

Impact of New Overtime Regulations on Health Care Occupations

BY LOUIS B. MEYER III

THE FAIR LABOR STANDARDS ACT (FLSA) requires most employers to pay their employees at least the minimum wage for the first 40 hours worked in a week and overtime pay at one and one-half times the regular rate of pay for all hours over 40 worked in a week. Virtually every employer is covered by the FLSA because coverage is tied to either the employer's or the individual employee's connection to interstate commerce.

Section 13(a) of the FLSA provides several exemptions from the minimum wage and overtime requirements in limited instances. The most widely used exemptions are referred to as the "white-collar exemptions," which cover "any employee employed in a bona fide executive, administrative, or professional capacity . . ." ¹ In addition, certain computer employees may be exempt as professionals under either Section 13(a)(1) or Section 13(a)(17) of the FLSA. ²

Regulations issued by the United States Department of Labor (DOL) describe the tests for white-collar exemptions. ³ To qualify for an exemption, an employee usually must be paid a minimum salary each workweek (Salary Basis Test), and his job duties must fit within specific requirements described in the DOL regulations (Duties Tests).

Prior to regulations issued earlier this year, the Salary Basis Test had not been revised since 1975, and the Duties Tests had not been significantly revised since 1949. Litigation of wage-and-hour claims, such as failure to pay overtime, increased dramatically during the past decade. ⁴ Class-action lawsuits involving large groups of workers who were mistakenly classified as exempt, have resulted in settlements of several millions of dollars, and have received significant media attention in recent years. ⁵

On April 23, 2004, the DOL published final regulations revising the white-collar exemptions from the FLSA's minimum wage and overtime requirements (the Regulations). ⁶ The Regulations became effective Aug. 23, 2004. ⁷ The DOL indicated that it issued the Regulations to update regulations that had remained essentially unchanged for more than 50 years and to assist employers in properly classifying

employees. ⁸ Among other things, the Regulations raise the salary threshold below which workers are guaranteed overtime rights from \$155 per week (or \$8,060 per year) to \$455 per week (or \$23,660 per year). ⁹ The DOL claims that this change strengthens overtime protection for 6.7 million workers, including 1.3 million white-collar employees who were not entitled to overtime protection under the previous regulations. ¹⁰ However, opponents of the Regulations, including labor unions and other worker organizations, assert that the Regulations could actually take overtime protection away from up to 6 million workers in the United States by giving employers new loopholes to rescind overtime rights for many workers eligible under the previous regulations. ¹¹

Efforts are underway in Congress to rescind or limit the Regulations. On Sept. 9, 2004, the House of Representatives passed an amendment to an appropriations bill that would prohibit spending to implement or administer the Regulations, and on Sept. 16, the Senate Appropriations Committee approved a similar amendment to its version of the appropriations bill. Earlier this year, the Senate passed amendments to an export tax bill that would rescind portions of the Regulations, and on Sept. 29, the House appointed members of a conference committee and set an aggressive schedule for this committee to resolve differences between the House and Senate versions of the export tax bill. However, there is speculation that these amendments will be removed from the appropriations bill and the export tax bill when members from the House and Senate confer to produce final versions of these bills. Further, President Bush has threatened to veto any bill containing provisions intended to rescind the Regulations.

For now, the Regulations are the law, and employers are advised to comply with them. Several health care occupations receive special attention in the Regulations, including nurses, physician assistants, medical technologists, dental hygienists, paramedics, emergency medical technicians ("EMTs") and ambulance drivers. Other positions present in health care organizations are also

affected by the Regulations. This article highlights the major aspects of the Regulations and discusses the impact the Regulations may have on health care occupations. ¹²

Salary Basis Test

The first prerequisite for most of the white-collar exemptions is the Salary Basis Test. An exempt employee must be paid a salary at or above a threshold level for each workweek, regardless of how many hours he actually works. As mentioned, the Regulations raise the salary threshold from \$155 per week (or \$8,060 per year) to \$455 per week (or \$23,660 per year). Under the Regulations, most employees who earn less than \$455 per week (or \$23,660 per year) on a salary basis cannot meet the executive, administrative or professional exemptions and are therefore entitled to overtime pay, regardless of their job responsibilities. ¹³ Computer employees, however, may be paid at least \$455 per week (or \$23,660 per year) on a salary basis or at least \$27.63 per hour if paid on an hourly basis to qualify as exempt. ¹⁴

Three types of professional employees continue to be exempt from the FLSA's minimum wage and overtime requirements without respect to the Salary Basis Test. Teachers, lawyers and physicians are exempt regardless of the compensation they earn. ¹⁵

Being paid on a "salary" basis means an employee receives a fixed amount of compensation each pay period on a weekly or other basis. ¹⁶ The Regulations also provide that an exempt administrative, professional or computer employee may be paid on a "fee" basis, rather than on a salary basis, if the employee's fee payments meet the salary threshold using the test stated in the regulations. ¹⁷ For purposes of this article, references to the Salary Basis Test include compensation on a fee basis that meets the test for determining whether an employee's fee payments meet the salary threshold.

To be exempt, an employee's fixed salary cannot be reduced because of variations in the quality or quantity of the employee's work. ¹⁸ Except for permissible deductions from pay, an exempt employee must receive

his full salary for any week in which he works, regardless of the number of days or hours worked.¹⁹ However, exempt employees need not be paid for any workweek in which they do not perform any work.²⁰

Employers often believe that payment of a fixed salary at or above the threshold level is all that is required to exempt an employee from overtime requirements. However, the Salary Basis Test is only the first step. Once that threshold is met, the employee's actual job duties must also fit within the functions described in the overtime regulations for a particular exempt category.

Duties Tests

The primary purpose of these DOL Regulations is to make it easier for employers to determine whether their employees meet the regulatory criteria. Specifically, the DOL sought to clarify and modernize what are known as the Duties Tests. Some highlights of the tests under the Regulations for determining whether an employee's actual job duties fit within one of the white-collar exemptions follow.²¹

Executive. To fit within this exempt category, an employee's job functions must meet three requirements: (1) the employee's primary duty must be management of the enterprise or a recognized department or subdivision; (2) the employee must customarily and regularly direct the work of two or more other full-time employees; and (3) the employee must have the authority to hire, fire or promote other employees (or to make recommendations as to hiring, firing, promotion or other change of status of other employees, which are given particular weight).²²

Administrative. This category does not mean clerical or secretarial staff, as its title might suggest. It encompasses employees who perform fairly significant functions that support the business's operations or the operations of its customers. To meet this exemption, an employee's job responsibilities must meet two requirements: the employee's primary duty must (1) be performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (2) include the exercise of discretion and independent judgment with respect to matters of significance.²³ The Regulations provide guidance as to the meaning of "work directly related to management or general business operations."²⁴ The Regulations also

specify factors to be considered in determining whether an employee's primary duty includes the "exercise of discretion and independent judgment with respect to matters of significance."²⁵

Learned professional. To be exempt under this category, an employee must have a primary duty of performing office or non-manual work 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 occasionally may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.²⁶ "Work requiring knowledge of an advanced type" is defined in the Regulations as work predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.²⁷ The regulations also exempt creative professionals from the FLSA's minimum wage and overtime requirements if the employee's primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work.²⁸

Computer employee. Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as "professionals" under Section 13(a)(1) of the FLSA or they may be exempt under the standard in Section 13(a)(17) of the FLSA.²⁹ Under either section, according to the Regulations, a computer employee is exempt only if his primary duty consists of: (1) application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications; (2) design, development, documentation, analysis, creation, testing or modification of computer systems, programs or prototypes based on and related to user system design specifications; (3) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.³⁰

For all of the white-collar exemptions, "primary duty" means the principal, main, major or most important duty that the employee performs.³¹ 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.³²

Highly Compensated Employees

The Regulations create a new category of exempt workers known as "highly compensated employees." These are employees who: (1) perform office or non-manual work; (2) are paid at least \$455 per week (or \$23,660 per year) on a salary basis and, through additional compensation, earn more than \$100,000 per year; and (3) customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the Duties Tests for these white-collar exemptions.³³ The \$100,000 total annual compensation may include the employee's base salary, additional salary, bonuses or commissions, but may not include benefits or compensation for board, lodging and other facilities.³⁴

Blue-Collar Workers

The Regulations make clear that the exemptions from the minimum wage and overtime requirements under Section 13(a)(1) of the FLSA apply only to "white-collar" employees who meet both the Salary Basis Test and the Duties Tests in the DOL's regulations. To alleviate concerns that the tests in the Regulations would make certain types of occupations ineligible for overtime pay, the Regulations specifically provide that the overtime exemptions do not apply to "blue-collar" workers who "perform work involving repetitive operations with their hands, physical skill and energy." For example, non-management employees in maintenance, construction and similar occupations (such as carpenters, electricians, mechanics, plumbers, craftsmen, operating engineers, construction workers and laborers), who engage in routine manual and physical work and gain their skills and knowledge through apprenticeships and on-the-job training are never exempt from the FLSA's minimum wage and overtime requirements regardless of how highly paid they may be.³⁵

Permissible Deductions From an Exempt Employee's Pay

The Regulations provide that an employee is not paid on a "salary" basis and cannot be exempt from the FLSA's mini-

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imum wage and overtime requirements under the white-collar exemptions if an employer makes deductions from the employee's fixed salary based on variations in the quality or quantity of the employee's work or absences caused by the employer, jury duty, attendance as a witness, temporary military leave or the operating requirements of the business.³⁶ Under the Regulations, if an exempt employee is ready, willing and able to work, deductions from the employee's pay may not be made for time when work is unavailable.³⁷

As noted above, teachers, lawyers and physicians are automatically exempt from the FLSA's minimum wage and overtime requirements without regard to the Salary Basis Test. Accordingly, the overtime regulations concerning permissible deductions from an exempt employee's pay are not applicable to such workers.

For all other exempt employees, deductions from an employee's fixed salary are permissible if they are: (1) due to absences from work for one or more full days for personal reasons other than sickness or disability; (2) for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary due to sickness or disability; (3) to offset amounts employees receive as pay for jury duty, attendance as a witness or military leave; (4) for penalties imposed in good faith for violations of safety rules of major significance; or (5) for unpaid disciplinary suspensions of one or more full days imposed in good faith, and pursuant to a written policy applicable to all employees for violations of workplace conduct rules (e.g., sexual harassment, drug or alcohol violations, or violations of state or federal law).³⁸

In addition, an employer is not required to pay the full salary for an exempt employee's initial or final week of employment.³⁹ An employer also is not required to pay an exempt employee his full salary for weeks in which unpaid leave under the Family and Medical Leave Act is taken.⁴⁰ Public employers also should note that the DOL retained its rule allowing partial-day salary deductions for exempt employees if the public entity has a policy or practice of "public accountability" or paying employees only for time worked, as a way of being accountable to taxpayers for use of public funds.⁴¹

If an employer has an "actual practice"

of regularly making improper deductions from an exempt employee's salary, it will lose the exemption not only for that employee but also for other employees in the same job classification who are working for the manager responsible for the improper deductions for the time period during which the improper deductions were made.⁴² However, isolated or inadvertent improper deductions from an exempt employee's salary will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.⁴³

Further, the Regulations create a "safe harbor" against loss of the exemption for exempt employees due to improper deductions from their salary. If an employer: (1) has a clearly communicated policy prohibiting improper deductions and includes a complaint procedure; (2) reimburses employees for any improper deductions; and (3) makes a good faith commitment to future compliance with the regulations against improper deductions, the employer will not lose the exemption for any exempt employees due to improper deductions unless the employer willfully violates the policy by continuing the improper deductions after receiving complaints from employees.⁴⁴

Impact of the Regulations on Health Care Occupations

As mentioned, several health care occupations receive special attention in the Regulations and other positions present in health care organizations are significantly affected by the Regulations. Some examples of the professions and occupations impacted by the Regulations are identified below.

Physicians. The Regulations do not change the long-standing rule that physicians are exempt from the FLSA's minimum wage and overtime requirements without respect to the Salary Basis Test. The regulations continue to clearly provide that the white-collar exemption under Section 13(a)(1) of the FLSA covering "any employee employed in a bona fide . . . professional capacity" includes: (1) a licensed physician who is actually engaged in the practice of medicine; and (2) a medical school graduate who is engaged in an internship or residency program for the practice of medicine.⁴⁵ This exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practi-

tioners.⁴⁶ For purposes of this exemption, "physicians" includes medical doctors (including general practitioners and specialists), osteopaths, podiatrists, dentists and optometrists.⁴⁷ Interns and residents who hold degrees in general or specialized medicine, osteopathy, podiatry, dentistry or optometry and are engaged in an internship or residency program for the practice of their profession are exempt employees.⁴⁸

Nurses. The Regulations also continue the well-established rule that registered nurses (RNs) generally meet the Duties Tests for a "learned professional" and are exempt employees if they are registered by the appropriate state licensing board and are paid on a salary basis that meets the salary threshold (\$455 per week or \$23,660 per year).⁴⁹ Under these Regulations, however, licensed practical nurses (LPNs), licensed vocational nurses (LVNs) and other similar health care employees do not qualify as exempt learned professionals, regardless of work experience and training, and are specifically classified as eligible for overtime pay because a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.⁵⁰

Physician Assistants. Pursuant to the Regulations, physician assistants (PAs) who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and are certified by the National Commission on Certification of Physician Assistants, generally meet the Duties Tests for the learned professional exemption and are exempt employees if they are paid on a salary basis that meets the new salary threshold.⁵¹

Medical Technologists. The Regulations provide that registered or certified medical technologists who successfully complete three academic years of pre-professional study in an accredited college or university, plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association, generally meet the Duties Tests for the learned professional exemption and are exempt if they are paid on a salary basis that meets the new salary threshold.⁵²

Absent qualification under this standard, other medical technologists or techni-

cians, such as ultrasound technologists, licensed veterinary technicians and other similar employees, do not meet the requirements for the learned professional exemption, regardless of work experience and training, because they do not work in occupations that have attained recognized professional status.⁵³ Under the Regulations, professional occupations are limited to those in which an advanced specialized academic degree is a standard prerequisite for entrance into the profession.⁵⁴

Dental Hygienists. According to the Regulations, dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the Duties Tests for the learned professional exemption and are exempt employees if they are paid on a salary basis that meets the new salary threshold.⁵⁵

Paramedics, EMTs and Ambulance Personnel. As discussed above, the Regulations specifically provide that the overtime exemptions do not apply to “blue-collar” workers regardless of the salary they receive. For the same reasons (i.e., concerns that the tests in the Regulations would make certain types of occupations ineligible for overtime pay), the Regulations specifically provide that the overtime exemptions do not apply to certain public safety workers, including police officers and other law enforcement officers, firefighters, paramedics, EMTs, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as law enforcement, firefighting, rescuing victims of fires, crimes or accidents, or similar work.⁵⁶

Other Medical Occupations. In addition to RN, PA, registered or certified medical technologists and dental hygienists, the Regulations specifically provide that a number of other professions that serve the medical profession may qualify for the “learned professional” exemption if they meet the Duties Tests for this exemption and are paid on a salary basis that meets the new salary threshold.⁵⁷ These other medical professions include, but are not limited to, pharmacists, therapists, sanitarians, dietitian, social workers, psychologists and psychometrists.⁵⁸

It should be further noted that members of these medical professions, RNs, PAs, registered or certified medical technologists and

dental hygienists, as well as any employee in a health care occupation who does not meet the Duties Tests for the learned professional exemption, may be exempt from the FLSA’s minimum wage and overtime requirements if: (1) they qualify as a “highly compensated employee” under the new regulation; or (2) they meet the Duties Tests for exemption as an “executive” or “administrative” employee and are paid on a salary basis that meets the new salary threshold.

Conclusion

Health care employers and their legal counsel should make an effort to learn more about the Regulations and their impact on health care occupations, and review the exempt or non-exempt status of all salaried employees under the Regulations⁵⁹ because employers can pay a significant price for erroneously classifying employees as exempt when they do not meet the requirements of the regulations. An employee improperly classified as exempt and denied overtime pay despite working more than 40 hours in a workweek can recover up to three years of unpaid overtime, plus the possibility of liquidated damages in an amount equal to the unpaid compensation, and attorney’s fees.⁶⁰ In this area of the law, an ounce of prevention definitely is worth more than a pound of cure. ■

Endnotes

1. 29 U.S.C. § 213(a).
2. *Id.*; *id.* § 213(a)(17).
3. See 29 C.F.R. Part 541.
4. The DOL recovered \$212 million in back wages in fiscal year 2003, a 21 percent increase over the prior year. See DOL News Release, Nov. 18, 2003, available at www.dol.gov/opa/medialpress.
5. Such class-action settlements have included: T-Mobile, \$4.7 million; Bank of America, \$4.1 million; and Siemens Building Technologies, \$1.2 million. See DOL News Releases, Nov. 26, 2003 and March 29, 2004, available at www.dol.gov/opa/medialpress.
6. See 29 C.F.R. §§ 541.0 to § 541.710, 69 Fed. Reg. 22122. (April 23, 2004)
7. *Id.*
8. See 29 C.F.R. Part 541—Preamble: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees; (69 Fed. Reg. 22122) (hereafter Preamble).
9. Preamble (Section I); 29 C.F.R. § 541.600.

10. See 29 C.F.R. Part 541, Preamble (Section I and Section VI).

11. Ross Eisenbrey, Economic Policy Institute, “Briefing Paper # 152” by July 14, 2004.

12. The author wishes to thank Susanna K. Gibbons of Poyner & Spruill LLP for her contributions to this article.

13. 29 C.F.R. §§ 541.600(a), (b).

14. *Id.* §§ 541.400(b), 541.600(d).

15. See *id.* §§ 541.303, 541.304.

16. *Id.* § 541.602(a). The Regulations provide that the \$455 per week salary basis requirement may be translated into equivalent amounts for periods longer than one week (e.g., \$910 if paid biweekly; \$985.83 if paid semimonthly; \$1,971.66 if paid monthly); however, the shortest pay period that will meet the salary basis requirement is one week. See *Id.* 29 C.F.R. § 541.602(b).

17. *Id.* § 541.605. Being paid on a “fee” basis means an employee is paid an agreed sum for a single job, regardless of the time required for its completion. To determine whether the employee’s fee payments meet the salary threshold, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least \$455 per week (or \$23,660 per year) if the employee worked 40 hours per workweek. *Id.*

18. *Id.* § 541.602(a).

19. *Id.*

20. *Id.*

21. An employee’s job title alone will not qualify him as an exempt employee. His actual job duties must meet the requirements of one of the white-collar exemptions. See *id.* § 541.2.

22. *Id.* §§ 541.100 to 541.106. A business owner employed with his company may be an exempt “executive” if he owns at least a 20 percent equity interest in the company and is actively engaged in its management. See *id.* § 541.101.

23. *Id.* § 541.200 to 541.204.

24. See § 541.201.

25. See § 541.202.

26. *Id.* § 541.301 (a)-(d). This exemption is usually limited to professions where specialized academic training and an appropriate academic degree are standard prerequisites for entrance into the profession, but it is also available to employees in such professions who perform substantially the same work as the degreed employees and have attained substantially the same level of knowledge

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through a combination of intellectual instruction (at or past college level) and work experience. See *id.* § 541.301 (c), (d).

27. *Id.* § 541.301(b). The regulations also provide that an employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. *Id.*

28. *Id.* § 541.302.

29. *Id.* § 541.400(a). The Regulations emphasize that job titles are not determinative of the availability of this exemption because job titles vary widely and change quickly in the computer industry. *Id.*

30. *Id.* § 541.400(b).

31. *Id.* § 541.700.

32. *Id.*

33. *Id.* § 541.601

34. *Id.* § 541.601(b)(1); 541.606.

35. *Id.* § 541.3(a).

36. See *id.* § 541.602(a), (b)(3).

37. *Id.* § 541.602(a).

38. *Id.* § 541.602(b)(1), (2), (3), (4), (5).

39. *Id.* § 541.602(b)(6).

40. *Id.* § 541.602(b)(7). When an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of his full

salary for the time actually worked. *Id.*

41. *Id.* § 541.710.

42. *Id.* § 541.603(b). The Regulations state that an actual practice of making improper deductions demonstrates that the employer did not intend to pay the employees on a salary basis, and the Regulations identify several specific factors to consider when determining whether an employer has an actual practice of making improper deductions. See *Id.* § 541.603.

43. *Id.* § 541.603(c).

44. *Id.* § 541.603(d).

45. *Id.* § 541.304(a).

46. *Id.* § 541.304(b).

47. *Id.*

48. *Id.* § 541.304(a)(2), (c).

49. *Id.* § 541.301(e)(2). Registered nurses who are paid on an hourly basis should receive overtime pay.

50. *Id.*

51. *Id.* § 541.301(e)(4).

52. *Id.* § 541.301(e)(3).

53. See "Fact Sheet # 170: Technologists and Technicians and the Part 541 Exemptions under the FLSA" available at www.dol.gov/fairpay.

54. *Id.* § 541.301(d).

55. *Id.* § 541.301(e)(3).

56. *Id.* § 541.3(b).

57. *Id.* § 541.600(e).

58. *Id.* The Regulations acknowledge that the areas in which the learned professional exemption may be available are expanding. The expansion of academic training and the offering of specialized degrees in new fields creates new specialists in particular fields of science or learning. If an advanced specialized degree becomes a standard prerequisite for a particular occupation, that occupation may acquire the characteristics of a learned profession. *Id.* § 541.301(f).

59. The DOL has launched a detailed Internet tool designed to provide substantial guidance to employers seeking to comply with the Regulations. Called an "eLaws Advisor" and accessible from the Web address www.dol.gov/eleaws/overtime.htm, the new Internet tool supplements the DOL's Fair Pay Web site, www.dol.gov/fairpay, which offers a variety of resources such as fact sheets and online training seminars.

60. 29 U.S.C. §§ 216(b), 255(a).

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