

NEW FEDERAL OVERTIME RULES ARE IN EFFECT

DECEMBER, 2004

The Wage and Hour Division of the Department of Labor (DOL) recently implemented its final rule concerning exempt status of executive, administrative, professional, outside sales and computer employees published in the Code of Federal Regulations (29 CFR Part 541). A copy of the rules are available on the Department of Labor's website (<http://www.dol.gov>).

The preamble to the regulations sets forth a summary of the major changes and their economic impact. In general, the new rules expand the number of workers eligible for overtime by increasing the annual earnings threshold from \$8,060 per year to \$23,660 or less. According to the Department of Labor, this strengthens overtime for 6.7 million low wage salaried workers and includes 1.3 million salaried white collar workers who are not eligible under the current regulations. Below are highlights of some of the most significant changes.

MINIMUM SALARY REQUIREMENTS

All employees who earn a salary of less than \$23,600 per year must be paid overtime. The minimum salary needed to be considered an exempt employee is \$455 a week or \$23,660 a year. This minimum amount is referred by the DOL as the "standard" test and it replaces the old long and short test that applied to different salary levels for different exemptions.

POLICE, FIRE AND EMT

The new rules specifically state that the overtime exemptions do not apply to managerial police officers, firefighters, paramedics, emergency medical technicians and similar public safety employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crime; conducting investigations or inspections for violations of law; performing surveillance; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports and similar work.

COLLECTIVE BARGAINING AGREEMENT

The new law clarifies that employers may exceed the minimum salary standard in collective bargaining and that employers must also comply with state laws providing a higher minimum wage or other protections.

BLUE COLLAR WORKERS

The rule provides that exemptions from overtime do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, and physical skill and energy such as that performed by carpenters and electricians.

HIGHLY COMPENSATED EMPLOYEES

Under the new law, employees earning at least \$100,000

per year may be exempt if they customarily and regularly perform exempt duties and they are paid at least \$455 per week on a salary or fee basis.

DISCIPLINARY SUSPENSIONS FOR EXEMPT EMPLOYEES

An employer may now impose on an exempt employee an unpaid disciplinary suspension of one or more full days for infractions of workplace conduct rules. Such rules might include rules against sexual harassment, violence, alcohol, drug abuse and violations of state and federal laws. Partial day deductions are still prohibited.

EMPLOYEES WHO ARE PART OWNERS

Employees who own at least a 20% equity interest in the business are exempt only if they are "actively engaged in its management."

EXECUTIVE EXEMPTION

The final rule requires that an exempt executive must have authority to hire or fire or make recommendations as to hiring, firing, advancement, promotion or any other change of status that are given particular weight. The new rules, however, add that the executive's recommendation have some "particular weight." The employee must also supervise two or more employees and have other indicia of managerial control. The regulations provide further guidance regarding the term "management functions" and include planning and controlling the budget. The new law eliminates the sole charge exception for independent establishments or separate branches. This executive test applies not without limitation to salaried restaurant and store managers.

ADMINISTRATIVE EMPLOYEE EXEMPTION

The final rule provides that in order to be an exempt administrative employee, the employee's primary duty must be the performance of office of non-manual work directly related to the management or general business operations of the employer or the employer's customers. Second, that an employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. Section 541.203 addresses specifically the following occupations: insurance claims adjusters; financial services industry employees; "team leadership", executive assistants, human resources managers, purchasing agents, inspectors and others.

PROFESSIONALS

Under the new rules, a licensed practical nurse or other similar health care employee does not qualify as an exempt professional. (The law relating to registered nurses remains the same.) Under the new rules, the duties of an exempt

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FEDERAL OVERTIME RULES IN EFFECT (CONT.)

professional include primary work requiring: (1) advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or (2) invention or originality in a recognized artistic or creative field. Also, the rule eliminates the requirement that the employee engage in tasks, the results of which cannot be standardized. Consistent exercise of discretion and judgment is still required. The provision that prohibited an employee from spending more than 20% of his or her time on activities that were not an essential part or unnecessarily incident to his or her professional work has been eliminated.

The law adds a new section that discusses the exempt status of specific occupations such as registered or certified medical technologists, dental hygienists, physician's assistants, accountants, chefs, paralegals, athletic trainers, funeral directors or embalmer and nurses (the statute distinguishes between RN's and LPN's).

COMPUTER EMPLOYEE EXEMPTION

Computer employees are no longer in the administrative section of the rules. Computer employees to be exempt are no longer required to consistently exercise discretion and judgment and the exemption is no longer limited to work related to "software functions." Under the new rules, an exempt computer employee's work may involve either: (1) application of system analysis, techniques and procedures or (2) system/program development and design. The regulations continue to provide that exempt computer employees may be paid either on a salary basis or at an hourly rate of not less than \$27.63 per hour.

OUTSIDE SALES EMPLOYEE EXEMPTION

An outside sales employee is exempt from overtime if their "primary duty" is outside sales activities and they engage in those sales customarily and regularly. The new rule eliminates the requirement that the sales employee spend at least 80% of their time on outside sales activities and related tasks.

A SAFE HARBOR FOR CORRECTING IMPROPER DEDUCTIONS

The new law provides that improper deductions that are either isolated or inadvertent will not result in loss of the exemption to any employee subject to such improper deductions, if the employer reimburses the employee's for any improper deductions. The statutes further provides, however, that if an employer has the "actual practice of making improper deductions, an employer will lose the exemption only for 'the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for actual and proper deductions'", but only if the employer: (1) has a clearly communicated policy that prohibits pay deductions, (2) has a complaint mechanism, (3) reimburses employees for improper deductions and (4) makes a good faith commitment to comply in the future. The best evidence of such a policy, according to the DOL, is a written policy.

Eileen K. Husband

Ms. Husband heads our firm's labor and employment group. Please contact her at (734) 261-2400 or via e-mail at ehusband@cmda-law.com for answers to questions you may have on the new federal overtime rules.

ATTORNEYS JOIN FIRM

The firm is pleased to announce that the following attorneys have recently joined our firm.

RIVERSIDE, CALIFORNIA

Sarah Overton joined our Riverside, California office and concentrates her practice on Insurance Defense, General Civil Defense, Public Entity Defense and Appeals and Writs.

Her teaching experience includes teaching *Intellectual Property* at California Baptist College and being a featured speaker on *Document Production* at various seminars for paralegals.

She is a member of the San Bernardino County Bar Association (Chairperson of the Lawyer Referral Service); is a Board Member and Legal Advisor to Friends of Prospect Park; and is a Legal Advisor to First United Methodist Church of Redlands.

Ms. Overton received a Juris Doctor from San Diego School of Law (1992) and a Bachelor of Arts degree in Theatre from California State University (1986). She can be reached by calling (951) 276-4080 or via e-mail at soverton@cmda-law.com.

Michael J. McNeil focuses his practice on workers' compensation, social security law, personal injury, criminal law and domestic law. He has over 30 years of experience in workers' compensation.

He received a Juris Doctor degree (1973) from Golden Gate School of Law and a Bachelor of Arts degree in History (1968) from University of California at Santa Barbara. From 1963 to 1966 he served as a medi-

cal specialist in the U.S. Army- Special Forces. Mr. McNeil can be reached by calling (951) 276-4080 or via e-mail at mmcneil@cmda-law.com.

PHOENIX, ARIZONA

Donald S. Smith focuses his practice on business law, primarily in areas involving transactions including commercial, financial and real estate transactions, acquisitions, franchising and international licensing. Prior to joining the firm, he served as Senior Counsel to ConocoPhillips and Circle K Stores Inc. and their predecessors for a combined total of more than 16 years. He practiced primarily in the areas of acquisitions and dispositions, marketing, procurement, franchising and international licensing.

He is a member of the State Bars of Arizona and Montana; American Bar Association (member of various subcommittees, Section of Business Law); and the ABA Forum on Franchising. He has been a faculty member for the International Franchise Association, ABA Forum on Franchising; Arizona Bar Association; Montana Bar Association; Maricopa County Bar Association; Western Association of Equipment Lessors; and the American Association of Equipment Lessors.

Mr. Smith received a Juris Doctor and a Master of Science degree from the University of Montana and a Bachelor of Arts degree in General Business from Carroll College in Helena, Montana. Mr. Smith is an Of Counsel attorney affiliated with our Firm and can be reached by calling (602) 207-5073 or via e-mail at dsmith@cmda-law.com.

T. Joseph Seward, Managing Partner

PARTNER WINS CASE FOR WESTERN MICHIGAN MUNICIPALITY

Richard Winslow, a partner in our Grand Rapids office, recently defended a city in western Michigan against claims of racial profiling. Eight jurors unanimously agreed that all police officers acted properly when they began their investigation of a brutal assault and robbery that occurred in an isolated area of a ravine. Having scant information to begin their search for five suspects, the officers immediately began to search for anyone who possibly matched the limited description. As the investigation continued, three names were provided, including the name of one of the Plaintiffs. Five youths were picked up near the scene of the assault, and identified by the victim as having hit him on the head from behind, knocking him to the ground, then kicking, punching and robbing him of over two hundred dollars. It later appeared that the victim was expecting to buy drugs from the Plaintiffs.

The Plaintiffs blamed their troubles on the police, who they characterized as racists. One of the Plaintiffs testified he had been a good student and was “not the kind of person who got into trouble” before moving to the Defendant city. Grades from his previous school showed he failed most of his subjects and was frequently disciplined for misbehavior. He, his younger brother and another Plaintiff sued three officers and the City claiming they were singled out, arrested and prosecuted because of their race. They pointed out that one of the white suspects was not prosecuted for the assault (he was, however, charged with withholding information). The officer in charge of the investigation testified that the white teenager was not prosecuted for the assault because the victim had retracted his statement identifying him. Charges were dropped against everyone, including the three Plaintiffs because the victim stopped cooperating with the prosecution.

Suing two other officers, the younger brother also claimed he was frequently a suspect in criminal investigations. One month after the first incident, he was unsuccessfully prosecuted for curfew violation, resisting arrest and being a minor in possession of intoxicants. His attorney argued that being in the company of a 17-year-old friend met the requirements of the City curfew ordinance and that he didn’t resist “that much” and that the police couldn’t prove he had alcohol. In the civil rights trial, it was shown that the curfew ordinance requires that a person under 16 be accompanied by an adult, over the age of 18. The jury was not permitted to hear that all three were under juvenile probation orders that forbid the 17-year-old plaintiff from associating with either of the brothers. The claim of “selective enforcement” was made on the fact that the white resident of the property where the curfew violation occurred, was not charged with furnishing alcohol to minors, but she did tes-

tify that she was arrested and charged with being a minor in possession of alcohol. The younger plaintiff was unable to attend trial due to probation/parole restrictions placed upon him by a court in Florida. The jury found in favor of one officer, and the court dismissed the claims against the other officer.

A third claim arising out of yet another arrest of the older brother was dismissed by the Honorable Richard Enslen of the United States District Court, Western District of Michigan, because the Plaintiff was convicted on one of the two charges he was arrested for, and no evidence of “selective prosecution” existed for the jury to consider.

The Plaintiff relied upon Michael Cosgrove as a “police expert” from Florida, who claims a Ph.D. in police supervision and discipline from LaSalle University. Attorney Winslow discovered the “Ph.D.” was not from the highly regarded, LaSalle University in Pennsylvania, but from a diploma mill in Louisiana that operated under that same name until it was forced to cease doing business by the federal government. Cosgrove admitted he had no idea of the credentials of his “doctoral advisor” whom he had never even met. The Plaintiff argued that the lack of a valid Ph.D. did not affect the expert’s expertise, but Attorney Winslow argued that it demonstrated a profound lack of intellectual integrity. The trial judge disagreed. Following closing arguments, but before telling the jurors to begin deliberation, Judge Enslen personally vouched for the reputations of the witness and the bogus LaSalle University.

Attorneys summarized the four days of testimony in 2 ½ hours. The Plaintiffs’ attorney requested over \$57,000 damages for racial “profiling,” false arrest and because he claimed the City provided inadequate training to its officers on the subject of cultural diversity, which caused the police to violate their civil rights. He further suggested the jury could add \$100,000 punitive damages, if it thought it was merited.

Richard Winslow urged the jurors to begin deliberation by frankly discussing their feelings about race before considering whether race played any part in the officers’ decisions and actions. He argued that although the Plaintiffs may truly feel they were arrested because of their race, evidence did not show the Defendants were so motivated; and emphasized that the same laws applied to everyone, regardless of cultural, ethnic and racial differences. The jury took seven hours to complete deliberations since there were many Plaintiffs, Defendants and claims to be considered. The jurors unanimously agreed that all police officers acted properly when they began their investigation of a brutal assault and robbery.

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