

WHO'S EXEMPT? THE NEW FAIR LABOR STANDARDS ACT REGULATIONS

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I. OVERVIEW OF THE FAIR LABOR STANDARDS ACT.

- A. The Fair Labor Standards Act is the federal minimum wage and overtime law. The federal minimum wage currently is \$5.15 per hour. Minimum wage is rarely an issue, since labor market conditions generally dictate a higher wage.
- B. The general overtime requirement is that all work in excess of a workweek longer than 40 hours must be paid at not less than one and one-half times the employee's regular rate of pay. The Fair Labor Standards Act contains numerous variations, exceptions, and exemptions from this overtime pay requirement. Understanding these variations, exceptions, and exemptions is the key to avoiding most kinds of violations of the Act.
 - 1. Interpretations of the Fair Labor Standards Act come from a variety of sources. First, is the text of the Act itself. Second, regulations issued by the United States Department of Labor often are conclusive, because the Act itself authorizes the Secretary of Labor to interpret and enforce the Act. The Department of Labor also publishes formal opinion letters regarding overtime issues. Last but not least, federal and state court decisions usually, but not always, defer to the Department of Labor's interpretation.
 - 2. Keep in mind that when a violation is claimed, the employer has the burden of proving a job is exempt. Accurate job descriptions, while not determinative, go a long way toward meeting the employer's burden of proof.
- C. The Fair Labor Standards Act also permits states to establish a higher minimum wage or enforce a maximum workweek lower than the maximum provided by federal law. In Michigan, this usually presents no complications, because Michigan law generally tracks

federal law, and because Michigan law does not, by its own terms, apply to any employer who is subject to the Fair Labor Standards Act, unless application of the federal minimum wage would result in a lower minimum wage than provided by Michigan law.

II. THE OVERTIME EXEMPTIONS MOST COMMONLY AT ISSUE ARE THE SO-CALLED “WHITE-COLLAR” EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, AND OUTSIDE SALES EMPLOYEES.

- A. The Fair Labor Standards Act itself exempts from both minimum wage and overtime requirements any employee employed in a *bona fide* executive, administrative, professional, or outside sales capacity. The Act contains no definition of these exemptions. Instead, their scope is determined by the Secretary of Labor.
- B. Department of Labor Regulations defining the scope of these white-collar exemptions fall into two major categories. In part, the Regulations set forth “duties tests,” which define what sorts of job duties are executive, administrative, professional, etc. The second category of Regulations sets forth a “salary-basis test,” which generally requires that white-collar employees treated as exempt be paid on a salary of a fee basis.
- C. Until last year, the duties test regulations had not been significantly revised since 1949. The salary-basis test regulations had not been significantly revised since 1954.
- D. In some respects, the Regulations had become obsolete. For example, a salary threshold of \$155 a week for most employees covered by the white-collar exemptions was no longer even minimum wage for a full-time employee. The Regulations also contained short tests for “high salaried” employees who were making as little as \$250 per week. There had long been consensus that the Regulations were badly in need of an update, but attempts to do so bogged down in political disagreements.
- E. The old regulations also were obsolete because they were designed when it was easier to distinguish nonexempt production work from exempt office work. Nonexempt work was typically manufacturing, blue-collar production work. Exempt work was typically white-collar

office work. As the economy has moved away from manufacturing toward service and technology based work, it has become much more difficult to distinguish exempt from nonexempt work, especially where the administrative exemption is concerned. What was once nearly always exempt staff work now can be production work, leading to confusion over whether it is exempt.

- F. In 2003, the Department of Labor published a detailed proposal to significantly revise the Regulations covering the white-collar exemptions. The inevitable controversy ensued, but on April 23, 2004, the Department of Labor published its final revised rules. Although the 2004 final rules, which became effective August 23, 2004, are in some respects a less dramatic departure from the old rules than the 2003 proposal had been, the final rules still are the most significant changes in the white-collar exemptions in more than 50 years.

III. SUMMARY OF THE CHANGES IN THE WHITE-COLLAR EXEMPTIONS.

- A. The new Regulations raise the minimum salary for the white-collar exemptions (except outside sales employees) to \$455 per week, or \$23,660 per year. Employees who do not meet this pay threshold can no longer be treated as exempt, even if they perform the duties of an exempt employee.
- B. The old short tests for “high-salaried” employees have been replaced by a streamlined test for certain employees making \$100,000 per year or more, even if they otherwise would not qualify. To be exempt under this streamlined test, the employee:
1. Must receive at least \$455 per week on a salary or fee basis, with the rest paid in commissions or nondiscretionary bonuses or other nondiscretionary compensation (including salary- or fee-basis pay) for a total of at least \$100,000 per year;
 2. The highly compensated employee’s primary duty must include office or non-manual work; and
 3. He or she must customarily and regularly perform at least one of the duties or responsibilities of an exempt employee.

The Department of Labor emphasizes that the streamed-line test applies only to employees performing office or non-manual work and not to workers such as skilled trades workers no matter how highly paid they might be.

- C. The “sole charge” exemption from the percentage limitation on nonexempt work is eliminated.
- D. The Regulations concerning the salary-basis test are largely unchanged. Nevertheless, they do expand the circumstances under which a disciplinary suspension can be imposed on a salaried employee without destroying his or her exempt status. Under the old Regulations, an employer jeopardized a salaried employee’s exempt status by imposing an unpaid disciplinary suspension unless the suspension was for an entire workweek, or unless the suspension was for a safety violation of major significance, such as smoking in an explosives plant. Under the new Regulation, unpaid suspensions for disciplinary reasons may be imposed on exempt employees in daily increments, if pursuant to a written disciplinary policy that is applicable to all employees (exempt and nonexempt alike).
- E. The final rule does not change the administrative exemption in the way that had been proposed in 2003. The 2003 proposal would have deleted the much litigated “discretion and independent judgment” test and substituted a “position of responsibility” test. By 2004, the Department of Labor conceded that a “position of responsibility” test would do little to bring certainty and clarity to the test, so that was dropped and the “discretion and independent judgment” test was retained.
- F. On the same day that the Department of Labor published the final rules, it also published a 69-page Preamble that in some ways is more illuminating than the new rules themselves. For example, the Preamble contains a detailed discussion of the staff work versus production work dichotomy, indicating that for the administrative exemption, it should be deemphasized, that it is “ ‘one analytical tool’ that should be used ‘toward answering the ultimate question’ and is only determinative if the work ‘falls squarely on the production side of the line.’ ”

IV. TABLES SUMMARIZING THE TESTS FOR THE WHITE-COLLAR EXEMPTIONS UNDER THE OLD REGULATIONS AND NEW REGULATIONS.

Where the old rules had a long test and a short test for employees making at least \$250 per week, the tables contain the short test.

A. Old and new tests for executive employees

OLD REGULATIONS	NEW REGULATIONS
\$155 per week (\$250 per week for the short test)	\$455 per week
Primary duty of the management of the enterprise or a recognized department or subdivision.	Primary duty of the management of the enterprise or a recognized department or subdivision.
Customarily and regularly directs the work of two or more other employees.	Customarily and regularly directs the work of two or more other full-time employees, or their equivalent.
	Has the authority to hire or fire other employees, or suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status for other employees is given particular weight.

B. Old and new tests for administrative employees

OLD REGULATIONS	NEW REGULATIONS
\$155 per week (\$250 per week for the short test)	\$455 per week
Primary duty of performing office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers.	Primary duty of performing office or nonmanual work directly related to the management or general business operations or the employer or the employer's customers.

OLD REGULATIONS	NEW REGULATIONS
Customarily and regularly exercises discretion and independent judgment.	Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

C. Old and new tests for **professional** employees

OLD REGULATIONS	NEW REGULATIONS
\$170 per week (\$250 per week for the short test)	\$455 per week
Primary duty of performing 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 study.	Primary duty of performing work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the constant exercise of discretion and judgment.
Consistently exercises discretion and judgment	Advanced knowledge in a field of science or learning
	Advanced knowledge customarily required by a prolonged course of specialized intellectual instruction.

D. Old and new tests for **creative professional** employees

OLD REGULATIONS	NEW REGULATIONS
\$170 per week (\$250 per week for the short test)	\$455 per week
Performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	Primary duty is performing work that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

E. Old and new tests for computer professional employees

OLD REGULATIONS	NEW REGULATIONS
<p>\$170 per week (\$250 per week for the short test)</p>	<p>\$455 per week on a salary basis, or \$27.63 per hour.</p>
<p>Primary duties are:</p> <ul style="list-style-type: none"> • Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or • 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 • Design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or • A combination of the above duties, the performance of which requires the same level of skill. 	<p>Primary duties are:</p> <ul style="list-style-type: none"> • Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; or • 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 • Design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or • A combination of the above duties, the performance of which requires the same level of skill.
<p>The employee is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>	<p>The employee is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>

F. Old and new tests for **outside sales persons**

OLD REGULATIONS	NEW REGULATIONS
No salary minimum (no separate short test), and no salary-basis test.	No salary minimum, and no salary-basis test.
Employed for the purpose of customarily and regularly engaged away from the employer's place of business in making sales; or in obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.	Primary duty of making sales; 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.
Does not devote more than 20 percent of the hours worked by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations.	Customarily and regularly engaged away from the employer's place or places of business.

G. Old and new tests for **highly compensated** employees

OLD REGULATIONS	NEW REGULATIONS
There was no regulation before 2004, corresponding to the new regulation.	Employee is paid \$100,000 annually, including at least \$455 per week paid on a salary basis.
	Performs office or nonmanual work.
	Customarily and regularly performs at least one of the duties of an exempt executive, administrator, or professional employee identified in the above-standard tests for exemption.

V. THE NEW “SAFE HARBOR” RULE FOR IMPROPER PAY DEDUCTIONS.

A. The final rules contain a new “safe harbor” by which an employer may avoid destroying the exempt status of salaried employees. The 1990s saw some federal courts rule that entire classes of exempt employees were nonexempt because of seemingly minor or inadvertent deductions from pay that were deemed inconsistent with paying on a salary basis. This resulted in the imposition of Draconian back pay awards for unpaid overtime. Although the courts have more recently pulled back from these decisions, employers should take advantage of the “safe harbor” rule.

B. The requirements of the safe harbor provision are:

1. The employer must have a clearly communicated (read:written) policy that prohibits the improper pay deductions.
2. The clearly communicated policy must include a complaint mechanism. The employer must reimburse employees for any improper deductions and make a good-faith commitment to comply in the future.

If the employer does the above, it will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

VI. MANY OTHER EXCEPTIONS AND EXEMPTIONS FOR EMPLOYEES AND INDUSTRIES ARE SET FORTH IN THE ACT ITSELF.

These were unchanged by the new Regulation.