

Special points of interest:

- New Overtime Rules Issued—120 day to comply
- Webcast with Tammy McCutchen, Administrator Wage & Hour
- Featured Client— The Sarasota Opera
- Wage Basis Test Changes
- Duties Tests Combined

2004

The Human-side

J. ASHCRAFT AND ASSOCIATES, INC.

FLSA Rules Change: 120 days to comply

As advised over the past four months, the proposed overtime rule change is here.

For months, the proposal by the Secretary of Labor to modernize the overtime provisions of the Fair Labor Standards Act has been a topic for major posturing among the political parties. The threats, however, to prevent the Secretary from publishing new rules by not providing the funding necessary in the departmental budget, fell flat as the Senate passed an omnibus spending bill by a 65 to 28 vote. That bill included \$11.8 billion to support the DOL's activities, including the revamping of white-collar overtime rules.

As a result, the Secretary of Labor finalized the rules to update and clarify regulations defining 'white-collar' exemptions under the FLSA.

On April 23, 2004, those rules were published in the Federal Register making the rule changes final and effective 120 days from the date of publishing.

We will devote most of this issue to the rule changes.



Most important to the changes is the new salary basis test. In addition, the former short test is eliminated, a new professional exemption is created, and new docking of salaried employee's pay is permitted. Finally, the proposed safe harbor rules came through intact, and the highly compensated and ownership definitions were redefined.

While the controversy thrives, all-in-all the changes were minor except for the wage basis test. We will discuss it all on following pages.

Key consideration? Each employee's exemption stands on its own. Titles don't matter.

Webcast with W & H Administrator McCutchen

Ms. Tammy D. McCutchen, Administrator of the Wage and Hour Division of the Department of Labor, took some time on April 23rd to discuss with members of SHRM the new overtime rules. The main idea behind the rules is to modernize a system that had not been essentially changed since 1949.

Ms. McCutchen emphasizes

the biggest change is the salary basis test. The duties tests combined the old long and short tests. However, some of the most challenging language problems, initially set aside in the proposal, for instance, the administrative duties test of discretion and independent judgment, have been put back in the regulations for lack of a better term.

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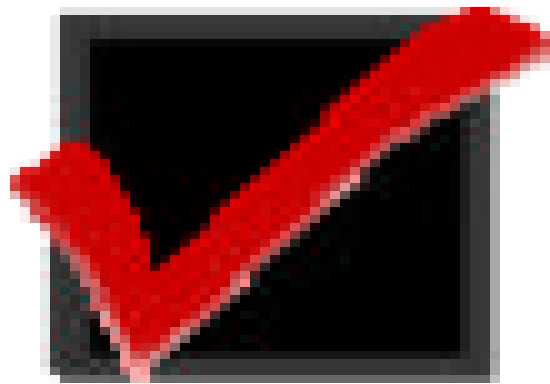
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Salary Basis Test

New rules carry a new salary basis test. The old test required a salary of \$155 per week for Executives and Administrative employees and \$170 per week for professionals. With a salary of \$250 per week a short duties test was acceptable. The new rules carry only one salary basis test and that is \$455 per week. A word of caution, the initial proposal carried a salary basis test of \$425 per week. Therefore, the final rules increased the salary test by \$30 per week.

The salary basis test is untouchable. However, for administrative and professional employees the salary basis test may be met on a 'fee basis'. In all cases, the salary basis test must be met prior to applying the duties tests for the respective exemption.

The salary basis test simply means that any employees not making a salary of \$455 per week, that is \$23,660 annually in direct wages, may not be classified as exempt regardless of job and title. Therefore, if you have an operation where you pay the Manager, for example, \$400 per week, and a non-discretionary bonus does not provide the additional monies to equal the



\$23,660 income, that 'manager' must be paid overtime for all hours worked in excess of 40 in a work week even though the duties test is met.

Therefore, two precautions to take seriously: to be exempt an employee must be on a guaranteed salary; meeting the duties test without meeting the salary test will not make an employee exempt. In the same light, meeting the salary test and not meeting the duties test in its entirety will not qualify an employee for exempt status.

As a result, every employer should perform a minimum of a wage/hour audit, including job descriptions. Once you know who is eligible by salary, then it is time to look at the duties tests to determine exempt status.

"You can't hold a man down without staying down with him".

-Booker T. Washington-

In the News

ITEM: New FMLA allows salaried employee pay docking. Deductions from pay are permissible when an exempt employee is: absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employee receives as a jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infraction. Also, an employer is not required to pay the full salary in the initial or terminal week of employment or for weeks in which an exempt employee takes unpaid leave under the FMLA.

ITEM: Safe harbor provision of the new rules. If an employer has a clearly communicated policy prohibiting improper deductions and including a

complaint mechanism, reimburses employees for any improper deductions, and makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

ITEM: New OT rules permit "fee basis" for administrative, professional, and computer employees. The salary basis test must still be applied. However, that salary basis may be on a fee basis rather than on the salary basis. If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis." A fee is normally paid for a unique job, rather than for a series of jobs repeated a number of times and for which identical payments repeatedly are made. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week if the employee worked 40

Featured Client: The Sarasota Opera Sarasota, Florida

A historic theater in the heart of Sarasota, Florida is the home of the Sarasota Opera. One of the smallest cities in the world to have its own dedicated Opera House, the Sarasota Opera is the hub of this culturally diverse city.

The Opera's Executive Director is Ms. Susan Danis and its Artistic Director is Maestro Victor DeRenzi. Together they have placed the Sarasota Opera, and its Winter Festival, on the operatic map. Opera lovers from around the world journey to Sarasota from late January through March to see and hear the magnificent performances by the company of internationally recruited singers.

The Opera supports a year round youth program. This year they are presenting an original opera commissioned by the Sarasota Opera. During the season, the Apprentice program recruits about 24 trained voices and provides them with real life operatic experience on the stage. The



apprentices take on secondary roles and are the outstanding chorus for which the house is recognized. A second tier of performers are the Studio Artists. They number around 12 and sing the secondary leads. The principal artists, recruited from around the world, have extensive operatic experience singing in some of the larger and better known Opera companies such as the San Francisco, Chicago Lyric, and New York City operas.

Under the direction of Maestro DeRenzi, the Sarasota Opera is in the midst of performing the entire Verdi repertoire. A stickler for detail and

tradition, Maestro DeRenzi will have performed every Verdi opera, original and revised, with the 2013 performance of Aida.

This year marks the 47th year of the Sarasota Opera. We are very proud to include Ms. Danis, Maestro DeRenzi, and the dedicated year round staff as friends and clients.

"The greatest lesson in life is to know that even fools are right sometimes".

-Winston Churchill-

Duties Test

When performing the duties test it is essential to know that all the must be "yes".

The new duties tests are a combination of the old long and short tests. Before, if the employee earned a salary of \$250 per week or more a short form duties test could be applied. That is no longer true. While the new tests change very little, they include some questions taken from the old long test. It is essential to answer each question with a great deal of thought and honesty. Being wrong can cost not only back pay but the courts can award damages as well.

Administrator McCutchen said in a web-cast that there are more class action suits filed claiming pay misapplication than all the discrimination suits combined.

Executive exemption comes with \$455 per week salary; primary duty managing an enterprise or a customarily recognized department or subdivision; customarily directs the work of two or more other full-time employees or equivalent; AND must have the authority to hire or fire or suggestions or recommendations to hire, fire, advance, promote or any other status change of

other employees must be given particular weight.

Administrative exemption carries the \$455 per week salary, or *fee basis*; primary duty of office or non-manual work directly related to the management or general business operation or customer; AND exercising discretion and independent judgment.

Learned Professional must earn \$455 per week salary or fee basis; primary duty performing work of advanced knowledge which is predominantly intellectual in character and includes consistent exercise of discretion and judgment; advanced knowledge must be in a field of science or learning; AND advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Creative Professional must comply with all the above professional tests, compensated at least \$455 per week salary or fee basis; AND perform work requiring invention, imagination, originality or talent in a recognized field or artistic or creative endeavor.

Computer exemption is unchanged. But pay must be \$455 per week or \$27.63 per hour.

Definitions: FLSA

EXECUTIVE:

Primary Duty - means principal, main, or major or most important duty that the employee performs.

Two or More - means two full-time employees or equivalent. One full-time and two half-time is equivalent.

ADMINISTRATIVE:

Primary Duty - means most important duty performed based on all the facts in each particular case with emphasis on the character of the employee's job as a whole.

Directly Related - assist in running or assist with running or servicing the business.

Employer's Customer - an employee may qualify if the primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Advisors, consultants may thus be exempt.

Discretion and Independent Judgment—generally free from immediate direction or supervision, authority to make an independent choice. The fact that the judgment is reversed after review does not mean the employee is not exercising discretion or independent judgment.

Matters of Significance - refers to the level of importance or consequences of the work performed

PROFESSIONAL:

Advanced Knowledge - means work which is predominantly intellectual in character and which includes work requiring consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical or physical work. Use knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning - include law, medicine, theology, accounting, engineering, architecture, teaching, physical, chemical, or biological sciences, pharmacy and other recognized professional status as distinguishable from mechanical or skilled trades where knowledge could be fairly advanced, but is not a field of science or learning.

Prolonged Course of Specialized Intellectual Instruction - is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession.

Recognized Field of Artistic or Creative Endeavor - includes music, writing, acting, and the graphic arts.

Invention, Imagination, Originality or Talent - this distinguishes the creative from work that primarily depends on intelligence, diligence and accuracy.

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