New FLSA Regulations on Exempt Employees

May 01 2004

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On April 23, 2004, the Department of Labor, Wage and Hour Division, published its final regulations concerning white collar exemptions under the Fair Labor Standards Act. The new regulations are effective on August 23, 2004. The new salary basis amount is a guaranteed minimum of $455.00 per week ($23,660 annually) for executive, administrative, professional, computer and the new highly compensated ($100,000 a year) employees. The "long" and "short" tests have been replaced by a "standard duties" test.

The exempt executive employee will usually need to manage 2.0 FTE's and have the authority to hire or fire or make meaningful recommendations concerning hiring and firing. The administrative exempt employee will need to be performing as a primary duty office or nonmanual work "directly related to management or general business operations" where the employee exercises "discretion and independent judgment with respect to matters of significance." The professional employee will need to have a college degree except for long-recognized exceptions, *e.g.*, nurses and medical technologists. On the job experience will not be sufficient as it was under the proposed interim rules. Computer exempt employees will need to be computer systems analysts, computer programmers, software engineers or other similar skilled workers in the computer field. The highly compensated exempt employees must perform at least one exempt duty.

The regulations make clear that the exemptions do not cover blue collar workers. Included among those not exempt are paramedics, EMTs, first responders, medical technicians and LPNs. The exemptions do include physician assistants and pharmacists paid on a salary basis. Physicians are exempt even without being paid on a salary basis.

The regulations allow exempt employees to be suspended for less than a full calendar week for unpaid suspensions of a full day or more for infraction of workplace conduct rules. The suspension cannot be for performance or attendance issues. The suspension policy must be in writing and be applicable to all employees.

Reaffirming the Department's position, the new regulations provide that exempt employees can be required to use accrued leave accounts, record and track hours, work specific schedules and still be seen as paid on a salary basis.

One important feature of the new regulations is the creation of a safe harbor when an employer discovers it has not made proper payment(s) to an employee. To be protected, the employer needs a written policy which establishes a complaint mechanism which is clearly communicated to employees. This policy needs to allow employee(s) to receive proper and prompt payments when they notify the employer of improper pay practices. If an employer does not make the proper payments once the issue is raised, then all similarly situated employees under the same manager lose their exemptions for the period the proper payments were not made. The Department does indicate that inadvertent improper deductions do not cause the loss of the exemption so long as corrections are timely made.

The regulations do allow state wage and hour laws to be more protective of employees. Accordingly, Wisconsin employers need to follow the State's more liberal wage and hour laws, *e.g.,* allowing the employees to leave the premises during unpaid meal breaks, requiring 30 minute unpaid meal breaks, etc.

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