

BUSINESS RESEARCH YEARBOOK

**Global Business
Perspectives**

VOLUME XIII 2006

MARJORIE G. ADAMS

ABBASS ALKHAFAJI

EDITORS

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Editors

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I A B D

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PREFACE

This volume contains an extensive summary of most of the papers presented during the Thirteenth Annual Conference of the International Academy of Business Disciplines held in San Diego, California April 6 – 9, 2006. This volume is part of the continuing efforts of IABD to make available current research findings and other contributions to practitioners and academics.

The International Academy of Business Disciplines (IABD) was established eighteen years ago as a world wide, non-profit organization, to foster and promote education in all of the functional and support disciplines of business. The objectives of IABD are to stimulate learning and increase awareness of business problems and opportunities in the international market place and to bridge the gap between theory and practice. The IABD hopes to create an environment in which learning, teaching, research, and the practice of management, marketing and other functional areas of business will be advanced. The main focus is on unifying and extending knowledge in these areas to ultimately create integrating theory that spans cultural boundaries. Membership in the IABD is open to scholars, practitioners, public policy makers, and concerned citizens who are interested in advancing knowledge in the various business disciplines and related fields.

The IABD has evolved into a strong global organization during the past eighteen years, thanks to immense support provided by many dedicated individuals and institutions. The objectives and far-reaching visions of the IABD have created interest and excitement among people from all over the world.

The Academy is indebted to all those responsible for this year's program, particularly Ahmad Tootoonchi, Frostburg State University, who served as Program Chair, and to those who served as active track chairs. Those individuals did an excellent job of coordinating the review process and organizing the sessions. A special thanks also goes to the IABD officers and Board of Directors for their continuing dedication to this conference.

Our appreciation also extends to the authors of papers presented in the conference. The high quality of papers submitted for presentation attests to the Academy's growing reputation, and provides the means for publishing this current volume.

The editors would like to extend their personal thanks to Dr. Otis Thomas, Dean of the School of Business and Management, Morgan State University, for his support.

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IMPLICATIONS OF THE FAIRPAY OVERTIME INITIATIVE TO HUMAN RESOURCE MANAGEMENT

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ABSTRACT

Few labor issues are as polarizing as overtime rights. After years of study, discussion, public debate, and comment, the Department of Labor introduced sweeping changes to the Fair Labor Standards Act of 1938 (FLSA). Under the rubric of the FairPay Overtime Initiative (FPOI), the federal law addressing overtime went into effect on August 23, 2004. The FPOI clarifies employee rights to overtime pay for human resource managers as well as protecting employers from costly lawsuits. This paper gives an explanation of the initiative with implications for employees and employers. Key changes in the FLSA are highlighted and new exemption tests are detailed.

I. INTRODUCTION

The FLSA of 1938 requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and receive overtime pay at one and one-half times the regular rate for all hours worked over 40 hours in a workweek. Defined within the act are certain types of employees who are exempt from both minimum wage and overtime pay, i.e. if that worker is employed as a *bona fide* executive, administrative, professional, outside sales, or computer employee. These exempt categories are cumulatively referred to as the *white collar* exemption. To qualify for such exemptions the job description and/or employment contract must meet certain salary and job duties tests (FLSA, 1938). The past thirty years have seen these tests become outdated resulting in debate over the need to either pay overtime to exempt employees or to redefine exemption status (Khorsandi & Kleiner, 2001).

On April 24, 2004 the Wage and Hour Division of the United States Department of Labor (DOL) responded to these decades-old exemption descriptions with new regulations relating to *white collar* exemptions of the FLSA called the FPOI. The purpose of the new FLSA regulations was to modernize, update, and clarify the criteria for these exemptions and to eliminate legal problems that the prior regulations caused. This article presents a discussion of the rationale behind the new regulations, an explanation of the rules developed by DOL, and concluding comments regarding the implications and benefits of such regulations for employees and employers.

II. REASONS FOR INCREASED LITIGATION

Every president since Jimmy Carter has tried unsuccessfully to simplify federal overtime pay rules which are contained in the FLSA. The climate changed dramatically in the late 1990s primarily due to the increase in employee lawsuits brought under the Act against employers. Employees claimed they were being denied overtime benefits provided under the Act and were winning multi-million dollar judgments against their employers for non-compliance with the regulations (Becker, 2004; Crawford, 2004). The number of class-action suits based upon the provisions of the FLSA climbed from 31 in 1997 to 102 in 2003—over a 300% increase (“Judicial Business”, 2004). The result of such increased litigation is estimated to cost the economy more than \$2 billion annually (National Association of Convenience Stores, 2004).

Increases in wage and hour lawsuits can be attributed to the desire of employers to cut costs and increase productivity. Competitive pressures have forced companies across most industries to cut jobs and revamp their work force deployment, blurring the lines between employees authorized to receive overtime pay and those who are exempt. Because certain employees did not have to be paid overtime and could work unlimited hours without receiving any additional compensation, organizations began to increasingly classify employees as exempt under the FLSA when, in fact and by law, the employees should have been classified as nonexempt. In response to such organizational behavior, increasing numbers of managerial, administrative, sales, and temporary employees began filing high-visibility class-action lawsuits against employers for unpaid overtime.

Another driving force that contributed to the increase in lawsuits was that the FLSA regulations provided for significant attorneys’ fees in addition to the damages arising out of a misclassification or non-classification of employee(s). In many cases, the courts applied provisions allowing for double damages. Plaintiffs are now entitled to liquidated damages in an amount equal to the unpaid overtime on their FLSA claim (29 U.S.C. 216.b, 2004). The FLSA originally made such damages mandatory (*Overnight Motor Transportation Co. v. Missel*, 1942). However, the Portal-to-Portal Act (1947), made doubling discretionary rather than mandatory, by permitting a court to withhold liquidated damages in an action to recover unpaid minimum wages. Nevertheless, there is still a “strong presumption in favor of doubling” (*Walton v. United Consumers Club, Inc.*, 1986). It appears then that double damages are the norm; single damages the exception. The potential for attorneys’ fees being awarded in addition to damages, actual and double, thus attracted many attorneys to the FLSA litigation arena.

III. THE FAIRPAY OVERTIME INITIATIVE REVIEWED

To qualify for exempt status (i.e., exempt from paying overtime), employees generally must meet certain tests regarding their salary and job duties. More specifically, the DOL has outlined three tests in the FPOI which must be met by each *white collar* exemption category in order for him or her to qualify under the available exemptions to the FLSA requirements (FairPay: DOL’s, 2004). Under the regulations these tests, when correctly applied, determine which positions are eligible for exemption from overtime pay and which are not.

The first test is the *salary-basis test*. To be exempt from overtime pay, employees must be paid a pre-determined fixed salary (not an hourly wage) that is not generally subject

to reduction due to variations in quality or quantity of work performed. Salary is defined as including only the guaranteed portion of an employee's pay; not any benefits, bonuses, incentive payments, commissions, or other inducements. This definition of salary has long been the standard rule under federal overtime law and has not been changed with the new initiative. Also, the employee must be paid the full salary for any week in which he or she performs work, and the employee need not be paid for any work week when no work is performed. Furthermore, rates cannot be prorated for employees who work less than 40 hours per week.

The second test is the *salary-level test*. To be exempt from overtime, the new rules require that employees earn a minimum salary of \$455 a week, or \$23,660 a year. This is triple the prior minimum salary of \$155 a week, or \$8,060 a year. Examples of employees most likely to be affected include fast-food managers, office managers, and some retail floor supervisors. Additionally, the new proposed regulations provide for a new *white collar* classification referred to as *highly compensated* employees. These *white collar* employees who earn more than \$100,000 a year are generally exempt from overtime pay under the new law (29 C.F.R.541.602, Part 825, 2004).

The third and last required qualification is called the *duties test*. This test represents a major change to the Act and incorporates the most significant revision to the final FLSA regulations. The focus of the duties tests for exemption classification is based upon the employee's primary duty. Primary duty means the principal, main, major, or most important duty that the employee performs. Factors to consider when determining the primary duty of an employee include, but are not limited to: 1) the relative importance of the major or most important duty as compared with other types of duties; 2) the employee's relative freedom from direct supervision; 3) the relationship between the employee's salary and the wages paid to other employees for performance of similar work; and 4) the amount of time spent performing the major or most important duty (DOL, FLSA Overtime Security, n.d.).

IV. WHITE COLLAR EMPLOYEE EXEMPTIONS

All employment positions are presumed to be entitled to overtime pay unless the duties tests and the salary tests indicate that the position falls within one of the five job classifications identified in the Act as being exempt from overtime pay. To identify whether or not a *white collar* employee is exempt, that employee must fall within one of the following defined classifications: 1) executive (including sub-classifications of manager and business owner), 2) administrative, 3) professional (including learned and creative sub-classifications, 4) computer, and 5) outside sales personnel.

To qualify for the executive employee exemption, each of the following four conditions must be met: 1) the employee must be compensated on a salary basis at a rate not less than \$455 per week (\$23,660 per year); 2) the employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; 3) the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and 4) 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 (DOL, Fact Sheet #17B, 2004).

An exempt administrative employee is one “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 whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance” (29 C.F.R 541, 2004, p. 22137). The regulatory criteria that define this category include the following: 1) the employee must be compensated on a salary fee basis at a rate not less than \$455 per week; 2) 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 3) the employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (DOL, Fact Sheet # 17C, 2004).

An exempt professional employee must have a primary duty of performing office or non-manual work: 1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience; or 2) requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (29 C.F.R. 541.300(a) 2.i, ii, 2004). Such primary duty requirements have resulted in two designations for professional employees: *learned* and *creative*.

The new regulations provide a narrow interpretation for the specific classification of *outside salesmen*. To qualify as an outside sales employee and the exemption, the employee must meet the following qualifications: 1) the employee’s primary duty must be making sales as narrowly defined within the Act, or solicit purchase or service contracts or rental type contracts for the use of facilities for which a consideration will be paid by the client or customer; and 2) the employee must customarily and regularly be engaged away from the employer’s place or places of business (DOL, Fact Sheet # 17F, 2004).

The new regulations contain a separate subpart for the *computer professional* exemption. To qualify for the computer employee exemption, the following conditions must apply: 1) 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; 2) the employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled employee in the computer field performing computer-related duties (DOL, Fact Sheet # 17E, 2004).

V. CONCLUSION

An update of the overtime pay regulations contained in the FLSA is long overdue and the DOL’s FPOI is a reasonable solution to eliminating and correcting the existing deficiencies of the present FLSA regulations. The FPOI is definitive in its attempt to clarify and simplify the FLSA, eliminating highly litigated problem areas. In theory, the new regulations modernize the FLSA standards; represent a substantial improvement over past rules; and satisfy the debate over paying exempt employees for overtime by redefining exempt status and duties tests. After comparing the present regulations with the proposed regulations it is our contention that the update would be beneficial to both employees and employers. It is our belief that the FPOI is both beneficial to employers and employees, making it easier for employees to know their rights, for employers to understand their obligations, and for DOL to be able to aggressively enforce the FLSA (Boehner, 2004).

Knowledgeable and informed employees are the first line of defense against dishonest employers who seek to evade the requirements of the FLSA. Any new regulations should enable employees to more easily recognize when they are owed overtime pay and will reduce investigation and enforcement costs when violations occur (Kersey, 2004). The prior regulations are unnecessarily complicated, outdated, and do not benefit employees.

Employers will also benefit from clearer rules because they avoid the risk of legal confusion and costly litigation. Any new regulations should permit disciplinary deductions for violations of workplace misconduct rules, provided the deduction is pursuant to a uniformly applied, written, disciplinary policy. It is foreseeable that the number of FLSA lawsuits brought against employers will continue to increase unless abated by new and modernized regulations which are more definitive of the exempt classifications under the FLSA.

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