



WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

ATTORNEYS & COUNSELORS AT LAW

THE EAGLE'S VIEW

June 2004 Volume 4, Issue 6

WAGE AND HOUR ISSUES NEW WHITE COLLAR EXEMPTION REGS

About our Firm

Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Nelson & Schneider, P.C., Atlanta, Georgia; Wimberly Lawson Daniels & Brandon, Greenville, South Carolina; and Wimberly, Lawson, Suarez & Russell, Tampa, Florida.

Locations

Knoxville Office

Bank of America Building, Suite 900
550 Main Avenue
P. O. Box 2231
Knoxville, Tennessee 37901-2231
Phone: 865-546-1000/Fax: 865-546-1001

Morristown Office

929 West First North Street
P.O. Box 1066
Morristown, Tennessee 37816-1066
Phone: 423-587-6870/Fax: 423-587-1479

Cookeville Office

1420 Neal Street - Suite 201
P.O. Box 655
Cookeville, Tennessee 38503-0655
Phone: 931-372-9123/Fax: 931-372-9181

Nashville Office

200 Fourth Avenue South
Suite 900
Nashville, Tennessee 37219
Phone: 615-727-1000/Fax: 615-727-1001

Website: www.wlswd.com

Affiliated Offices

Wimberly, Lawson, Steckel, Nelson & Schneider, PC
Atlanta, Georgia

Wimberly Lawson Daniels & Brandon
Greenville, South Carolina

Wimberly, Lawson, Suarez & Russell, LLC
Tampa, Florida

In April the Wage & Hour Division of the U.S. Department of Labor issued the final rule amending the white collar exemptions (from overtime) (§541 Regulations) which will become effective on August 23, 2004, assuming Congress does not kill them. The Senate already has voted to substantially modify these provisions, rolling back some of the admittedly modest expansions of the exemptions proposed. The firestorm of criticism directed at Wage & Hour for these rules may explain why they were last effectively changed in 1975. This article examines and explains the new regulations based on the underlying assumption that Congress does not substantially modify these provisions.

The so-called "white collar exemptions" in the Fair Labor Standards Act (FLSA) for executive, administrative, and professional employees have never been a model of clarity. While the new rules initially proposed by the Administration over a year ago would have made a number of changes that would assist those trying to understand and apply the regulations, a well-orchestrated barrage of letters following their publication caused Wage & Hour to retreat from a number of those changes. The revised new rules are not as substantial as those originally proposed.

The regulations provide exemptions for executive, administrative, professionals, computer professionals and outside sales. The major changes are as follows:

* Change the minimum salary amount from \$250.00 a week to \$455 a week;

* Create a single test, eliminating the long and the short tests;

* Create a "safe harbor" presumption that an employee earning at least \$100,000 per year is not entitled to overtime;

* Specifically remove most law enforcement and fire fighting personnel from the exemptions;

* Define "primary duty" as the main or major duty, without specifying percentages of time involved;

* Eliminate the "sole charge" classification from executive exemption;

* Include computer-related administrative duties as exempt duties;

* Create new guidelines for journalists;

* Specifically list certain occupations as meeting or not meeting exemptions;

* Expand the definition of teachers to include nursery school teachers;

* Allow, under certain circumstances, a 1-day unpaid suspension for violations of workplace conduct rules without destroying the exemption;

* Define the scope for losing the exemption for improper deductions;

* Redefine the window of correction;

* Clarify the effect of additional compensation to exempt employees;

* Define salary to include guarantees of hourly, day and shift pay; and

* Provide guidelines on the impact of the use of manuals;

STANDARD TESTS

The new regulations provide a standard test for each one of the

exemptions. The new tests are as follows:

Executive test: To be exempt as an "executive," the employee must:

1. Be compensated on a salary basis of not less than \$455 per week;

2. Have as his or her primary duty the management of the enterprise or a customarily recognized department or subdivision thereof;

3. Customarily and regularly direct the work of 2 or more employees;

4. Have authority to hire or fire or to make recommendations as to hiring, firing or other changes in status that are given particular weight.

Administrative test: To be exempt as an "administrator," the employee must:

1. Be compensated on a salary or fee basis of not less than \$455 per week;

2. Have as his or her primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customer(s);

3. Exercise discretion and independent judgment as to matters of significance.

Professional test: To be an exempt "professional," the employee must:

1. Be compensated on a salary or fee basis of not less than \$455 per week;

2. Have as his or her primary duty work either 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

Inside....

Know Your Attorney
Mary Moffatt Helms.....Page 2

Wage and Hour Issues
New White Collar
Exemption Regs (cont).....Page 2

Special Note
Changes to Subscription.....Page 4

invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Outside sales employee test: To be exempt as an outside salesperson, the employee must:

1. Have as his or her primary duty either making sales



Police officers or firefighters whose primary duty is to investigate crimes or fight fires cannot qualify as exempt under the new rules.

or obtaining orders or contracts for services or for the use of facilities;

2. Customarily and regularly be engaged away from the employer's place of employment in performing such primary duties.

How do these new rules differ from the old ones? In the executive test, the requirement that the employee must hire or fire or have recommendations given particular weight is new, and was added from the old "long test." In the outside sales employee (besides slightly changing the name to conform with modern politically correct usage) the, new test drops the old requirement that at least 20% of the employee's work be sales or sales-related. The more meaningful change is that the new criteria are published as regulations, whereas the old were never more than interpretative bulletins subsidiary to less specific regulations. The significance of this change is

that Wage & Hour's explanations now have the force and effect of law.

SAFE HARBOR (29 C.F.R. § 541.601)

The new regulations create a safe harbor for employers with respect to employees earning \$100,000 or more a year: these highly-compensated individuals will be presumed to be ineligible for overtime. The \$100,000 amount is a significant increase from the first proposal's more sensible \$65,000 a year. If the employee performs any exempt duty and makes a \$100,000 a year, the employee is exempt. The employer is given a 1-month grace period to make up an employee's pay to reach the \$100,000 mark and preserve the exemption. For example, if an inside sales

person who supervises 2 employees has a poor final quarter in commissions and earnings fall below the magic number, the employer may make up the difference in the month following the end of the year and preserve that employee's exempt status.

LAW ENFORCEMENT AND FIRE FIGHTERS (29 C.F.R. §541.3(b)(2))

Police officers or firefighters whose primary duty is to investigate crimes or fight fires cannot qualify as exempt under the new rules. Even if the employee directs the work of others in the conduct of the investigation or fighting fires, the employee will not qualify as exempt. This is a major change: in the past, first-line supervisory officers such as police sergeants and fire captains often qualified for the exemption as executives. This new change will make it very difficult to treat any employee

actually involved in the investigation of crimes or fighting fires as exempt, even if that employee has supervisory responsibilities.

REDEFINE PRIMARY DUTY (29 C.F.R. § 541.700)

Wage & Hour has adopted a definition of "primary duty" that a number of courts had adopted over Wage & Hour's objection at the time. "Primary duty" is now defined as the *main, major or most important* duty of the employee. The new regulations affirm that an exempt employee can perform both exempt and nonexempt duties at the same time without losing the exemption. Wage & Hour notes specifically that an assistant manager in a restaurant who performs both exempt and nonexempt duties at the same time can still qualify for the executive exemption. Such employees, who may flip burgers, shelve merchandise, or ring sales alongside the hourly employees whom they supervise, have been at the center of a number of lawsuits in recent decades, but this regulatory change certainly clarifies their status and will make such lawsuits less attractive for plaintiffs' lawyers in the future.

ELIMINATE SOLE CHARGE PROVISION

The new regulations have dropped the "sole charge" provision. The concept of that provision was that every establishment has at least one manager who can properly be regarded as exempt, even (for example) if he or she supervised just 2 employees. Now, employees who are in charge of a small establishment must meet all of the provisions of the regulations to qualify for the exemption. However, since the definition of "primary duty" has been changed from a time-based definition which many small establishment managers could not meet to one emphasizing the importance of the managerial duties, such managers may still qualify for the exemption.

KNOW YOUR ATTORNEY



MARY MOFFATT HELMS

Mary has been a practicing attorney since 1987. In 1994, she joined Wimberly Lawson Seale Wright & Daves, PLLC and became a Member in 2002. She received her B.S. degree from East Tennessee State University, magna cum laude, and received her J.D. degree from Washington & Lee University. Ms. Helms has served on the Hearing Committee for the Tennessee Board of Professional Responsibility of the Supreme Court of Tennessee, and is a member of the Board of Directors for the Morristown Boys' & Girls' Club. Her areas of practice include employment law and litigation, and business law and litigation.

INCLUDE COMPUTER RELATED ADMINISTRATIVE DUTIES (29 C.F.R. § 541.202(b))

Wage & Hour has acknowledged that employees who are engaged in computer network, internet and database administration may qualify for the administrative exemption. Employers have long struggled with how to classify certain employees who have very important duties related to the computer, the internet and database management but do not meet the strict definition of computer professional, often because their duties do not meet the technical definition of computer professional. Now it will be safer to classify such employees as exempt administrative employees.

NEW GUIDELINES FOR JOURNALISTS (29 C.F.R. § 541.302(d))

Media companies and the courts also have struggled over whether journalists should be regarded as exempt creative professionals. Wage & Hour has provided guidelines which will make it easier to determine whether an individual is exempt or not. For example, on-air reporters will generally be considered exempt.

SPECIFIC LISTING OF OCCUPATIONS AS MEETING OR NOT MEETING AN EXEMPTION

In the new regulations, Wage & Hour specifically lists certain occupations which they declare to meet the duties test of the exemption. Some of the occupations listed as meeting the duties test of an exemption are:

- * insurance claims adjustors
- * financial service employees (not including selling)
- * major project leaders
- * human resources managers
- * purchasing managers
- * buyers
- * dental hygienists
- * physician assistants
- * CPA's
- * athletic trainers with 4 year degrees in the area

* funeral directors
 * chefs
 Some occupations listed as not meeting the duties test are:

- * paralegals
- * public sector inspectors
- * ordinary inspection work
- * comparison shoppers
- * cooks
- * examiners or graders

The "in" and "out" lists are the product of decades of litigation. They do not change the law so much as resolve some ambiguities that have made these occupations fertile grounds for FLSA lawsuits.

EXPAND DEFINITION OF EXEMPT TEACHERS TO INCLUDE NURSERY TEACHERS AND EXTRACURRICULAR ACTIVITIES (29 C.F.R. § 541.303(b))

One area of controversy related to the exemption for teachers has focused on nursery school teachers. Plaintiffs' lawyers have argued that a nursery teacher's primary duty was that of care giver, and that teaching was only a secondary duty. In the new rules, Wage & Hour has specifically decreed that nursery school teachers fall within the general exemption for teachers. Plaintiffs' lawyers also have argued over the years that those responsible for extracurricular activities such as coaching (as opposed to academic instruction) should not qualify for the exemption for teachers because teaching, strictly speaking, was not their primary duty. The new regulations recognize the importance of extracurricular activities to the well-rounded education of students, and hold that time spent on these activities qualifies the coach/instructor for the teacher exemption.

ALLOW FOR ONE-DAY UNPAID SUSPENSION OF EXEMPT EMPLOYEES (29 C.F.R. § 541.602 (b)(5))

One of the inequities of the old regulations was that in order to suspend an exempt employee for misconduct, the employer had to suspend the employee for the entire workweek or not at all: a

suspension of one day could cause the exemption to be invalidated, and trigger liability for up to 3 years unpaid overtime. This problem has been corrected in the new rules. An exempt employee can be suspended for a whole day (or days) based on the employer's good faith belief that the employee has violated written workplace conduct rules. The written policy must be applicable to all employees.

DEFINE EFFECT OF IMPROPER DEDUCTIONS (29 C.F.R. § 541.603)

Correcting another inequity that developed under the old regulations, in the new rules Wage & Hour has limited the impact on an employer of making an improper deduction from an exempt employee's pay. Plaintiffs have long argued – often successfully – that a single improper deduction from an exempt employee's pay voids the exemption for every employee. Under the new rules employers making improper deductions will lose the exemption only for the time period in which the deductions were made, and only for employees in the same job classification working for the same manager. This may be the most valuable change for employers in terms of limiting dollars-and-cents liability.

REDEFINE THE WINDOW OF CORRECTION (29 C.F.R. § 541.603(d))

The window of correction has been redefined. Under the new regulations, an employer may correct an improper deduction from an exempt employee's salary (avoiding the liability described above) if it has a clearly communicated rule that prohibits improper deductions and which

includes a complaint mechanism, it reimburses the employees when it discovers the improper deduction, and makes a good faith commitment to comply in the future. The best evidence of a clearly communicated rule is a written rule.

CLARIFY THE EFFECT OF ADDITIONAL COMPENSATION TO EXEMPT EMPLOYEES (29 C.F.R. § 541.604)

Wage & Hour consistently has taken the position that as long as an employee receives a guaranteed salary, the employees could also receive additional compensation without losing the exemption. In spite of this official position, some courts ruled that such payments caused the exemption to be lost. In the new regulations, Wage & Hour reinforces its position and specifically allows hourly pay, time and half pay and compensatory time to be paid to exempt employees in addition to their guaranteed salary without jeopardizing their exemption.



In April the Wage & Hour Division of the U.S. D.O.L. issued the final rule amending the white collar exemptions (from overtime) which will become effective on August 23, 2004, assuming Congress does not kill them.

Wimberly Lawson
Seale Wright & Daves, PLLC
Attorneys & Counselors at Law
P.O. Box 2231
Knoxville, Tennessee 37901-2231

Visit our Website at <http://www.wlswd.com>

PRSR STD
US Postage
PAID
Permit 582
Knoxville, TN
37950

RETURN SERVICE REQUESTED

CHANGES TO SUBSCRIPTION

If you would like to change your address or unsubscribe to this publication, please visit the newsletter portion of our website ([wlswd.com](http://www.wlswd.com)). A special link has been provided. OR, you may call Brenda Hopper at 865-546-1000.

THE EAGLE'S VIEW

June 2004 - Volume 4, Issue 6

PAGE 4

ALLOW GUARANTEED HOURLY, DAILY AND SHIFT PAY TO BE CONSIDERED A "SALARY" (29 C.F.R. § 541.604(b))

An employee who is guaranteed a certain number of hours, day pay or shift pay will meet the salary component of the exemption requirement as long as there is a reasonable relationship between the guaranteed amount and the amount actually earned. For example, guaranteeing an employee 20 hours at \$25.00 an hour (\$500) would not bear a reasonable relationship to \$1,000 (40 hours x \$25 an hour).

PROVIDE GUIDANCE ON THE USE OF MANUALS (29 C.F.R. § 541.704)

Plaintiffs' lawyers have argued, sometimes successfully, that requiring administrative and professional employees to follow policy manuals divests the employees of independent

discretion and judgment necessary for them to qualify as exempt. The new regulations acknowledge that some manuals are highly technical or complex and require an individual to have specialized knowledge or skill to understand them, and thus such manuals do not preclude the employees from qualifying for the exemption.

CONCLUSION

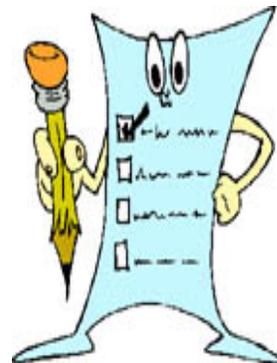
While the underlying tests have not been radically changed, the new regulations raise some issues of their own. It may be a matter of years before all of these issues are resolved. If Congress does not forbid implementation of these regulations, prudent employers would be wise to adopt the suggested written programs related to disciplinary suspension of exempt employees and the window of correction and to review their job descriptions to make sure that exempt positions remain exempt.

SMOKY MOUNTAIN FALL CONFERENCE

**October 28 and 29, 2004
Knoxville, TN**

MUSIC CITY FALL CONFERENCE

**November 18 and 19, 2004
Nashville, TN**



Please note our insert for important information on upcoming fall conferences