

**FAIR LABOR STANDARDS ACT
New "Fair Pay" Rules
Eff. August 23, 2004**

The Department of Labor's new "Fair Pay" rules (29 C.F.R. § 541.0, *et. seq.*) have been adopted and become effective on August 23, 2004. These new rules clarify the exemptions found in section 13(a)(1) of the Fair Labor Standards Act ("FLSA") for executive, administrative, professional, outside sales, and computer employees. In the past, the determination of whether an employee was exempt as being in an executive, administrative or professional position was based upon a minimum salary, whether the salary was guaranteed without regard to the quality or quantity of work performed, and the specific job duties of the employee. Depending upon how much salary an employee received, the employee might be subject to a "short test" or a "long test" of duties. The salary levels in the rules have not been adjusted since 1975, and the job duties have not ben altered since 1949. So, even though there was a lot of controversy surrounding the adoption of the new rules, it does seem that some adjustments needed to be made to bring the rules current. In the current rules, the salary levels are unrealistically low. For example, an employee earning \$155/week (\$8,060/year) in an executive or administrative position is subject to the long test of duties. A professional earning \$170/week (\$13,000/year) is also subject to the long test of duties. An executive, administrative or professional employee earning \$250/week (\$13,000/year) is subject to the short test of duties. In the new rules, the minimum salary levels

have been raised. Now, the minimum salary or fee for all positions is \$455/week (\$23,660/year). With few exceptions (*i.e.*, teachers), executive, administrative, and professional employees must earn this minimum salary to qualify for the exemption. Employees paid less than the minimum salary are not exempt, regardless of what duties they perform or responsibilities they have. Employees paid more than the minimum salary will be exempt if they meet the job duties test. Employers no longer have to be concerned about whether to apply a short test of duties or a long test of duties. Now, there is only one job duties test for each exempt classification.

The new rule is reorganized into subparts for each category of exemption and for the common elements, such as the definitions. The new subparts are:

Subpart A – General Regulations

Subpart B – Executive Employees

Subpart C – Administrative Employees

Subpart D – Professional Employees

Subpart E – Computer Employees

Subpart F – Outside Sales Employees

Subpart G – Salary Requirements

Subpart H – Definitions and Miscellaneous Provisions

Executive Employees

An employee entitled to the executive employee exemption is one:

- Who is compensated on a salary basis at a rate of not less than \$455/week exclusive of board, lodging, or other facilities;
- Whose primary duty is management of the enterprise or of a customarily recognized department or subdivision of the enterprise;
- 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 to the status of other employees are given particular weight.

In addition, there is an executive owner exemption. Any employee who owns a bona fide 20% equity interest in the enterprise in which he/she is employed and who is actively engaged in management is an exempt executive regardless of salary.

Administrative Employee

An employee entitled to the administrative exemption is one:

- Who is compensated on a salary or fee basis at a rate of not less than \$455/week, exclusive of board, lodging, or other facilities;
- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The new rules provide examples of typical employees who will generally meet the administrative duties requirements. Those identified in the rules include insurance adjusters; financial services employees; a project team leader; human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization; an executive or administrative assistant with authority to handle matters of significance; and purchasing agents with authority to bind the enterprise. The rules also state that public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists, and similar employees generally do not meet the duties requirements for the administrative exemption.

The administrative exemption also applies to an employee compensated for services on a salary or fee basis at a rate of not less than \$455/week, exclusive of board, lodging, or other facilities, whose primary duty is performing administrative

functions directly related to academic instructions or training in an educational establishment or department or subdivision thereof. Examples of the educational administrative exemption are superintendents or other heads of school systems and any assistants responsible for administration of curriculum, quality and methods of instruction, measuring and testing the learning potential and achievement of students, and the like and academic counselors who perform work such as administering school testing programs, assisting students with academic problems, and advising students concerning degree requirements.

Professional Employees

An employee entitled to the professional exemption is one:

- Who is compensated on a salary or fee basis at a rate of not less than \$455/week, exclusive of board, lodging, or other facilities;
- Whose primary duty is 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; or

Requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

The professional exemption includes teachers, tutors, instructors, and lecturers in the activity of imparting knowledge and who are employed and engaged in this activity as a teacher in an educational establishment in which the person is employed, regardless of salary.

Computer Employees

The section 13(a)(1) exemption for a professional applies to computer employees who are compensated on a salary or fee basis at a rate of not less than \$455/week, exclusive of board, lodging, or other facilities. Also the section 13(a)(17) exemption for an employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker applies if the employee is compensated on an hourly basis at a rate of not less than \$27.63/hour. Under either section of the Act, the exemption only applies to computer employees whose primary duty consists of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employees exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

Outside Sales Employees

Any employee whose primary duty is making sales¹ or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client/customer and who is customarily and regularly engaged away from the employer's place of business in performing his/her primary duty. No salary requirements pertain to this exemption.

Miscellaneous

Keep in mind that a job title alone is not sufficient to determine exempt status. You must first look to the minimum salary basis and then to the job duties specified for the particular exemption. All of the important words and phrases contained in the rules are defined by the rules. Read the definitions and use them in making your exemption determinations.

Under the rules, "blue collar workers," or those workers who perform work involving repetitive operations with their hands, physical skill, and energy will never be exempt employees regardless of how highly compensated they are. For example, non-management employees in maintenance and construction, electricians, mechanics, plumbers, craftsmen, operating engineers, and the like are non-exempt employees no matter how much they earn. In addition, police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, EMTs, ambulance personnel, rescue workers,

¹ A "sale" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition. 29 U.S.C. § 203(3)(k).

hazardous materials workers and similar employees, regardless of rank or pay, are not exempt employees if they are performing work such as preventing, controlling, or extinguishing fires; rescuing fire, crime, or accident victims; preventing or detecting crime; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining, and apprehending suspects; detaining or supervising suspected and convicted criminals, including ones on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

There is also a special exemption for highly compensated employees. Any employee who has a total annual compensation of at least \$100,000 is exempt under section 13(a)(1) if he/she customarily and regularly performs any one or more of the duties of an executive, administrative, or professional employee. “Total annual compensation” must include at least \$455/week paid on a salary or fee basis and may also include commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned during a 52-week period. It does not include board, lodging, or other facilities; payments for medical insurance or life insurance; contributions to retirement plans; and the cost of other fringe benefits.

These rules will be effective on August 23, 2004. It is not too early to be conducting a thorough review of each position in your organization to determine whether it is or is not an exempt position under the new Fair Pay rules.