

**The U.S. Department of Labor's FairPay Overtime Initiative is Set to Significantly Change Overtime Pay Practices. The New Rules Take Effect on August 23, 2004.**

*Please note that this update is simply intended to advise you of some, but not all, of the new changes and is merely provided for informational purposes. Nothing herein is intended to constitute a legal opinion or advice. If you have particular questions, or if you have concerns about how the FairPay Overtime Initiative will impact your business, please contact one of the attorneys at Berman Fink Van Horn P.C. to assist you.*

The U.S. Department of Labor has announced new rules governing overtime pay requirements that will become effective on Monday, August 23, 2004. Referred to as the "FairPay Overtime Initiative" (the "Initiative"), these rules are expected to have a significant impact on many so-called "white collar" professions, including computer-related industries. The Initiative, and the exemptions of the Fair Labor Standards Act ("FLSA"), generally do not apply to "blue collar" employees, such as manual laborers or other workers who perform work involving repetitive operations with their hands, physical skill and energy.

Generally, the FLSA, and its associated rules (such as the Initiative), require that most employees be paid: (1) at least the federal minimum wage for all hours worked; and (2) overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. The FLSA provides exemptions from both of these requirements for persons employed as bona fide executive, administrative, professional and outside sales employees, as well as certain "computer" employees. "Computer" employees is a generic term to broadly refer to: computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field. There are specific tests that set forth the particular criteria that determine if an employee falls within these categories of employment.

Importantly, one of the key means to determine if a particular salaried employee is exempt, their minimum weekly salary, is being significantly increased. Under the new rules, an exempt employee must be paid at least \$455 per week, or \$23,660 per year; this is an increase from \$155 per week for executive and administrative employees and \$170 per week for professional employees. There is a similar threshold of \$455 per week for computer employees. However, computer employees, unlike the others, can be paid on an hourly basis. To qualify for the exemption, an hourly computer employee must be paid at least \$27.63 per hour.

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There is also a general exemption for persons employed in outside sales. Ordinarily, to qualify as an exempt employee, such persons' primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities and the person must be customarily and regularly engaged in these tasks away from the employer's place of business.

The compensation level for exempt employees is not the only significant change under the Initiative. Many of the tests used to determine if an employee qualifies as executive, administrative, or professional have also been changed. For instance, to be an executive, the employee must be empowered to either hire and fire other employees or have a particular level of influence in general personnel decisions. The test for each category has been revised in some similar fashion under the Initiative.

The Initiative also changes the rules governing whether an employer may deduct or "dock" pay from an exempt employee. If the employer does so improperly, the employee may no longer be considered exempt and may, therefore, be entitled to overtime pay.

As you can see, the Initiative offers some significant changes towards the overtime pay structure. By being aware of these changes, an employer should be able to realize substantial savings. According to the U.S. Department of Labor, while businesses may incur some initial costs, the Initiative is expected to save U.S. businesses at least \$252.2 million a year. Further, the U.S. Department of Labor believes that the Initiative will not have a substantial impact on small businesses.

For more general information, the Department of Labor has a helpful web site, located at <http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm>.