

Overtime Pay Laws

by Jack K. Merrill

It was a long time coming, but last summer people on both sides of the political aisle agreed to overhaul the federal overtime regulations. A law was enacted and new rules took effect on August 24, 2004.

Some people believe the changes will cause many employees to lose overtime pay benefits, but it remains to be seen whether this is true. One thing is clear: Federal overtime laws have changed, and employers across the nation must familiarize themselves with the new provisions and conduct internal evaluations to ensure they comply.

Violations

Companies that fail to follow this law can be investigated by the U.S. Department of Labor (DOL) and may be subject to large back-pay orders, double damage awards, and orders to reimburse employee legal fees. The DOL is serious about this. In fiscal year 2003, it collected more than \$182 million in back wages arising from overtime and minimum-wage payment violations alone, and assessed more than \$3 million in penalties.

If you are an employer, you need to be aware that the DOL has the power to take a single employee's complaint and convert it into an investigation of your entire work force. The department can force you to open your wage records for a general review that could find overtime, minimum-wage, recordkeeping, or other alleged violations. If it finds an overtime pay violation, the DOL can require back pay for the two prior years, or three years if it decides the transgression was intentional.

Hourly vs. Salaried Workers

While hourly employees are entitled to overtime, paying workers a weekly salary does not in and of itself exempt them from overtime eligibility. As of August 2004, any employee earning less than \$455 weekly is entitled to overtime pay, regardless of the type of work he performs. For any time worked beyond 40 hours in a given week (defined as a consecutive pay period of seven 24-hour days), employees must receive 1½ times their regular pay rates. (For the purposes of calculating overtime, the hourly pay for salaried employees is determined by dividing their weekly salary by 40 hours.)

White-collar categories. Compliance is more complex when you have white-collar employees who make more than \$455 per week. When it comes to these employees, the DOL focuses on three categories of workers: executive, admin-

istrative, and professional. One rule that applies to all three groups is that employees who receive a salary of more than \$100,000 per year are automatically exempt from overtime. Beyond that, however, the three categories have different guidelines.

Executive Employees

To qualify as an executive who is exempt from overtime pay, an employee must meet the following general criteria:

- ✓ The salaried employee must be paid no less than \$455 per week.
- ✓ The employee's primary work must relate to managing all of a business or a recognized, established division of the business.
- ✓ The employee must regularly direct the work of at least two full-time workers or their equivalent.



- ✓ The executive employee must have the authority to hire and fire the employees he supervises or must play an important role in personnel matters.

The DOL defines management of a business as work that includes such tasks as interviewing and training new employees; setting pay rates and work schedules; disciplining workers; reviewing employee performance; and exercising control over the purchase of materials, equipment, supplies, and the like.

In sum, executives are employees who make key decisions about a business's direction. They are generally top-level workers who exercise broad independent judgment in important areas of business operation, though they need not be in sole control of all matters.

Titles don't matter. Calling someone an executive or giving him an executive title does not make him one for purposes of overtime pay. To be an executive, the employee has to perform the kind of executive functions listed above. An employee who performs trade work or answers to a supervisor who is not at the very top of the company would not normally be considered an executive.

Administrative Workers

Administrators are also exempt from overtime pay requirements, and their duties can be said to complement those of the executives and other managers they commonly serve. To qualify for this exemption, the following must be true of an administrative worker:

- ✓ Like an executive, an administrator must receive a salary of at least \$455 weekly.
- ✓ The worker's primary duty must be office or nonmanual work that relates to management of the business operations of an employer or its customers.
- ✓ The employee must exercise discre-

tion and independent judgment on significant matters.

Of the three major white-collar exceptions to overtime rules, the ones concerning administrative workers may be the trickiest to apply. That's because it's not always easy to determine if the employee exercises sufficient discretion on matters that "relate to" operations management.

According to the DOL, the administrator's work must be "directly related to assisting with the running or servicing" of the business. The areas of responsibility that fall under this phrase might include taxation, budgeting, quality control, and health and safety issues. The employee who deals with these issues exercises the requisite independent judgment if he compares or evaluates potential courses of conduct and makes decisions about the direction the business takes.

In the event of a dispute, the inquiry would focus on whether the employee has the authority to make decisions that significantly affect the business. To qualify for exemption from overtime pay, the administrator would have to formulate policy, carry out major assignments, or have the authority to make serious financial decisions. Workers will not fall into this category if their primary job is to follow orders from above.

Management jobs. As with other exempt white-collar workers, the analysis for managers focuses on the primary duties performed by the employee. The standard examples of exempt administrators are executive assistants and human-resource managers. In the construction world, this category of exemption might apply to production managers, project managers, and site supers. It could also apply to a bookkeeper, provided he had discretion on matters of budgeting, financing, and accounting.

Manual work. The administrative exemption probably would not apply


to lead carpenters, even though they perform some supervisory duties. Trade work is a primary part of the lead carpenter's job and people who regularly do manual work are not exempt from overtime.

It's worth noting that the occasional performance of manual work would not necessarily cost someone his exempt status. For example, on smaller job sites, it's not unusual for a manager to sweep the floor or help the crew unload a truck. Doing this does not entitle him to overtime if his primary responsibility is to supervise the employees who normally do the work.

Professional Workers

Like executives and administrators, professionals must earn a weekly salary of \$455 or higher to be exempt from overtime pay rules. In addition, the employee must meet the following criteria:

- ✓ The worker must work primarily in areas that require advanced knowledge.
- ✓ The advanced knowledge must be in a field of science or learning.
- ✓ To qualify for the professional exemption, the employee must have undergone a prolonged course of specialized intellectual instruction.

Professionals are now relatively easy to identify. They generally work as accountants, engineers, and the like, and possess a recognized professional status. Though those performing creative work may be exempt under this category of workers, tradespeople and others who might previously have been considered professionals based on their high skill levels now clearly fail the exemption test because they do not meet the formal educational requirement. 

Jack K. Merrill counsels small businesses on employment matters and dispute resolution for Kushner & Sanders LLP in Wellesley, Mass.