

THE NEW FLSA OVERTIME REGULATIONS

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I. SCOPE OF ARTICLE

On April 20, 2004, the United States Department of Labor (DOL) issued new regulations relating to the executive, administrative, professional, outside sales, and computer exemptions under the Fair Labor Standards Act (FLSA). The regulations update, clarify, and in some cases, redefine those employees who qualify for an exemption from the overtime pay requirements of the FLSA. The new regulations became effective August 23, 2004 and replace salary and duties tests found in regulations dating back more than 50 years.

The DOL has repeatedly stated that it will enforce these new regulations vigorously. Accordingly, while employers may find it slightly easier to classify an employee as exempt in some areas, employers now face additional hurdles in other areas, tending to make classifying employees as exempt more challenging than under the old regulations. Compliance with the new regulations will be particularly challenging for small businesses, which lack the resources of larger companies but are nonetheless typically required to comply with the FLSA. This paper provides a summary of the new regulations, with a particular emphasis on how they will impact small businesses.

II. SALARY LEVEL TEST

The FLSA requires that most employees in the United States be paid at least the federal minimum wage (currently \$5.15 per hour) for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet three tests: (a) a salary level test; (2) a salary basis test; and (3) a job duties test. For most employees, the minimum salary level required for exempt status is \$455 per week. This amount must be paid "free and clear" and may be paid in equivalent amounts for periods longer than one week: biweekly (\$910); semimonthly (\$985.83); or monthly (\$1,971.66).

III. HIGHLY COMPENSATED TEST

The regulations contain a special rule for "highly-compensated" workers who are paid total annual compensation of \$100,000 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:

- the employee earns total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
- the employee's primary duty includes performing office or non-manual work; and
- the employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

The required total annual compensation of \$100,000 or more may consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump-sum, make-up amount to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

“Customarily and regularly” means greater than occasional but may be less than constant, and includes work normally and recurrently performed every workweek but does not include isolated or one-time tasks. Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee normally and recurrently directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

IV. SALARY BASIS TEST

A. General Requirements

To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least \$455 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour.

Being paid on a “salary basis” means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee’s predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.” If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

B. Circumstances in Which the Employer May Make Deductions from Pay

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 employees receive as 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 infractions. 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 Family and Medical Leave Act.

C. Effect of Improper Deductions from Salary

The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions. Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

D. Safe Harbor

If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) 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.

E. Fee Basis

Administrative, professional and computer employees may be paid on a “fee basis” rather than on a 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 payment is generally 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 hours. For example, an artist paid \$250 for a picture that took 20 hours to complete meets the minimum salary requirement since the rate would yield \$500 if 40 hours were worked.

V. DUTIES TEST

A. Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- the employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;

- the employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- the employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

1. Key Definitions

The new regulations define several key terms that are part of the test for exempt status. Some of the key terms for the executive exemption are as follows:

- “Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.
- Generally, “management” includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.
- The phrase “a customarily recognized department or subdivision” is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.
- The phrase “customarily and regularly” means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.
- The phrase “two or more other employees” means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and

regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

- Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

2. Exemption of Business Owners

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

B. Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- the employee's primary duty must be 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
- the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

1. Key Definitions

The new regulations define several key terms that are part of the test for exempt status. Some of the key terms for the administrative exemption are as follows:

- To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service

establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

- An employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Thus, employees acting as advisors or consultants to their employer’s clients or customers — as tax experts or financial consultants, for example — may be exempt.
- In general, "the exercise of discretion and independent judgment" involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee’s particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee’s decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.
- The term “matters of significance” refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee’s duties may cause serious financial loss to the employer.

2. Educational Establishments and Administrative Functions

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than \$455 a week and whose primary duty is performing

administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities.

C. Professional Exemption

The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees: learned professionals and creative professionals.

1. Learned Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- the advanced knowledge must be in a field of science or learning; and
- the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

a. Key Definitions

The new regulations define several key terms that are part of the test for exempt status. Some of the key terms for the learned professional exemption are as follows:

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

- Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.
- The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

2. Creative Professional Exemption

To qualify for the creative professional employee exemption, all of the following tests must be met:

- the employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week; and
- the employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

a. Key Definitions

The new regulations define several key terms that are part of the test for exempt status. Some of the key terms for the creative professional exemption are as follows:

- One requirement for the creative professional exemption is that the employee perform work requiring "invention, imagination, originality or talent." This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations. Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and

record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.

- "Recognized fields of artistic or creative endeavor" include such fields as, for example, music, writing, acting and the graphic arts.

b. Specific Occupations

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers.

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

D. Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- the employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- the employee's primary duty must consist 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.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

E. Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- the employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- the employee must be customarily and regularly engaged away from the employer's place or places of business.

The salary requirements of the regulation do not apply to the outside sales exemption. An employee who does not satisfy the requirements of the outside sales exemption may still qualify as an exempt employee under one of the other exemptions allowed by Section 13(a)(1) of the FLSA and the Part 541 regulations if all the criteria for the exemption is met.

1. Key Definitions

The new regulations define several key terms that are part of the test for exempt status. Some of the key terms for the outside sales exemption are as follows:

- "Sales" includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition. It includes the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.
- Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies. The word "services" extends the exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.
- The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

- An outside sales employee makes sales at the customer’s place of business, or, if selling door-to-door, at the customer’s home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business, even though the employer is not in any formal sense the owner or tenant of the property.
- Promotion work may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee’s own outside sales or solicitations is exempt work. However, promotion work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.
- Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Several factors should be considered in determining whether a driver has a primary duty of making sales, including a comparison of the driver’s duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor’s license when required by law, the description of the employee’s occupation in collective bargaining agreements, and other factors set forth in the regulation.

VI. MISCELLANEOUS ISSUES

A. Blue-Collar Workers

The exemptions provided by FLSA Section 13(a)(1) do not apply to manual laborers or other “blue-collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt “blue-collar” employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training.

FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under Section 13(a)(1) of the FLSA nor the regulations at 29 CFR Part 541, no matter how highly paid they might be.

B. Veterans

Veterans are not exempt administrative, executive or professional employees under Section 13(a)(1) based upon their status as veterans. Military training, for example, generally is not sufficient to meet the requirements for the professional exemption. No amount of military training will satisfy the requirements of the learned professional exemption because the exemption applies only to employees who are in occupations that have attained recognized

professional status, which requires that an advanced specialized academic degree is a standard prerequisite for entrance into the profession. No amount of military training can turn a “blue collar” occupation or a technical field into a profession. For example, a veteran who has received substantial military training as a veteran but works on a manufacturing production line or as an engineering technician is not exempt under Section 13(a)(1) from the minimum wage and overtime requirements of the FLSA.

C. Financial Services Industry Employees

Employees in the financial services industry generally meet the duties requirements for the administrative exemption and are not entitled to overtime pay if their duties include work such as collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer’s financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption. In applying the exemption, it does not matter whether the employee’s activities are aimed at an end user or an intermediary. The status of financial services employees is based on the duties they perform, not on the identity of the customer they serve.

D. Nurses

Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt.

Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations, and are entitled to overtime pay.

E. Technologists and Technicians

Technologists and technicians, such as engineering technicians, ultrasound technologists, licensed veterinary technicians, avionics technicians and other similar employees are not exempt under Section 13(a)(1) from the minimum wage and overtime requirements of the FLSA because they generally do not meet the requirements for the learned professional exemption. Technologists and technicians do not meet these requirements for the learned professional exemption because they do not work in occupations that have attained recognized professional status, which requires that an advanced specialized academic degree is a standard prerequisite for entrance into the profession.

F. Other Laws & Collective Bargaining Agreements

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws,

regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

VII. ALTERNATIVES TO TRADITIONAL OVERTIME ARRANGEMENTS

A. Belo Plans

Section 7(f) of the FLSA specifically authorizes employers to pay non-exempt employees who actually work irregular hours a guaranteed weekly amount. See 29 U.S.C. § 207(f). Such a plan is commonly referred to as a Belo Plan. The applicable United States Department of Labor regulations describe Section 7(f) as "an exemption from the overtime provisions of the [FLSA]" 29 C.F.R. § 778.404.

Under a Belo Plan, an employer pays an employee a fixed salary for all hours worked up to a maximum number of hours not to exceed sixty in one week. Any hours worked above the agreed upon maximum must be compensated at a rate of not less than one and one-half times the agreed upon regular rate. A Belo Plan will only be valid if the employer pays the employee pursuant to a plan that actually meets all the requirements of the exemption. 29 C.F.R. § 778.404 Such a plan satisfies applicable federal laws and regulations if the employer complies with each of the following conditions:

- the employee's duties must necessitate irregular and fluctuating hours of work;
- the contract must specify a regular rate of pay of not less than the statutory hourly minimum applicable to the employee;
- the contract must specify compensation of not less than one and one-half times the regular rate for all hours worked in excess of forty hours;
- the contract must provide for a weekly guarantee of pay; and
- the weekly guarantee, on the basis of the rates so specified, must cover no more than sixty (60) hours.

In addition to the above requirements, an employer may not make deductions from the guaranteed pay for absences in workweeks in which the employee does any work at all, regardless of how little.

B. Fluctuating Workweek Arrangements

Fluctuating workweek agreements allow employers to pay non-exempt employees a fixed and unvarying weekly salary for all straight time worked in any given week irrespective of the number of hours worked. The requirements of a fluctuating workweek agreement are as follows:

- affected employees must be paid on salary basis pursuant to an understanding that the salary represents all straight time pay irrespective of how few or how many hours the employee works in a given week, and such employees must have work schedules that result in them working a fluctuating number of hours per week;
- the effective pay rate for all workweeks must not be less than the applicable minimum wage;
- the employee must receive additional compensation for all overtime hours at a rate not less than one-half ($\frac{1}{2}$) his regular rate of pay; and
- the “regular rate of pay” is determined by dividing the number of hours worked in the workweek into the weekly salary.

Each of these requirements, along with recommendations for complying with them, is discussed more fully below.

Federal regulations require that there be a “clear mutual understanding” between the employer and the employee regarding the parties’ agreement to utilize a fluctuating workweek arrangement. See 29 C.F.R. § 778.114. Thus, an employer intending to utilize a fluctuating workweek arrangement should first obtain signed written agreements with all employees covered by such an arrangement.

Under such an arrangement, affected employees must be paid their fixed salary even if they work less than forty (40) hours in a particular week. Moreover, in weeks in which affected employees work more than forty (40) hours, they must be paid their fixed salary plus overtime compensation at a rate of at least one-half ($\frac{1}{2}$) times the employees’ “regular rate” for each hour worked over forty (40) in a given week.

When a fluctuating workweek arrangement is in place, an employee’s “regular rate” of pay is determined by dividing the actual hours worked into the fixed salary. For example, suppose an employee under a fluctuating workweek arrangement is paid a fixed salary of \$400 per week. If the employee worked forty (40) hours during a given week, the employee’s regular rate for that week would be \$10 per hour (\$400 divided by 40 hours equals \$10/hour). If, during a subsequent week, the employee worked fifty (50) hours, the employee’s regular rate of pay for that week would be \$8 per hour (\$400 divided by 50 hours equals \$8/hour). Thus, the employee’s regular rate of pay would fluctuate from week to week, depending on the number of hours the employee worked in a given week. At no time can an employee’s regular rate be less than the applicable minimum wage.

Computation of the extra half-time compensation owed to non-exempt employees who work overtime hours (over 40 hours in a given week) under fluctuating workweek agreements is made simple through use of a Department of Labor generated co-efficient table. This table obviates the need to calculate the employee’s regular rate for each workweek prior to computing the overtime pay. Instead, if an employee works overtime hours under a fluctuating workweek agreement, the employer simply multiplies the employee’s fixed weekly salary by the decimal equivalent that appears in the table corresponding to the hours (and fractions thereof) worked by

the employee in that particular workweek. The product of that multiplication is the dollar amount of half-time compensation owed to the employee for the overtime hours worked in that week. This amount is then added to the fixed weekly salary to yield the total compensation to be paid to the employee for that particular workweek.

The applicable federal regulations do not prohibit an employer from paying more than half-time for overtime hours but do provide that, “where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for non-overtime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.” See 29 C.F.R. § 778.114.

In sum, an employer wishing to utilize a fluctuating workweek arrangement, should first obtain signed written agreements with all employees covered by such an arrangement. Next, the employer should be certain that the arrangement is structured in such a manner that: (1) the effective pay rate for all workweeks is no less than the applicable minimum wage, (2) covered employees receive a fixed salary irrespective of how few or how many hours the employees work in a given week, and (3) covered employees receive additional compensation for all overtime hours at a rate not less than one-half ($\frac{1}{2}$) their regular rates of pay. As set forth more fully above, the safest way of complying with the third requirement is by following the coefficient table when calculating overtime due.

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