The U.S. FairPay Overtime Initiative

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Introduction

The Fair Labor Standards Act (hereinafter referred to as the FLSA or Act, 1938) requires that most employees in the U. S. 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 a 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 and the workers are called white collar employees. To qualify for such exemptions the job description and/or employment contract must meet certain salary and job duties tests. The past thirty years have seen these tests become outdated resulting in uncertainty and ambiguity in their application. On April 24, 2004 the Wage and Hour Division of the U. S. Department of Labor responded to these decades-old exemption descriptions with new regulations relating to white collar exemptions of the Act called the FairPay Overtime Initiative (hereinafter referred to as 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 paper presents a discussion of the rationale behind the new regulations governing which employees may be classified as “exempt” and, consequently, not paid overtime for working more than forty hours in a work week, an explanation of the rules developed by the U. S. Department of Labor, and concluding comments regarding the benefits of such regulations. This is important for non-U. S. organizations and managers who have employees working in the U. S. and who are therefore subject to U. S. laws regulating compensation of these workers since much costly litigation and monetary judgments awarded to employees have recently arisen due to errors in calculating overtime due certain individuals.

Background for Change

Problems with Prior FLSA Regulations

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 (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 (Administrative Office of the U. S. Courts, 2005). In 2003, over 31,000 complaints were filed with the U. S. Department of Labor resulting in over 342,000 employees receiving back wages and employers being assessed nearly $10 million in civil penalties (Missouri Business Resource Center, 2004). The result of such increased litigation is estimated to cost the economy more than $2 billion annually (National Association of Convenience Stores, 2004). Some noteworthy instances include:

1. Farmers Insurance lost a class action brought by 2,400 claims adjusters. The jury’s verdict against the company was $90 million for failure to pay overtime (Gaswirth, 2003);

2. A case involving 69,000 Wal-Mart pharmacists was reportedly settled out of court for $50 million (Davis, 2001);

3. SBC Pacific Bell telephone company paid $35 million to settle a suit brought by 1,500 engineers who claimed they worked 50 hours a week on average but were paid for only 40 (Hansen, 2003).
In addition to such large organizations, owners of small businesses were also being placed in financial peril for non-compliance. For example, an enterprise with only three (3) salaried employees that misclassified these workers as management exempt (when in fact the employees were not management and not exempt under the regulations) could be assessed penalties of nearly $100,000. Additionally, the small business could be liable for both back overtime wages to the employees and legal expenses. Employers with prior violations of FLSA provisions could also be charged criminally and face imprisonment for up to six months and substantial fines.

Reasons for Increased Litigation

Increases in wage and hour lawsuits can be attributed to the desire of employers to cut costs and increase productivity. Increased international competition has put significant economic pressure on domestic enterprises to either hold the line on labour costs or consider outsourcing—domestic or foreign. Such 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. These industries stretched the workweek well beyond the 40-hour boundary. 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 non-exempt. The classification of exempt employees to non-exempt status was a very attractive option for organizations wanting to reduce labour costs. In response to such organizational behaviour, increasing numbers of managerial, administrative, sales, and temporary employees began filing high-visibility class-action lawsuits against employers for unpaid overtime. Many of these suits resulted in multimillion-dollar settlements and much bad publicity (National Association of Convenience Stores, 2004).

Addressing the Need for Change

On March 31, 2003, after several years of study, the U. S. Department of Labor proposed numerous revisions to the FLSA which took into account more than 75,000 public comments the agency received. This large number was evidence of the interest these revisions generated. The U. S. Secretary of Labor, Elaine L. Chao, announced on April 24, 2004 the final regulations governing overtime eligibility. The requisite publication in the Congressional Record, the Bush administration implemented the new regulations called the FPOI on August 23, 2004. This move was welcomed by many businesses, business owners, and employers, but was bitterly opposed by organized labour.

The FairPay Overtime Initiative

The introduction of the FPOI was intended by the Bush Administration to not only stem the increasing litigation in the employment overtime arena, but also to provide an economic benefit to business and labour. Labor Secretary Chao indicated that the regulations would strengthen overtime benefits for 6.7 million American employees, including 1.3 million low-wage employees who were denied overtime under the old rules (U. S. Department of Labor, n. d. a). Employers, anxious to turn the tide on the growth of expensive lawsuits by employees claiming they have been unfairly denied overtime pay, largely favoured the administration’s overhaul of wage laws. Conversely, pro-labour groups, including the AFL-CIO (CNN Money, 2004) and the Economic Policy Institute (Eisenbrey, 2004), generally asserted that the rules would bar six million employees from getting overtime.

The changes to the Act raise the threshold salary requirements below which workers would automatically qualify for overtime. Additionally, employers can deny overtime to highly compensated employees who earn an annual salary of at least $100,000 and have minimal exempt duties.
and responsibilities. Under the new FPOI rules, job titles alone were deemed insufficient to establish exempt status for an employee but an individual’s primary duty was given considerable weight. These changes had been long-awaited and greatly anticipated since the duties tests under the prior regulations had not been substantially changed since 1949 (except for computer professionals) and the salary levels test under the existing regulations had not been increased since 1975. The sections below describe such tests in more detail.

**Three Tests to Qualify for Exempt Status**

To qualify for exempt status, employees generally must meet certain tests regarding their salary and job duties. More specifically, the U. S. Department of Labor 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 (U. S. Department of Labor, n. d. a). Under the regulations these tests, when correctly applied, determine which positions are eligible for exemption from overtime pay and which are not. Table I summarizes the tests and the changes in the regulations.

**Salary-basis test**

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.

**Salary-level test**

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).

**Duties test**

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. It is here where the test or rule gets complicated and controversial. The new duties test is designed to clarify eligibility based on the type of daily work an employee performs. Job classification, job title, and type of compensation no longer determine exempt status as they did in the past.

The focus of the duties tests for exemption classification is based upon the employee’s primary duty (U. S. Department of Labor, n. d. b). Primary duty means the principal, main, major, or most important duty that the employee performs. The 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. 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.

<table>
<thead>
<tr>
<th>Tests</th>
<th>Description of Provision</th>
<th>Change from Prior FLSA Regulation</th>
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<tbody>
<tr>
<td>1. Salary-basis test</td>
<td>Employee is paid a set salary</td>
<td>None</td>
</tr>
<tr>
<td>2. Salary-level test</td>
<td>1) Employee is paid minimum of $455/week or $23,660/year</td>
<td>1) Prior FLSA $155/week or $8,060/year.</td>
</tr>
<tr>
<td></td>
<td>2) Computer employees paid a minimum salary $455/week or $23,660/year or a fee of $27.63 per hour</td>
<td>2) New</td>
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<td></td>
<td>3) Highly compensated employees are designated as those earning $100,000</td>
<td>3) New</td>
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<td></td>
<td>—They perform “office or non-manual” work, and;</td>
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<tr>
<td></td>
<td>—They regularly perform any one or more of the exempt duties i.e.,</td>
<td></td>
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<tr>
<td></td>
<td>Executive, Administrative, or Professional</td>
<td></td>
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<tr>
<td>3. Duties test</td>
<td>Exempt status defined by duties according to specific employee categories: executive, administrative, professional, computer employees, and outside sales</td>
<td>Revised</td>
</tr>
</tbody>
</table>

While time is not the sole determinant factor, an employee who spends more than 50 percent of his or her time performing a specific activity can generally be said to have that activity as his or her primary duty. If the employee spends less than 50 percent of their time performing this duty the employee may still meet the primary duty requirement if other factors support the conclusion that this duty is the main or primary emphasis of the job (U. S. Department of Labor, n. d. b).

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. In making this determination the employer must look at both the salary and duties required of the position to decide if overtime is due the employee. 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.

Exemptions from the FLSA

The exemptions provided by FLSA Section 13(a)(1) apply only to the so called white collar employees who meet the salary and duties tests set forth in Part 541 of the regulations. This white collar de-
lineation, which has not changes with the new regulations, implies application only to management or upper tier employees in a business who wear white shirts and do not get dirty in the performance of their duties. The exemptions do not apply to manual labourers or other blue collar workers who perform work involving repetitive operations with their hands, physical skill, and energy in such areas as production, maintenance, construction, and similar occupations, no matter how highly paid they may be (U. S. Department of Labor, n. d. c).

<table>
<thead>
<tr>
<th>Employee Category</th>
<th>Tests Required</th>
</tr>
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<tbody>
<tr>
<td>Executive (Subpart B) Management</td>
<td>Salary-basis test; the salary-level test; and duties tests to include: customarily and regularly directs two or more full time employees (FTEs); has authority to hire, fire, or influence the status of the same FTEs; and manages a recognized department or subdivision of the enterprise (421.100) Salary-basis test; active in management and owns ≥ 20% equity interest in the enterprise. Salary-level test does not apply (541.101)</td>
</tr>
<tr>
<td>Business Owner</td>
<td>Salary-basis test; the salary-level test; and duties tests to include: Performs office or non-manual labor that is not on a manufacturing production line (541.200); and uses discretion and independent judgment (541.202).</td>
</tr>
<tr>
<td>Administrative (Subpart C)</td>
<td>Salary-basis test; the salary-level test; and duties tests to include: learned professionals, creative professionals, and teachers who perform office or non-manual labor (541.300). Some exceptions exist in the medical profession to the salary or fee-level requirement (541-303).</td>
</tr>
<tr>
<td>Professional (Subpart D)</td>
<td>Salary-level test at $455 per week and a fee-level test that requires the employee to be paid ≥ $27.63 per hour; will carry job titles such as computer systems analyst, computer programmer, software engineer or similarly skilled employee; consults with client for needs analysis; designs, develops, and implements computer systems based upon either user specifications or machine operating systems or some combination thereof. No longer required to exercise discretion or judgment (541.400).</td>
</tr>
<tr>
<td>Computer employees (Subpart E)</td>
<td>No specific salary-basis or salary-level tests required. Duties include: making sales and receiving pay from a client or a customer and customarily and regularly engaged away from employer’s place of business making sales or contracts.</td>
</tr>
<tr>
<td>Outside sales employees (Subpart F)</td>
<td>An exception to salary-level test requires the employee to be paid ≥ $100,000 per year where they customarily and regularly perform duties of executive, administrative, or professional employees (541.601).</td>
</tr>
</tbody>
</table>

Notes:

* New categories.
* Manual (blue collar) laborers are entitled to overtime no matter how highly paid. § 541.3(b) makes clear that police, fire fighters, paramedics, and other first responders are entitled to overtime if regularly involved in the customary duties of first responders and criminal justice.
The following sections provide a more comprehensive discussion of the five white collar exemptions (i.e., executive, administrative, professional, computer, and outside sales positions) and the tests required for exemption status relative to these classifications. Table II above provides a basic breakdown of the key categories and the three tests required for exemption status.

Executive employee exemption

To qualify for the executive employee exemption, each of the following four conditions must be met (U. S. Department of Labor, n. d. d): 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. While this requirement typically means that the employee must direct a total of 80 employee-hours of work, circumstances might justify lower standards, e.g., firms with standard workweek of 37.5 hours or 35 hours in which supervision of a total of 75 or 70 hours would be sufficient; 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. Generally, a manager's suggestions and recommendations must pertain to employees who the manager or executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have particular weight even if a higher level manager's recommendation has more importance and whether or not the employee has authority to make ultimate decisions as to an employee's change in status. This definition was derived by incorporating factors from numerous U. S. court decisions (e.g., Baldwin v. Trailer Inns, Inc.; Molina v. Sea Land Services, Inc.; Wendt v. New York Life Insurance Co.; Passer v. American Chemical Society; Wright v. Zenner & Ritter, Inc.; Kuhlmann v. American College of Cardiology; Marchant v. Sands Taylor & Woods Co.; Anderson v. Federal Cartridge Corp.).

Two categories of employees considered executives involve managers and business owners. One key requirement under the executive exemption is that the employee's primary duty must be management. For example, under the executive exemption a fast food manager must be involved in key staffing decisions like hiring, firing, and promoting in order to be deemed ineligible for overtime. Previously, that manager had to have the actual power to hire and fire employees in order to be considered exempt. This new standard test would provide extra protection to low-level supervisors. In order to remain exempt from overtime pay under the new regulations these managers must be given significant authority over an important aspect of their organizations' operations: the hiring, firing, and promotion of staff. Consequently, low-level supervisors will either gain real executive authority or receive overtime pay.

Under a new special rule for business owners, an employee who owns at least a bona fide 20% equity interest in the enterprise in which he or she is employed and who is actively engaged in its management is considered a bona fide exempt executive. The duties portion, which states that the owner must be active in the management of the business, was added after considering comments from the AFL-CIO (American Federation of Labor and Congress of Industrial Organizations, 2004). This protects an employee from being given a token level of ownership in a small business simply to work excessive hours at a fixed salary (FLSA, 1938, p. 22132).

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Administrative employee exemption

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." (Federal Register, 2004). The regulatory criteria that define this category include the following: 1) the employee must be compensated on a salary or 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 (U. S. Department of Labor, n. d. e). "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" (29 C.F.R. § 541.202(a)). A non-exhaustive list of administrative management fields include: tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, advertising, marketing, procurement, research, safety and health, personnel management and human resources, employee benefits, labour relations, public relations, government relations, computer network, Internet and database administration, and legal and regulatory compliance.

Many blue collar workers engage in conduct or hold positions as team leaders where they oversee and/or direct the work of other employees within the team. There has been much speculation that the leaders of millions of workplace teams would or could possibly be considered exempt as administrative employees under the regulations. Generally, teams are established to improve quality, safety, morale, or customer services, and are not per se supervisory. Team leaders generally have job descriptions that are not supervisory or managerial. Any supervisory function they may have is incidental to their job defined duties. Similarly, team leaders' duties fall outside the provisions of the administrative exemption (29 C.F.R. § 541.203 (c)). This essentially means that team leaders must perform primarily office or non-manual work that involves the exercise of discretion and independent judgment. The team leader provision should have little if any effect on blue collar workers who have minimal ancillary supervisory authority.

Professional employee exemption

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 endeavour (29 C.F.R. § 541.300(a) 2.i. ii).

Such primary duty requirements have resulted in two designations for professional employees: learned and creative. To qualify for the learned professional employee exemption, all of the following criteria must be met: 1) the employee must be compensated on a salary or fee basis at a rate of less than $455 per week; 2) 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; 3) the advanced knowledge must be in a field of science or learning; and 4) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction (U. S. Department of Labor, n. d. f).
These learned individuals include professionals such as lawyers, doctors, registered nurses, dental hygienists, athletic trainers, funeral directors, embalmers, executive chefs, CPAs, and engineers. However, technologists and technicians, beauticians, licensed practical nurses, bookkeeper, cooks, paralegals, and other skilled trades people are owed time-and-one-half and remain covered by the FLSA because possessing a specialized or advanced academic degree is generally not a prerequisite for entry into such occupations.

The second designation for professional exemption is the creative employee. To qualify for the creative professional employee exemption, both of the following tests must be met: 1) the employee must be compensated on a salary or fee basis at a rate not less than $455 per week and 2) the employee’s primary duty must be the performance of work requiring invention, originality or talent in a recognized field of artistic or creative endeavor (U. S. Department of Labor, n. d. f). These creative individuals include professionals such as actors, musicians, composers, certain painters, writers, cartoonists, essayists, novelists, and journalists whose primary duty is work requiring invention, imagination, originality or talent.

Both the current and new rules provide for a hybrid or special exemption within the creative exemption. Self-taught professionals, such as attorney Abraham Lincoln, who gain acceptance into a profession by apprenticeship, work experience, or individual study (this is the so-called Abe Lincoln exception) are provided exempt status within the regulations. Both the current and the new regulations offer the same verbatim examples: “the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry” (29 C.F.R. § 541.301 (d)).

Outside sales employee exemption

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 (U. S. Department of Labor, n. d. g). Additionally, “promotion 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” (29 C.F.R. § 541.503). Finally, the new regulations address the hotly-litigated topic of driver-salesmen and indicate that a driver-salesman can be exempt if the employee’s primary duty is sales and not primarily delivery of merchandise. Factors used by the Department of Labor (29 C.F.R. § 541.504) to determine exempt status for driver-salesmen include the following: 1) a comparison of the driver’s duties with those of other employees engaged as drivers and as sales-persons; 2) the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; 3) whether or not the driver has a selling or solicitor’s license when required by law; and 4) the description of the employee’s occupation in collective bargaining agreements.

Computer professional employee exemption

The new regulations contain a separate subpart for the computer professional exemption. Consistent with Congressional amendments to the FLSA in 1996, the U. S. Department of Labor has deleted the requirement that computer professionals consistently exercise discretion and judgment. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative regarding whether the position should be classified as exempt or not. Specifically excluded from this
exemption are individuals whose position includes the manufacture, repair, and operation of computers.

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 the duties described as: a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or b) 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; or c) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or d) any combination of a, b, and c which requires performance at the same level of skills (U. S. Department of Labor, n. d. h).

Qualification for this exemption is more complex and rigorous than the first reading of the regulations would suggest. Not only must the employee meet the earnings threshold but the primary performance or duties attributed to this employee must be as computer systems analyst, a programmer, software engineer, or other highly skilled worker in the computer field.

Highly compensated and other employee exemptions

While not listed specifically as a new category, the overtime initiative has added highly compensated employees and first responders as areas receiving special regulatory treatment. The new regulations provide for a streamlined exemption for highly-compensated employees who earn at least $100,000 gross per year (including base salary, commissions, and non-discretionary bonuses). Such employees will be automatically exempt from overtime pay if they also perform office or non-manual work and customarily and regularly perform one or more of the exempt duties contained in one of the five white collar exemptions listed above (29 C.F.R. § 541.601). Blue collar workers engaged in manual work making in excess of $100,000 are still covered by the FLSA and are entitled to overtime.

Likewise, first responder positions are covered by the FLSA and are entitled to overtime. Such first responders, even though vested with minimal management responsibility, generally will not qualify as exempt executives because their primary duty is not management. They are not exempt administrative employees because their primary duty is not 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. While some first responders have college degrees, they are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field or learning customarily acquired by a prolonged course of specialized intellectual instruction (U. S. Department of Labor, n. d. i).

First responder positions entitled to overtime pay include police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, 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 law; performing surveillance; pursuing, restraining, and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing
investigative reports; or other similar work (U. S. Department of Labor, n. d. i). It is virtually an impossibility to classify an employee exempt if a portion of the employee’s duties involve responding to emergency situations or supervising emergency situations.

Concluding Comments

An update of the overtime pay regulations contained in the FLSA is long overdue and the U. S. Department of Labor’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 act, eliminating highly litigated problem areas. In theory, the new regulations modernize the FLSA standards and represent a substantial improvement over past rules. After comparing the present regulations with the new regulations it is believed that any update would be beneficial to both employees and employers, making it easier for employees to know their rights, for employers to understand their obligations, and for the U. S. Department of Labor to be able to aggressively enforce the FLSA (Boehner, 2004).

Knowledgeable and informed employees are the first line of defence 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. The out-of-date rules have and will encourage litigation, thus draining economic resources from employers and employees alike. It is also our contention that high profile lawsuits and expensive litigation has the perverse effect of drawing attention away from low-wage employees who have the strongest need for overtime protection. Such litigation shifts consideration toward higher-paid employees who generate larger back-pay settlements from which employment lawyers can draw their fees rather than representing lower wage employees (Kersey, 2004). Clearer and simpler rules, by contrast, should lower enforcement costs to both the potential litigants and the U. S. Department of Labor and make it more practical for attorneys to accept cases involving low-wage 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. Without the enactment of the FPOI there is and will be great potential for continued increases in litigation with large monetary judgments. 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 Act.

In reviewing and applying the new regulations, employers doing business in the U. S. should remember the basic premise underlying the law: the U. S. government desires the creation of as many jobs as possible to be subject to overtime provisions so that a maximum number of people are employed resulting in increased economic spending power and an enhanced U. S. economy (Woodford, 2004).

References

29 C.F.R. § 541.102.

29 C.F.R. § 541.202 (a).

29 C.F.R. § 541.203 (c).

29 C.F.R. § 541.300 (a) 2 i. ii.
29 C.F.R. § 541.301 (d).
29 C.F.R. § 541.503.
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29 C.F.R. § 541.601.


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