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MTAS

Municipal Technical Advisory Service

*In cooperation with the
Tennessee Municipal League*



June 8, 2004

FAIR PAY INITIATIVE

(Section 13(a)(1) of the Fair Labor Standards Act):

The Executive, Administrative, Professional, and Computer Employees Exemptions Revisited

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On April 23, 2004, the U.S. Department of Labor issued final regulations revising the executive, administrative, and professional exemptions under the Fair Labor Standards Act. The regulations provide revisions, updates, and clarifications to Section 13(a)(1) (the white-collar exemption) and Section 13(a)(17) (computer employee exemption) of the Fair Labor Standards Act.

The new rules, known as the Fair Pay Initiative, have the potential of expanding the number of workers eligible for overtime by nearly tripling the salary threshold, and specifically establishing that the exemptions do not apply to certain jobs. The new regulations also contain new definitions regarding which employees must be paid a minimum wage and premium overtime wages when they work more than 40 hours a week. The new rules are effective August 23, 2004.

Section 13(a)(1) of the Fair Labor Standards Act provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity. Section 13(a)(17) provides an exemption from the minimum wage and overtime requirements for computer system analysts, computer programmers, software engineers, and other similarly skilled computer employees.

The Fair Pay Initiative modifies the old exemption tests for each category of exempt employees by adopting a single standard duties test for each exemption category, rather than the existing long and short duties tests. Previously, each category had a long and short test, each with a salary component and a duty component. The new rules provide three standards to be met for the exemption to apply: (1) the employee must be paid a predetermined and fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed (the salary basis test); (2) the amount of salary paid must meet minimum specified amounts (the salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties (the duties test).

This amended section of the FLSA contains a revised salary requirement. The minimum salary level was last updated in 1975. Now, to qualify as an exempt executive, administrative, or professional

employee, an employee must be compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities. The requirement will be met if the employee is compensated biweekly on a salary basis of \$910, semimonthly on a salary basis of \$985.83, monthly on a salary basis of \$1,971.66, or annually on a salary basis of \$23,659.92. The shortest period of payment that will meet this compensation requirement is one week. In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than \$27.63 an hour or annually on a salary basis of \$57,470.40.

An employee with total annual compensation of at least \$100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's duties. This exemption applies only to employees whose primary duty includes performing office or non-manual work.

As in the old regulations, an employee will be considered to be paid on a salary basis if the employee regularly receives, each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed. An exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked unless subject to the exemptions provided by the law. Generally, the same exceptions to this provision apply.

The new regulations allow an employer to provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirements if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis. This additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half, or any other basis), and may include paid time off.

To qualify for exemption under the regulations, an employee's primary duty must be the performance of exempt work. The term "primary duty" means the principle, 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.

The revised regulations clarify that an employee employed in a bona fide executive capacity is an employee (1) who is compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities; (2) whose primary duty is management of the employing enterprise or of a customarily recognized department or subdivision; (3) who customarily and regularly directs the work of two or more other employees; and (4) who 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.

An employee employed in a bona fide administrative capacity is an employee (1) compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities; (2) whose 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 (3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

An individual employed in a bona fide professional capacity is an employee (1) compensated on a salary or fee basis at a rate of not less than \$455 per week, and (2) whose primary duty is 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 or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

Employees who work as computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption as professionals under the regulations. The exemption applies to any computer employees compensated on a salary or fee basis at a rate of not less than \$455 per week and to any computer employee compensated on an hourly basis at a rate not less than \$27.63 an hour. There are specific duty requirements to qualify for the exemption.

The regulations make it clear that the exemptions do not apply to blue-collar workers who perform work involving repetitive operations with their hands, physical skill, and energy. Such non-exempt 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, not through the prolonged course of specialized intellectual instruction. Non-management production line employees and non-management employees in 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 this part no matter how highly paid they might be.

The exemptions from overtime pay also do not apply to police officers, detectives, investigators, inspectors, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers, and similar employees regardless of rank or pay level who perform work such as preventing, controlling, or extinguishing fires of any type; rescuing fire, crime, or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of laws; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising

suspects and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

The new rules are available in the Federal Register, and a text version is available online at <http://www.dol.gov/fairpay>. For further information about the Fair Labor Standards Act, visit the Departments Wage and Hour Division Web page at <http://www.dol.gov/>. An online audio video seminar is also available on the Fair Pay Initiative Web site.

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