



LABOR AND EMPLOYMENT

BALCH & BINGHAM LLP

BULLETIN April 27, 2004

Alabama • Georgia • Mississippi • Washington, D.C.

DEPARTMENT OF LABOR PUBLISHES NEW RULES ON OVERTIME

On April 20, the Department of Labor issued the long-awaited regulations revising the tests used to determine who is entitled to overtime under the Fair Labor Standards Act (“FLSA”). The new rules, which become effective in August, provide greater clarity and ease of application in assessing which employees are exempt under the FLSA.

New Minimum Salary Levels

The biggest change is the revision to the salary requirements for white collar employees, which mandate overtime for all employees earning less than \$455 a week, or \$23,660 annually.

New Duties Tests for White Collar Employees

The new rules replace what were known as the long and short duties tests for the white collar exemptions with standard duties tests. The standard duties tests vary depending on whether the individual is an executive, professional, or administrative employee. For convenience, we have included a chart showing the changes in the tests.

Executives

The new duties test for executives adds an additional requirement. For an employee to be exempt as an executive, he or she must have the authority to hire or fire other employees or provide recommendations to hire or fire that are given particular weight.

Administrative Employees

Under the new test for the administrative employee exemption, an administrative employee’s *primary* duty must include the exercise of discretion and independent judgment. Under the old short test, an employer was only required to show that the administrative employee’s duties included, among other things, work requiring the exercise of discretion and independent judgment.

Professional Employees

The new duties test is virtually unchanged from the old test.

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Computer Employees

The new test for computer employees is more specific than the old rule and focuses more closely on what computer employees actually do on a daily basis. Under the new rule, an employee who makes more than \$455 a week will be considered exempt if his or her primary duties consist of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or (2) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

Highly Compensated Employees

Highly compensated employees making more than \$100,000 a year are deemed to be exempt employees provided they customarily and regularly perform at least *one* of the exempt duties set forth in the duties tests for executive, administrative, and professional employees.

Disciplinary Pay Docking

In the past, an employer was prohibited from docking an exempt employee's pay for disciplinary problems unless the employer docked a whole week's pay. The new rules allow pay docking for violations of company policies (i.e., sexual harassment or safety) on daily intervals without the employer running the risk of losing the exemption. The new rules also clarify how to dock an exempt employee's pay when the employee takes Family Medical Leave Act leave by allowing the employer to deduct a proportional share of the employee's salary. For example, if an employee takes four hours of FMLA leave in a given week, the employer may pay the employee 90% of her salary for that week.

Employees Guaranteed Overtime

Finally, the new rule specifies that employees in certain jobs like public safety, nursing are guaranteed overtime as nonexempt employees, and "blue collar" workers are also guaranteed overtime as nonexempt employees under the new rule.

We will be providing more details on the new regulations in the coming weeks.

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COMPARISON OF MINIMUM SALARY LEVELS FOR WHITE COLLAR EXEMPTIONS

Earnings	Old Regulations	New Regulations
Less than \$155/week	Guaranteed Overtime	Guaranteed Overtime
\$155 to \$249.99/week	Long Duties Test	Guaranteed Overtime
\$250 to \$454.99/week	Short Duties Test	Guaranteed Overtime
\$455/week to \$100,000/year	Short Duties Test	Standard Duties Test
\$100,000/year or more	Short Duties Test	Highly Compensated Test

COMPARING THE DUTIES TEST FOR EXECUTIVE EMPLOYEES

	Old Short Test	New Standard Test
Salary Level	\$250/week	\$455/week
Duties	1) Primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and 2) customarily and regularly directs the work of two or more other employees.	1) Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; 2) customarily and regularly directs the work of two or more other employees; and 3) 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 of status of other employees are given particular weight.



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COMPARING THE DUTIES TEST FOR ADMINISTRATIVE EMPLOYEES

	Old Short Test	New Standard Test
Salary Level	\$250/week	\$455/week
Duties	1) Primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and 2) includes work requiring the exercise of discretion and independent judgment	1) Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and 2) primary duty includes the exercise of discretion and independent judgment with respect to <i>matters of significance</i> .

COMPARING THE DUTIES TEST FOR PROFESSIONAL EMPLOYEES

	Old Short Test	New Standard Test
Salary Level	\$250/week	\$455/week
Duties	1) Primary duty consists of 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 and study; and 2) includes work requiring the consistent exercise of discretion and judgment; <i>or</i> Primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	1) Primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or 2) primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.



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COMPARING THE DUTIES TESTS FOR COMPUTER EMPLOYEES

	Old Short Test	New Standard Test
Salary Level	\$250/week	\$455/week
Duties	1) Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; 2) primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering; and 3) work requires the consistent exercise of discretion and judgment.	The exemptions apply only to a computer employee whose primary duty consists of: 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2) 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; 3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4) a combination of the aforementioned duties, the performance of which requires the same level of skills.



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