticipated that this new provision will reduce the growing number of costly litigations involving the salary basis test, as well as make it more difficult, and less rewarding, for plaintiffs to bring collective actions (class actions) based solely on salary basis violations.

The "safe harbor" is not available if the employer willfully violates its policy by continuing to make improper deductions *after* receiving employee complaints.

Thus, the safe harbor operates in a manner analogous to the *Farragher/Ellerth* defense to sexual harassment claims - if an employer has a clear, widely distributed policy regarding pay deductions that is consistent with the FLSA, the unauthorized, improper conduct of a rogue supervisor or manager with respect to docking employee pay (even if such improper docking is more than an isolated or inadvertent occurrence) will not defeat the FLSA exemption, *provided* the employer makes the affected employee(s) whole after it learns of the improper docking *and* takes other corrective steps to prevent a recurrence.

In the past, courts have ruled that an entire group of exempt employees can be rendered non-exempt if the salary of a single exempt employee doing a similar job is improperly docked. The new regulations, however, provide that if an employer has an "actual practice" of making improper deductions, the exemption will be lost only during the time period in which the improper deductions were made, only for those employees in the same job classification, and only for those employees who work for the same manager responsible for the actual improper deductions. Courts have also ruled that reclassification of a group of exempt employees could be required based on an employer policy that *theoretically* could have resulted in improper deductions, even if no actual improper pay practices were made. The DOL's new regulations have rejected these court holdings, and provide that the only way an employer can lose a white-collar exemption is if it *actually* makes improper deductions.[68]

WHAT SHOULD YOUR HR DEPARTMENT DO NOW?

Given the enormous amount of media publicity that has attended the final regulations, and the storm of protest generated by certain interest groups and politicians, employers should assume that their employees have been alerted to the controversy involving overtime eligibility. Equally important, the Bush administration has signaled its interest, during an election year, in FLSA-compliance through the establishment of compliance teams to monitor implementation of the new regulations. In light of the above, whether the new regulations come into effect on August 23 in their present or modified form or are blocked by Congressional action, increased litigation is almost a certainty.

HR professionals and their counsel should recognize that now is a good time to conduct an internal review of FLSA-related practices. Any such internal audit should evaluate job classifications and exempt status, "salary basis" pay practices, record-keeping, overtime pay practices, and time-worked practices, as well as include an assessment of how the regular rate of pay is figured to guard against non-compliance with legal requirements. The media attention focused on the new FLSA regulations also creates an opportunity to explain to employees the reasons for taking any corrective actions without unnecessarily raising suspicions that improprieties have occurred.

A prudent employer, accordingly, should consider these steps:

- Assign a Human Resources Manager the responsibility for FLSA Compliance.
- Identify currently exempt employees who earn less than $455 per week ($23,660 annually) and would be overtime eligible under the new regulations; determine whether it would be cost-effective to raise their salaries in an effort to retain exempt status (assuming they meet the duties test).
- Identify employees who earn $100,000 or more annually. If these employees are not already classified as exempt, determine if they would be exempt under the new highly compensated employees' test.
- Identify non-exempt employees who earn between $90,000 and $100,000 annually and determine whether it would be cost-effective to raise their salaries in an effort to satisfy the new highly compensated employees test (assuming they customarily do some exempt work).
- Review job responsibilities and conduct a job classification analysis of each position that you think may be affected by the new regulations to determine whether the employees performing those job functions are properly classified.
- Using the information obtained from the job analysis, revise job descriptions to reflect the work performed and skills required and classification status, as appropriate.
- Ensure that the payroll system is updated to account for all changes in exempt/non-exempt classifications and check to see that overtime is paid correctly and that im-

proper deductions are not being made.

- To secure the protections of the safe harbor provision, revise disciplinary and payroll administration policies and the employee handbook (or other written policies communicated to employees) to reflect the changes made in the "salary basis" test.
- Develop a communications strategy to disclose any sensitive information to employees.
- Even though some employees will now be exempt from overtime under the new regulations, an employer must still comply with the terms of any collective bargaining agreement in effect, including its overtime provisions.
- As a result of any reclassification of employees to exempt status, employers may now require additional hours from some employees without having to compensate them for the extra hours worked. This change may result in employee dissatisfaction particularly where excessive overtime demands are made on the work force. Concomitantly, some formerly exempt employees may be reclassified to non-exempt status and feel as if they have been demoted. It is important to let these employees know that they remain a valuable part of the organization.
- Remember state and local law obligations. In issuing its new regulations, the DOL reiterated that the FLSA sets minimum standards and that employers must comply with any state or local laws establishing a higher minimum wage, lower maximum workweek, or higher threshold for exempt status (*e.g.*, expanding the universe of overtime eligibility). Thus, for example, the State of Illinois has already enacted legislation rejecting those provisions of the new federal regulations that redefine coverage for employees heretofore classified as non-exempt which might make them exempt from overtime eligibility while incorporating those provisions found in the new regulations that would extend overtime eligibility to certain workers covered by the new salary test (*e.g.*, the $23,660 salary threshold).

COMPLIANCE AUDITS

- Wage-hour compliance audits should be done regularly—if not annually, then bi-annually—and should include questionnaires, interviews, and an examination of records. Often employers fall out of compliance unwittingly. As a result of the new regulations, many employers are auditing exempt classifications to ensure compliance.
- Audits should be conducted when there are significant process changes or a reorganization affecting more than a few job classifications; changes in federal or state law; or an abrupt increase in hours worked by employees in a job classification that is neither clearly exempt nor non-exempt.
- Keep upper-level management informed. If audits are undertaken and potential violations uncovered which HR professionals believe may warrant correction, liability will only increase if the employer is aware of the violation and does not remedy it. In the event of violations, damages include unpaid overtime for two years and, in cases of willful violations, three years; an additional equal amount in liquidated damages may also be awarded, not to mention costs and attorneys' fees.[69]
- Prudence dictates that legal counsel be involved with compliance audits. In so doing, any legal advice concerning compliance, or steps that should be taken to ensure compliance, may be protected from disclosure by the attorney-client privilege or work product immunity. Keep in mind, however, that the facts uncovered in the audit will not be protected by the privilege. The attorney need not perform the factual investigation, but should oversee the process, review the findings, and make recommendations before ultimate decisions are finalized as to any corrective actions that may be taken.
- The best audits include a systematic analysis of every job classification, timekeeping and pay procedures, methods of calculating the regular rate of pay and overtime rate, and child labor practices (where applicable). It is important to

explore exemptions that may be covered by state and local law wage orders.

- When misclassifications or errors are uncovered, it is important to remedy these violations immediately and in a positive light. Since workers may raise questions as to back overtime eligibility, many employers will make such payments, if appropriate, in an effort to reduce the likelihood of litigation. If litigation arises, the payment of back overtime pay mitigates damages and provides the employer with evidence that any violations that may have occurred were not willful.

NOTES

1. 29 U.S.C. §§ 201, 207(a)
2. 29 U.S.C. § 213(a)(1)
3. 29 U.S.C. § 213(a)(1)
4. The final regulations (also referred to throughout this article as the new regulations), referred to by DOL as the Fair Pay Rules, were published in the Federal Register from pages 22,122 through 22,274. 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541). Citations are given to the appropriate section of the Code of Federal Regulations that will take effect on August 23, 2004, for ease of use.
5. 69 Fed. Reg. 22,124.
6. Wage Hour Collective Actions Jumped 70 Percent Since 2000, Analysis Shows, Daily Lab. Rep. (BNA) No. 58, at C 2 (Mar. 26, 2004).
7. http://www.dol.gov/esa/whd/statistics/20318.htm.
8. Ann Zimmerman, Big Retailers Face Overtime Suits as Bosses Do More 'Hourly' Work, Wall Street Journal, May 26, 2004, at A1.
9. *Chao v. Siemens Bldg. Techs.,* No. CV 04-0661 (W.D. Wash., consent judgment filed Mar. 29, 2004).
10. As the new regulations leave the outside sales employees' exemption largely intact, with the exception that the salary requirements do not apply and the new standard duties test replaces the 20% time limitation on non-exempt hours, it will not be discussed herein. 29 C.F.R. §§ 541.500(a), (c).
11. 29 C.F.R. § 541.600.
12. 29 C.F.R. § 541.601(a).
13. 29 C.F.R. § 541.601.
14. This chart uses information from Table 2-1 in the DOL's Economic Regulations Impact Analyses ("Economic Report").
15. 29 C.F.R. § 541.3(a).
16. 29 C.F.R. § 541.3(b)(1).
17. To be compensated on a "salary or fee basis" is a term of art under the FLSA regulations.
18. 29 C.F.R. § 541.100(a)(1)-(4).
19. 29 C.F.R. § 541.700(a).
20. In addition to the regulations, the DOL also published in the Federal Register (from pages 22,122 through 22,191) a Preamble containing supplementary information about the new regulations, including a summary of major comments, a discussion of relevant federal case law, and further explanatory insights concerning each section and subpart. Throughout this Article, citations to the Preamble will be to the appropriate pages of the Federal Register.
21. 69 Fed. Reg. 22185.
22. 29 C.F.R. § 541.700(a)-(c).
23. 29 C.F.R. § 541.700(b).
24. The Preamble to the new regulations clarifies that "change in status" should be given the same meaning as the Supreme Court's definition of "tangible employment action" in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 761-62 (1998). Specifically, it means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 69 Fed. Reg. 22,131.
25. 29 C.F.R. § 541.105.
26. 29 C.F.R. § 541.105.
27. 29 C.F.R. § 541.102.
28. 29 C.F.R. § 541.200(a)(1)-(3).
29. 29 C.F.R. § 541.200(a)(2).
30. 69 Fed. Reg. 22,138.
31. 29 C.F.R. § 541.201(a).
32. 29 C.F.R. § 541.201(b).
33. 29 C.F.R. §§ 541.202(a), (c).
34. 29 C.F.R. §§ 541.202(a), (c).
35. 69 Fed. Reg. 22,143.
36. 29 C.F.R. § 541.202(b).
37. 69 Fed. Reg. 22,143.
38. 29 C.F.R. § 541.203(a)-(d).
39. 29 C.F.R. § 541.203(b).
40. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 9 Wage & Hour Cas. 2d (BNA) 720, 149 Lab. Cas. (CCH) P 34826 (11th Cir. 2004).
41. *Wilshin v. Allstate Ins. Co.,* 212 F. Supp. 2d 1360 (M.D. Ga. 2002).
42. *Reich v. John Alden Life Ins. Co.*, 940 F. Supp. 418, 3 Wage & Hour Cas. 2d (BNA) 904, 132 Lab. Cas. (CCH) P 33444 (D. Mass. 1996), judgment aff'd, 126 F.3d 1, 4 Wage & Hour Cas. 2d (BNA) 129, 134 Lab. Cas. (CCH) ¶ 33591 (1st Cir. 1997).
43. *Casas v. Conseco Finance Corp.*, 146 Lab. Cas. (CCH) ¶ 34502, 2002 WL 507059 (D. Minn. 2002).
44. 29 C.F.R. § 541.203(c).
45. See generally 29 C.F.R. § 541.203(d)-(f).
46. See generally 29 C.F.R. § 541.203(b), (e)-(j).
47. 29 C.F.R. § 541.300.
48. 29 C.F.R. § 541.301(d).
49. 29 C.F.R. § 541.304. Note, the salary requirements tests do not apply to physicians and lawyers.
50. 29 C.F.R. § 541.301(e).
51. 29 C.F.R. § 541.303.
52. 29 C.F.R. § 541.302.
53. 29 C.F.R. § 541.302(c).
54. 29 C.F.R. § 541.302(c).
55. 29 C.F.R. § 541.302(d).
56. 29 C.F.R. § 541.302(d).
57. See, e.g., *Freeman v. National Broadcasting Co., Inc.*, 80 F.3d 78, 24 Media L. Rep. (BNA) 1653, 3 Wage & Hour Cas. 2d (BNA) 289, 131 Lab. Cas. (CCH) ¶ 33352 (2d Cir. 1996)(finding that the duties of a domestic news writer, domestic producer, and field producer for television news show involved sufficient amount of creativity to qualify them as exempt); *Dalheim v. KDFW-TV,* 918 F.2d 1220, 18 Media L. Rep. (BNA) 1657, 30 Wage & Hour Cas. (BNA) 113, 117 Lab. Cas. (CCH) ¶ 35438 (5th Cir. 1990) (finding that while general-assignment reporters could be exempt creative professionals, the reporters in this case were nonexempt because their day-to-day work was largely dictated by management; news producers were also found nonexempt because they performed work pursuant to a "well-defined framework of management policies and editorial convention."); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 22 Media L. Rep. (BNA) 1257, 1 Wage & Hour Cas. 2d (BNA) 1313, 127 Lab. Cas. (CCH) ¶ 33046 (3d Cir. 1994) (finding reporters who worked for weekly newspapers either rewriting press releases, or writing standard recounts of public information by gathering facts on routine community events, were not exempt creative professionals).
58. 29 U.S.C.A. §§ 213(a)(1), (17).
59. 29 C.F.R. § 541.400(b)(1)-(4).
60. 69 Fed. Reg. 22,160; 22,176.
61. See generally 29 C.F.R. § 541.402.
62. 29 C.F.R. § 541.704.
63. 29 C.F.R. §§ 541.118(a), 541.602.
64. 29 C.F.R. §§ 541.118, 541.602(b)(1)-(4), (6), (7).
65. 29 C.F.R. § 541.602(b)(5).
66. 69 Fed. Reg. 22,177.
67. 69 Fed. Reg. 22,178.
68. 29 C.F.R. § 541.603(d).
69. 69 Fed. Reg. 22,180-22,181.