

# White Collar Overtime Exemptions: Fair Pay and Beyond...

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## “Fair Pay” Regulations: An Introduction

**T**he federal wage and hour law, the Fair Labor Standards Act (FLSA), has been a familiar mainstay for subject employers. Since the 1930's, changes in the law and implementation of its regulations have been few and far between, perhaps due to the politically charged issues inherent in the law. Indeed, it took months of drafting and re-drafting by the U.S. Department of Labor (DOL) and thousands of public comments before the most recent regulatory changes saw the light of day. In fact, the new regulations barely survived the political wrangling designed to scuttle—or at least delay—the changes. Nonetheless, on August 23, 2004, the DOL's “Fair Pay” regulations took effect. The changes in the regulations are significant, and all employers covered by the FLSA will need to be familiar with the new rules.

## Goodbye “Long Test” and “Short Test”

The Fair Pay regulations represent the DOL's efforts to streamline the overtime exemptions and bring them in line with current economic realities. Notably, the DOL has eliminated the familiar “long test” and “short test” from the wage and hour lexicon. Instead, each of the white collar exemptions contains a

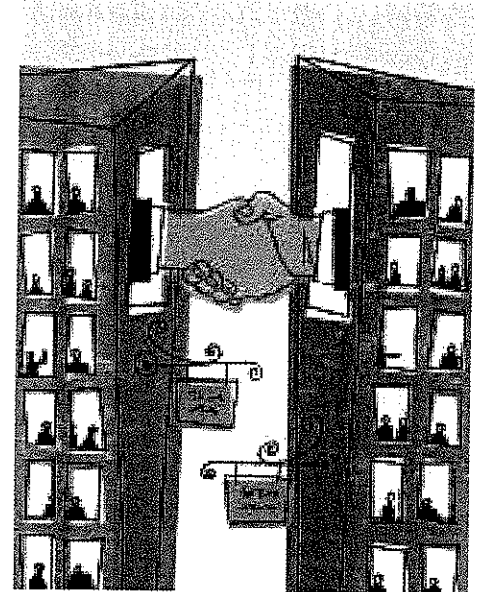
single “duties” test generally applicable to all employees earning at least \$455 per week. At a minimum, this will have the effect of substantially raising the salary threshold for exempt employees.

## “Salary Basis” Is Alive and Kicking

In addition to the duties tests that must be satisfied for each exemption, white collar employees must generally be paid on a salary basis in order to be exempt. According to DOL regulations, a “salary basis” of payment anticipates that an employee will receive a predetermined amount of compensation each pay period, regardless of the quality or quantity of the employee's work. The DOL's regulations have allowed deductions from an exempt employee's salary, but only in limited circumstances.

The Fair Pay regulations make two substantial changes in this area. First, the DOL will allow an employer to reduce an exempt employee's salary in increments of a day or more for suspensions imposed in good faith for violations of workplace conduct rules. Previously, employers could not suspend employees without pay for less than a full work-week, unless the suspension was for a violation of a safety rule of major significance. Thus, the new rules afford employers more flexibility in disciplining exempt employees.

Second, the new regulations create



a “safe harbor” for employers who make improper salary deductions. Under the safe harbor, an employer may implement a clearly communicated policy that prohibits unlawful deductions from an exempt employee's salary; includes a complaint mechanism for bringing improper deductions to the attention of management; provides for the reimbursement of employees who suffer improper deductions; and provides that the employer will make a good faith commitment to avoid improper deductions after they are brought to management's attention. If the employer adopts such a “safe harbor” policy, it will not lose an overtime exemption under the FLSA for any employee unless it “willfully” violates the policy by continuing to make improper deductions after receiving an employee's complaint.

## Highly Compensated Employees: No More Free Lunch

Changes to the economy over the last decade have resulted in the escalation of wages required to recruit and



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obtain highly skilled employees who may not perform all the "duties" necessary to qualify for a white collar exemption. As a result, unhappy employers have been faced with the situation of paying overtime—at the statutory rate of one and one-half times the employee's regular rate of pay—for hours worked beyond a forty-hour work week by employees who are very well compensated for their work. In response to this problem, the Fair Pay regulations contain a "highly compensated employee" exemption. Under the exemption, an employee whose total annual compensation is at least \$100,000 is exempt if the employee also "customarily and regularly" performs any one or more of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee. While the DOL retreated from an earlier position of making the exemption applicable to less highly paid employees, the highly compensated exemption may come as welcome relief to many employers.

### Forecast: Continued Uncertainty

According to the DOL, its Fair Pay regulations were designed to eliminate much of the uncertainty surrounding white collar exemption issues. One might wonder whether regulations that produced hundreds of pages of commentary by the DOL have accomplished that goal. Moreover, it is clear that many of the issues that have tormented employers in the past will not disappear. For example, after initially dispensing with the requirement that exempt administrative employees exercise "discretion" and "independent judgment" on matters of significance, the DOL retained the requirement. This is an issue that employers will continue to struggle with in classifying exempt employees.

Some of the uncertainty left by the

Fair Pay regulations cannot be laid at the feet of the DOL. Under the FLSA, employees are entitled to the benefit of the FLSA or applicable state law, whichever is more beneficial. In Oregon, employers have had to reconcile the federal and state overtime exemption rules to ensure that both are satisfied. At this point, it is unclear what, if any, changes the Oregon Bureau of Labor and Industries will make in response to the federal Fair Pay regulations. For the time being, Oregon employers will not be able to use safe harbor policies or highly compensated employee exemptions to avoid liability under state law. Obviously, Oregon employers will have to carefully monitor state administrative activity in this area.

### Final Words of Caution

Overtime exemption issues continue to warrant careful attention by Oregon employers and their legal counsel. Employees have increasingly utilized the collective action procedures under the

FLSA and more traditional class action rules to make overtime exemptions—and unpaid overtime—the focus of explosive, business-threatening litigation. Allegations of overtime violations under state and federal law are typically combined with claims of wage payment violations under Oregon law to create added potential liability. Thus, it is essential business practice for employers to use the new Fair Pay regulations as an opportunity to review their overtime classifications and audit their other payroll practices to avoid potential disaster. ☉

*Editor's note: Since this article was written, the House of Representatives has voted to withhold funding for U.S. Department of Labor enforcement of the Fair Pay regulations. The Senate is considering similar measures. Nonetheless, the President has promised to veto any legislation containing provisions seeking to overturn the new rules.*