

**THE NEW OVERTIME REGULATIONS:
INFORMATION FOR
ATTORNEY EMPLOYERS AND EMPLOYMENT ATTORNEYS**

**OKLAHOMA BAR ASSOCIATION
ANNUAL MEETING
Oklahoma City
November 10, 2004**

**Bill Wells
LEE & WELLS, P.C.
500 Court Plaza Building
228 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
405.235.5299 (T)
405.235.5335 (F)
billwells@leewells.com (E)**

Bill Wells
LEE & WELLS, P.C.
500 Court Plaza Building
228 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
405.235.5299 (T)
405.235.5335 (F)
billwells@leewells.com (E)

Bill Wells is a partner in Lee & Wells, P.C., an Oklahoma labor and employment law firm located in downtown Oklahoma City. The firm's practice emphasis is on labor and employment litigation and sports law.

Wells is a graduate of the University of Oklahoma (B.B.A., Finance) and the University of Oklahoma College of Law. Prior to moving to Oklahoma to accept a position with the Oklahoma City 89ers Baseball Club, he attended Indiana University.

Wells served four years as President of the Oklahoma Employment Lawyers Association, and is an active member of the Oklahoma Bar Association (Labor and Employment Law Section and Mock Trial Program), Oklahoma Trial Lawyers Association and Lawyers for Working Oklahomans. He also serves on the Board of Directors of the Oklahoma Association for Rowing.

Wells has presented programs on labor and employment law and trial techniques to legal and business groups throughout Oklahoma, including the U.S. Equal Employment Opportunity Commission, Oklahoma Bar Association, Oklahoma Trial Lawyers Association, Lawyers for Working Oklahomans, Oklahoma Department of Transportation, Central Oklahoma Manufacturers' Association, Oklahoma Manufacturers' Resource Network, Oklahoma Baseball Coaches Association and the Council on Education in Management. Seminar topics include: *"From the Boardroom to the Courtroom: Labor Litigation"*, *"Crossfire: The Interplay Between the Family and Medical Leave Act, the Americans with Disabilities Act and Oklahoma's Workers' Compensation Act"*, and *"Obtaining and Utilizing News Articles, Broadcasts and Footage at Trial"*. He has also served as an instructor at the Oklahoma Trial Lawyers Association College of Advocacy.

Wells is admitted to practice before the U.S. District Courts for the Western, Eastern and Northern Districts of Oklahoma, and the Tenth Circuit and Federal Circuit Courts of Appeal. He has handled litigation in the vast majority of Oklahoma's district courts, and has prosecuted and defended claims before the U.S. Equal Employment Opportunity Commission, the U.S. Department of Labor, the U.S. Merit Systems Protection Board, the Oklahoma Human Rights Commission, the Oklahoma Department of Labor, the Oklahoma Merit Protection Commission and the Oklahoma Employment Security Commission.

During law school, Wells was a member of the school's Association of Trial Lawyers of America trial competition team and was chosen for the Order of Barristers. Prior to law school, he was a staff writer for *The Daily Oklahoman*.

This material is given for informational purposes only. It is not intended to be legal advice, which must be individually tailored. No attorney-client confidential relationship is intended or implied by allowing anyone to read this material. No warranty as to the accuracy of this information is given, even though we think we have done an accurate job. You should seek advice from an attorney about your specific situation. This material is copyrighted by the author but may be distributed among attorneys so long as the file is complete and not altered.

Copyright (C) 2004-2005 William Wells

**THE NEW OVERTIME REGULATIONS:
INFORMATION FOR
ATTORNEY EMPLOYERS AND EMPLOYMENT ATTORNEYS**

**OKLAHOMA BAR ASSOCIATION
ANNUAL MEETING
Oklahoma City
November 10, 2004**

**Bill Wells
LEE & WELLS, P.C.
500 Court Plaza Building
228 Robert S. Kerr Avenue
Oklahoma City, Oklahoma 73102
405.235.5299 (T)
405.235.5335 (F)
billwells@leewells.com (E)**

I. INTRODUCTION

Underscored by a regulatory framework that dates back to the 1930's, the Fair Labor Standards Act (“FLSA”) has long functioned under an archaic and complex set of standards with regard to determining overtime pay. On April 20, 2004, the U.S. Department of Labor announced its long-anticipated new overtime pay regulations. With an effective date of August 23, 2004,¹ these new regulations have prompted sweeping changes with regard to the standards for overtime pay, while at the same time igniting a national firestorm involving politicians, pro-business organizations and labor unions. And the battle rages on.²

¹

The new regulations became effective 120 days from the date they were published in the Federal Register. The publication date was April 23, 2004. 69 Fed. Reg. 22122 (April 23, 2004) (codified at 29 C.F.R. §§ 541.0 *et seq.*).

²

In a special Sunday session conducted October 10, 2004, in conjunction with the passage of the American Jobs Creation Act of 2004, the U.S. Senate passed a bill (S.2975) designed to roll back the effects of the new overtime regulations. Sponsored by Sen. Tom Harkin, the measure is largely viewed as symbolic in nature, and will likely meet its demise in the U.S. House of Representatives.

Under the FLSA, “exempt” employees are not entitled to overtime pay, while “non-exempt” employees are. The centerpiece of these new regulations involves an overhaul of the exempt versus non-exempt standards, primarily in relation to the Executive, Administrative and Professional exemptions (often referred to collectively as the “white-collar” exemptions). 29 C.F.R. §§ 541.0 *et seq.* In this connection, the Labor Department believes the new regulations will strengthen overtime protection for over 6.7 million low-wage salaried workers, and extend overtime rights to 1.3 million white-collar salaried workers who were not previously entitled to overtime pay.

In implementing the new regulations, the Labor Department estimates costs will run in the neighborhood of \$1.1 billion (including start-up costs of \$627 million for general industry education and \$111 million for self-audits, and an annual tab of \$375 million for the increase in wages and overtime pay). In turn, the Labor Department predicts an annual savings of \$252 million due to the elimination of uncertainty and a corresponding drop in penalties and litigation.

II. OVERTIME BUILDING BLOCKS

While the focus of the new regulations involves the so-called “white-collar” exemptions, other long-standing features of the FLSA will remain in force. As such, a review of some of these overtime “building blocks” is warranted at the outset.

A. Regular Rate of Pay

The FLSA does not limit or otherwise restrict the number of hours an employee can work. Rather, it simply requires that non-exempt employees be paid (a) at least the minimum wage for the first forty hours they work in a workweek, and (b) at least one-and-one-half times their “regular rate of pay” for any additional hours worked in the workweek. 29 U.S.C. § 207.

Although employees may be paid on an hourly, salary, commission or piecemeal basis, one’s regular rate of pay for overtime purposes must be computed on an hourly basis. For employees paid by the hour, the regular rate is their hourly rate. For other workers, the regular rate is calculated by dividing the employee’s total compensation for a workweek, less statutory exclusions, by the number of hours the employee actually worked during that workweek.

Calculation of the amount of overtime due a worker paid on an hourly basis is simple. In addition to the straight-time hourly earnings for all of the hours worked, the employee must receive one-half the hourly rate for every hour over forty. Thus, an employee with an hourly rate of \$8.00 who works forty-four hours in a workweek is entitled to \$368 (forty-four hours at \$8.00, plus four hours at \$4.00).

Computing overtime due salaried employees can be more complex. A salaried employee's regular rate of pay is the amount of the salary divided by the number of hours of work for which the salary is intended to compensate. Therefore, a worker whose weekly salary of \$500.00 is intended to compensate for a workweek of forty hours has a regular rate of \$12.50 and must be paid, in addition to the salary of \$500.00, one-and-one-half times that rate, or \$18.75, for each hour over forty. If the salary is intended to cover a thirty-five hour workweek, the employee's regular rate is \$14.29. The Labor Department's position is that this employee would be entitled to receive the regular rate of \$14.29 per hour for hours thirty-six to forty, and \$21.44 (one-and-one-half times the regular rate) for all hours in excess of forty. 29 C.F.R. § 778.113.

In the more-common circumstance, when the salary is intended to compensate for fluctuating workweeks, the calculation becomes even more complicated. Federal courts and the Labor Department permit employers to use a fluctuating-workweek methodology to compute overtime pay under certain circumstances; however, under this method, the regular rate of pay must be computed anew every week, with resulting lower earnings per hour as the number of overtime hours increases. 29 C.F.R. § 778.114. Consequently, the employer and the employee must have a "clear mutual understanding" about the use of the fluctuating workweek method at the time of hire. *Id.*; *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644 (6th Cir. 1986).

Courts will carefully scrutinize unusual compensation arrangements that appear to be intended to circumvent the statutory overtime requirement. By way of example, in *Reich v. Bay, Inc.*, 23 F.3d 110 (5th Cir. 1994), the defendant paid rig welders who owned their own rigs an hourly wage and a separate equipment rental fee. Although the welders received one-and-one-half times their hourly wage for all overtime hours worked, the defendant reduced the rental rate for rigs used more than forty hours per week correspondingly - the net effect being that the lower rental rate offset the overtime payments. In this particular case, the Court held that this scheme violated the FLSA's overtime requirements.

B. Compensable Time

The FLSA requires that employees be paid at least the minimum wage for the first forty hours they work in a workweek, and one-and-one-half times their regular rate of pay for all additional hours worked. Therefore, a key to compliance with the overtime requirements is determining the number of “hours worked.” The FLSA defines “employ” as “to suffer or permit to work,” but it does not contain any general definition of “work” or of compensable time. 29 U.S.C. § 203(g).

In an early trilogy of cases, the U.S. Supreme Court mandated liberal tests for determining compensable time. Employees must be paid not only for all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer,” but also for idle time or time spent in incidental activities. *Tennessee Coal, Iron & R. Co. v. Muscoda Local 123*, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944); *Armour & Co. v. Wantook*, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

Under this test, time actually spent in production and related activities is clearly compensable. This includes not only the normal work day, but also any other time employees are required or permitted to perform work. *See, e.g., U.S. Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775 (6th Cir. 1995).

At the same time, work not requested or required by the employer counts as hours worked if the employer has actual or constructive knowledge of the work being performed. *See, e.g., Reich v. Dept. of Conservation & Natural Resources*, 28 F.3d 1076 (11th Cir. 1994). For instance, if an employee arrives early and performs tasks incidental to the normal working day, like starting machines or answering the phone, the time so spent is compensable if the employer knew or should have known of the employee’s activities. The same is true if an employee stays late to finish a project or takes work home and completes it there. *See, e.g., Lyle v. Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992).

Overtime cases involving waiting time always invoke the catchy, but conclusory, distinction between periods when employees are “engaged to wait” (compensable) and when they are “waiting to be engaged” (non-compensable). *Skidmore*, 65 S.Ct. 161 (1944). The critical issue in most of the waiting-time cases is whether employees can make effective use of the time for their own purposes. If they can not, the time is considered primarily for the employer’s benefit, the

employees are “engaged to wait,” and the time is compensable. *Id.* Time spent waiting for work during the work day because of machinery breakdowns, delivery delays or slow business will normally be compensable. Even if employees are permitted to leave the employer’s premises, courts generally find the waiting time compensable if it is too short for employees to use the time for their own benefit. *See, e.g., Mireless v. Frio Foods, Inc.*, 899 F.2d 1407 (5th Cir. 1990) (even though employees could leave the plant, waiting time of up to 45 minutes was compensable because most employees did not live near the plant and nearest store was two miles away). On the other hand, if employees are completely relieved of duty during the waiting time, and the periods are long enough to permit them to pursue their own activities, they are “waiting to be engaged,” and the time is not compensable. *See, e.g., Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988) (truck drivers’ waiting time not compensable where they had the opportunity to conduct personal business between assignments).

A similar analysis applies to employees who are “on call” and must be available to return to work on short notice. Depending on the requirements of the employer, such employees may not be able to travel out of town, attend concerts, or even leave their homes.

In *Bright v. Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992), for example, a biomedical equipment repair technician had to wear a beeper, arrive at the hospital within twenty minutes after being called, and not be intoxicated or otherwise impaired. The Court held that the on-call time was not compensable, even though the employee was on call during all of his off-duty hours and had had no relief from this status for almost one year. According to the Court, only where call backs are so frequent that employees can not effectively use their time, or where the employer’s on-call system is so distracting or burdensome that personal activities are inhibited, will on-call hours be compensable. *Also see Gilligan v. City of Emporia*, 986 F.2d 410 (10th Cir. 1993).

In *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, 503 U.S. 915 (1992), firefighters were subject to constraints almost identical to those in *Bright*, but with one critical difference. The firefighters were called back to work for at least an hour on an average of three to five times during a twenty-four-hour on-call period. The Court in this case found the frequency of the call backs so burdensome that the entire on-call time became compensable. Similarly, in *Cross v. Arkansas Commission*, 938 F.2d 912 (8th Cir. 1991), employees had to monitor hand-held radios twenty-four hours a day while on call,

and had to respond immediately to emergencies. These requirements restricted their travel, forced them to pay attention to the radios on a constant basis, and prevented them from going places where radio noise was unwelcome. The Court held that this on-call time was compensable.

Rest and meal periods are governed by straightforward Labor Department regulations. Break periods of twenty minutes or less are compensable. 29 C.F.R. §§ 785.18, 790.6(b). Meal periods are not compensable if employees are completely relieved of duty during that time. 29 C.F.R. § 785.19; *also see, e.g., Bates v. Dept. of Corrections*, 81 F.3d 1008 (10th Cir. 1996) (nothing in the FLSA requires that a bona fide meal period must be “scheduled” and “occur at a regular time”). If employees, however, are required to remain at their work station while eating, they are not completely relieved of duty and must be paid for the time. *See, e.g., Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113 (4th Cir. 1985). In the on-call setting, meal periods are not compensable if the employee is not primarily engaged in work-related activities during the meal time. *Armitage v. City of Emporia*, 982 F.2d 430 (10th Cir. 1992); *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145 (10th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

C. Litigation

Of all the exemptions, the “white-collar” exemptions contain the greatest potential for error, with possibly devastating results. White-collar employees are often highly-paid and routinely work more than forty hours per workweek. Consequently, a mistake in classifying them as exempt can result in large awards for unpaid overtime.

While the Labor Department has clear enforcement authority under the FLSA, individual employees, likewise, have standing to seek and recover unpaid overtime pay. 29 U.S.C. § 216(b). In such private actions, an aggrieved employee can recover (a) the actual unpaid overtime compensation, and (b) an equal amount in liquidated damages. *Id.* In addition to any judgment for a plaintiff, a court “shall * * * allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” *Id.* Courts have interpreted this language to only provide for the award of attorney’s fees to prevailing plaintiffs. *Cova v. Coca-Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958 (8th Cir. 1978).

Like most other remedial labor legislation, the FLSA contains protection for employees who assert rights under the statute. Subsection 215(a)(3) prohibits retaliation against employees for filing complaints or testifying in proceedings

brought under the FLSA. 29 U.S.C. § 215(a)(3). However, some courts have even extended this protection to employees who have not actually filed a complaint. *See, e.g., Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984) (protests directed at the employer protected); *cf., McKenzie v. Renburg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (personnel director's discussions with employer's attorney regarding her concerns of non-compliance not protected under the FLSA).

The FLSA authorizes a unique form of representative action in employee suits brought under Subsection 216(b). Unlike the familiar “opt-out” framework contained in Rule 23 of the Federal Rules of Civil Procedure, in which members of a plaintiff class remain members unless they affirmatively exclude themselves, no employee may be a party to an FLSA action unless he or she has consented in writing and filed the consent with the court. 29 U.S.C. § 216(b). Despite the distinction, courts are free to assist efforts to join potential plaintiffs in a representative action by allowing discovery of the names and addresses of similarly-situated individuals and authorizing the transmission of notices to any such individuals. *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989).

The statute of limitations for FLSA actions is two years, or three years in cases of “willful” violations. 29 U.S.C. § 255. Because FLSA claims are classic examples of continuing-violation claims, the statute of limitations is more likely bound to impact the value (i.e., limit the amount of damages) of a claim than the viability (i.e., timeliness) of a claim. *See, e.g., Knight v. Columbus*, 19 F.3d 579 (11th Cir.), *cert. denied*, 513 U.S. 929 (1994).

Resolving a three-way split among the Circuits regarding the “willful” standard as it relates to the statute of limitations, the U.S. Supreme Court adopted a “reckless disregard” standard in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988). In *McLaughlin*, the Court held that an employer commits a “willful” violation if “the employer either knew or showed a reckless disregard for the matter of whether its conduct was prohibited by the [FLSA].” *McLaughlin*, 108 S.Ct. 1677, 1681.

III. DISPELLING CERTAIN MYTHS: FOUR FALLACIES OF THE FLSA

Before delving into the new regulations, four common misconceptions regarding overtime pay warrant attention:

FALLACY: Salaried employees are exempt from (not entitled to) overtime pay.

REALITY: Not necessarily so. For an employee to be exempt, the employee must (a) be paid the minimum salary required by the FLSA (\$455 per week under the new regulations), and (b) satisfy the other requisite job-duty elements of the particular exemption (i.e., Executive, Administrative, Professional) being used.

FALLACY: Managers are exempt from overtime pay.

REALITY: Not necessarily so. A job title, standing alone, will not dictate whether an employee is exempt. 29 C.F.R. § 541.2. By way of example, for a managerial employee to be exempt, the employee must (a) be paid the minimum salary required by the FLSA (\$455 per week under the new regulations), and (b) actually perform certain functions required under the Executive exemption, including the actual supervision of at least two employees.

FALLACY: An employer can provide employees compensatory time in lieu of overtime pay.

REALITY: False. Private employers (as opposed to public employers) cannot compensate employees with compensatory time in lieu of overtime pay.

FALLACY: If an employee works fifty (50) hours one week, and thirty (30) hours the next, the employer can average the weeks together (to arrive at the 40-hour FLSA threshold) to avoid paying overtime pay to the employee.

REALITY: False. Under the FLSA, an employee's entitlement to overtime pay is determined on a workweek-by-workweek basis.

IV. OUT WITH THE OLD, IN WITH THE NEW

A. The “White-Collar” Exemptions

The FLSA provides for an array of exemptions, under which covered employees may be fully or partially exempt from (not entitled to) the Act’s overtime benefits. Subsection 213(a)(1) of the FLSA emboldens the Labor Department’s Wage-Hour Administrator (by way of the Secretary of Labor) with the authority to promulgate regulations specifying the conditions for many of these exemptions. 29 U.S.C. § 213(a)(1). It is, of course, this recent exercise of authority that has ignited the national debate regarding overtime pay.

At the center of this storm are the so-called “white-collar” exemptions. 29 U.S.C. § 213(a)(1). For those employees who are employed “in a bona fide executive, administrative, or professional capacity”, the employer is relieved from having to comply with the overtime requirements. *Id.*

From the litigation perspective, the U.S. Supreme Court has held that the exemptions are to be narrowly construed, and that the burden of persuasion rests with the employer. *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960). Once litigation ensues, great care must be exercised by an employer in relation to the timing of forwarding an exemption as a defense. *Magana v. Commonwealth of Northern Mariana Islands*, 107 F.3d 1436 (9th Cir. 1997) (employers waived their defense that plaintiff was an exempt professional employee by failing to raise the defense until three months after the filing of their answer).

A common thread between the former and current regulations is the requirement that an exempt employee be paid on a salary basis. Hourly rates of pay, no matter how high the amount, are antithetical to the concept of a salary, and employees found to be paid on an hourly basis do not qualify for any of the “white-collar” exemptions. *See, e.g., Brock v. Claridge Hotel & Casino*, 846 F.2d 180 (3rd Cir.), *cert. denied*, 488 U.S. 925 (1988).

Being paid on a salary basis means that for each week during which employees perform any work, they must receive a pre-determined amount of money that constitutes all or part of their compensation. 29 C.F.R. § 541.602. The salary may not be “subject to reduction” because of the quantity or quality of the work performed. 29 C.F.R. § 541.602(a). Exceptions to this non-deduction rule

exist for absences of one or more full days for personal reasons, or for absences of one or more full days due to sickness or disability if the employer has a sickness or disability compensation-substitute benefit plan or policy. 29 C.F.R. § 541.602(b). Deductions may also be made from an employee's salary without jeopardizing the employee's exemption as a penalty or punishment for violations of safety rules of "major significance". 29 C.F.R. § 541.602(b)(4); *see, e.g., Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993) (failure to report absences is not a violation of a safety rule of "major significance"); *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993) (same holding for tardiness and rude behavior). Likewise, unpaid disciplinary suspensions can be imposed for certain workplace conduct rule violations. 29 C.F.R. § 541.602(b)(5) (deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed for workplace conduct rule infractions, such as the violation of a written policy prohibiting sexual harassment).

B. Exemptions Under the Former Regulations

The former regulations set forth a series of elaborate tests for each of the "white-collar" exemptions. In addition to the uniform salary requirement, the former regulations required the application of a convoluted series of duties tests, broken down into a distinctive "short test" and "long test" for each of the exemptions. By way of example, under the former Executive exemption "long test", employees were exempt from (not entitled to) overtime pay if they received a salary of at least \$155 per week and met five duty-based criteria. The Executive exemption "short test" mandated a higher salary (\$250 per week) and the satisfaction of two of the five criteria.

C. Exemptions Under the New Regulations

According to the Department of Labor, the primary motivation for promulgating the new regulations was two-fold: (1) Raising the minimum salary requirement to a level commensurate with today's economic climate, and (2) working to demystify the duties tests. To this end, the prominent distinctions between the former regulations and the new regulations can be summarized as follows: (a) The minimum salary requirement for each "white-collar" exemption has been increased to \$455 per week across the board, and (b) the long- and short-test regime has been discarded in exchange for an exemption-by-exemption "standard" test (including a watered-down version of the standard test for "highly compensated [i.e., total annual compensation of \$100,000.00 or more] employees").

1. Executive Employee Exemption

The Executive exemption most often comes into play in relation to the managers and supervisors of a business enterprise. Under the new regulations, an employee will be considered exempt under the Executive exemption if the following elements are met:

1. The employee's compensation is in the form of a salary of at least \$455 per week (which translates to \$23,660 per year);
2. The employee's primary duty is the management of the enterprise or of a customarily recognized department or subdivision thereof;
3. The employee customarily and regularly directs the work of two or more other employees; and,
4. The employee has 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 are given particular weight.

29 C.F.R. § 541.100.

(A side-by-side comparison of the old and new regulations is contained in Exhibit A.)

As is the case with each of the white-collar exemptions, the FLSA dictates that the "primary duty" component of the job-duties test is going to be ascertained on a case-by-case basis. 29 C.F.R. § 541.700. That said, the Labor Department will defer in favor of finding an exemption if the subject employee is spending more than fifty percent (50%) of his or her time performing exempt work. 29 C.F.R. § 541.700(b).

In connection with the Executive exemption, "management" includes activities such as the interviewing, selecting and training of employees, setting and adjusting their rates of pay and hours of work, and appraising employee's productivity and performance for purposes of making promotion decisions. 29 C.F.R. § 541.102. "Two or more other employees" means two full-time employees or the equivalent. 29 C.F.R. § 541.104. As such, the supervision of one full-time

and two half-time employees will suffice, as will the supervision of four half-time employees. *Id.*

SIDEBAR: *Law Office Personnel*

While many a paralegal or legal assistant may ascend into a position of authority over other employees in a law office, a potentially unavoidable and unresolvable conflict between the Executive exemption criteria and the Oklahoma Rules of Professional Conduct will make it extremely difficult, if not impossible, for a paralegal or legal assistant to be categorized as an Executive exempt employee. Among the criterion required under the Executive exemption, an employee must “customarily and regularly direct[] the work of two or more other employees.” 29 C.F.R. § 541.100. The Oklahoma Rules of Professional Conduct provide, in turn, that attorneys have a non-delegable obligation to supervise the work of lay personnel. *See, e.g., State ex rel. Oklahoma Bar Ass’n*, 1983 OK 63, 663 P.2d 1228; Okla. Stat. Ann. tit. 5, Ch. 1, App. 3-A, Rules 5.3, 5.5. Consequently, any attempt to categorize a paralegal or legal assistant exempt under the Executive exemption must proceed with extreme caution. Ethical issues aside (in a figurative rather than literal sense), the Labor Department’s new regulations regarding the Executive exemption are silent with regard to the treatment of paralegals and legal assistants. In one of its isolated public pronouncements on the issue, the Labor Department declined to recognize the Executive exemption in a situation involving paralegals for factual - rather than legal or policy - reasons. Wage & Hour Op. Letter, 99-02 CCH WH ¶ 32, 728 (Feb. 19, 1998) (senior legal assistant not exempt as Executive employee because of insufficient information to determine whether “primary duty” criterion was met).

2. Administrative Employee Exemption

The Administrative exemption primarily targets employees who perform office work or non-manual labor. Under the new regulations, an employee will be considered exempt under the Administrative exemption if the following elements are met:

1. The employee’s compensation is in the form of a salary of at least \$455 per week (which translates to \$23,660 per year);

2. The employee's 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,
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200.

(A side-by-side comparison of the old and new regulations is contained in Exhibit A.)

With regard to the Administrative exemption, the phrase "work directly related to the management or general business operations" means that the employee must be performing work directly related to assisting with the running of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. 29 C.F.R. § 541.201(a). As it relates to a particular business, such work includes jobs performed in the areas of administration, budgeting, quality control, advertising, public relations and human resources. 29 C.F.R. § 541.201(b). Consequently, upper-level administrative assistants and human resource managers are two positions cited by the Labor Department that fall within the Administrative exemption. 29 C.F.R. §§ 541.203(d), (e).

SIDEBAR: *Law Office Personnel*

Though the new regulations are silent with regard to the treatment of paralegals and legal assistants under the Administrative exemption, the Labor Department has taken a long-standing position that paralegals and legal assistants are not Administrative exempt employees. *See, e.g.,* Wage & Hour Op. Letters, Feb. 10, 1978, Aug. 17, 1978, Sept. 27, 1979, April 23, 1984, June 12, 1984, Aug. 18, 1986, April 13, 1995, Nov. 9, 1997, Feb. 19, 1998, and March 20, 1998. From the Labor Department's perspective, though a paralegal's performance of certain tasks will "involve some judgment . . . such work does not involve the exercise of discretion and independent judgment at a level contemplated by 29 C.F.R. Part 541 . . . These duties involve the use of skills and procedures." Wage & Hour Op. Letters, 1998 WL 852691 (Feb. 19, 1998); 1998 WL 852667 (March 20, 1998). Aside from the ethical issues attendant with any effort to evaluate a paralegal under the Administrative exemption (see Sidebar discussion in Section C.1. *supra*), the Labor Department's position has been successfully defeated in at least one case. *Reich v. Page & Addison*, 1994 WL 143208 (No. 3:91-CV-2655-P, U.S. Dist. Ct., N. Dist. Tex., Dallas Div. (March 9, 1994)) (jury verdict in favor of law firm finding paralegals exempt under Administrative exemption in action brought by Labor Department).

3. Learned Professional Employee Exemption

The Learned Professional exemption often includes employees working in the traditional professions of law, medicine, pharmacy, theology, accounting, engineering, architecture, teaching and various types of physical, chemical and biological sciences. Under the new regulations, an employee will be considered exempt under the Learned Professional exemption if the following elements are met:

1. The employee's compensation is in the form of a salary of at least \$455 per week (which translates to \$23,660 per year);
2. The employee's primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

29 C.F.R. § 541.301

(A side-by-side comparison of the old and new regulations is contained in Exhibit A.)

Under the Learned Professional exemption, the focus is on whether a specialized degree is a prerequisite to performing the subject work. 29 C.F.R. § 541.301(d). From this viewpoint, attorneys, doctors, engineers, architects and accountants are almost always going to fall within the Learned Professional exemption. 29 C.F.R. § 541.301(c).

In an attempt to avoid confusion in ascertaining the status of employees working in other professions, the Labor Department has identified a non-exhaustive list of other jobs that generally will be exempt under the Learned Professional exemption, including registered nurses, dental hygienists and physicians assistants. 29 C.F.R. § 541.301(e). Conversely, according the Labor Department, other vocations, such as licensed practical nurses, are not. 29 C.F.R. § 541.301(e)(2).

SIDEBAR: *Law Office Personnel*

The new overtime regulations specifically address paralegals and legal assistants in the context of the Learned Professional exemption. Subsection 541.301(e)(7) provides that “[p]aralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field.” 29 C.F.R. § 541.301(e)(7). The Labor Department’s rationale is premised on the finding that, while many paralegals and legal assistants possess general four-year advanced degrees, most specialized paralegal programs consist of two-year associate degree programs. That said, the Labor Department leaves the open the possibility that paralegals with advanced specialized degrees in other professional fields may be exempt if they are applying their advanced knowledge in the subject professional field. In so doing, the Labor Department cites a hypothetical arrangement, one in which a law firm hires an engineer to work as a paralegal in providing expert advice in connection with product liability cases or patent matters. *Id.*

4. Creative Professional Employee Exemption

The Creative Professional exemption normally includes employees working in the fields of graphic arts, writing, music and acting. Under the new regulations, an employee will be considered exempt under the Creative Professional exemption if the following elements are met:

1. The employee's compensation is in the form of a salary of at least \$455 per week (which translates to \$23,660 per year);
2. 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.

29 C.F.R. § 541.302.

(A side-by-side comparison of the old and new regulations is contained in Exhibit A.)

V. CONCLUSION

As we progress into what the Labor Department says will be a new era in user-friendly overtime regulations, the August 23, 2004, effective date for the new regulations will simply serve as the beginning point for determining whether the Labor Department's predictions prove true. As always, the proof will likely be found in the litigation.

OVERTIME EXEMPTIONS

Former Regulations vs. New Regulations (Effective August 23, 2004)

Executive Employees			
	Former Long Test	Former Short Test	New Standard Test
Salary	\$155 per week	\$250 per week	\$455 per week
Duties	<p>Primary duty is the management of the enterprise or a recognized department or subdivision thereof.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire and fire other employees (or recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight).</p> <p>Customarily and regularly exercises discretionary powers.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty is the management of the enterprise or a recognized department or subdivision thereof.</p> <p>Customarily and regularly directs the work of two or more other employees.</p>	<p>Primary duty is the management of the enterprise or a recognized department or subdivision thereof.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight).</p>

EXHIBIT A

OVERTIME EXEMPTIONS

Former Regulations vs. New Regulations (Effective August 23, 2004)

Administrative Employees			
	Former Long Test	Former Short Test	New Standard Test
Salary	\$155 per week	\$250 per week	\$455 per week
Duties	<p>Primary duty is the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p> <p>Regularly and directly assists a proprietor, or exempt executive or administrative employee; or performs specialized or technical work requiring special knowledge under only general supervision; or executes special assignments under only general supervision.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty is the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p>	<p>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.</p> <p>Primary duty must include the exercise of discretion and independent judgment with respect to “matters of significance.”</p> <p>(“Matters of significance” refers to the level of importance or consequence of the work performed.)</p>

EXHIBIT A

OVERTIME EXEMPTIONS

Former Regulations vs. New Regulations (Effective August 23, 2004)

Learned Professional Employees			
	Former Long Test	Former Short Test	New Standard Test
Salary	\$170 per week	\$250 per week	\$455 per week
Duties	<p>Primary duty is the performance of office work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work.</p>	<p>Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.</p>

EXHIBIT A

OVERTIME EXEMPTIONS

Former Regulations vs. New Regulations (Effective August 23, 2004)

Creative Professional Employees			
	Former Long Test	Former Short Test	New Standard Test
Salary	\$170 per week	\$250 per week	\$455 per week
Duties	<p>Primary duty is the performance of work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on invention, imagination, or talent of the employee.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.</p>	<p>Performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.</p>	<p>Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</p>

EXHIBIT A

OVERTIME EXEMPTIONS

Former Regulations vs. New Regulations (Effective August 23, 2004)

Outside Sales Employees			
	Current Long Test	Current Short Test	New Standard Test
Salary	None Required	None Required	None Required
Duties	<p>Employed for the purpose of and 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.</p> <p>Does not devote more than 20 percent of the hours worked by nonexempt employees of the employer to the activities that are not incidental to and in conjunction with the employee’s own outside sales or solicitations.</p>	No separate “short” test.	<p>Primary duty is 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.</p> <p>Customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.</p>

EXHIBIT A

OVERTIME EXEMPTIONS

Former Regulations vs. New Regulations (Effective August 23, 2004)

Computer Employees				
	Former Long Test	Former Short Test	Section 13 (a) (17) Test	New Standard Test
Salary	\$170 per week	\$250 per week	\$27.63 an hour	\$455 per week <i>or</i> \$27.63 an hour
Duties	<p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming and software engineering.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming and software engineering.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware or software or system functional applications; <i>or</i> (B) design, development, documentation, analysis, creation, testing, or modification of a computer systems or programs, including prototypes, based on and related to user or system design specifications; <i>or</i> (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; <i>or</i> (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware or software or system functional applications; <i>or</i> (B) design, development, documentation, analysis, creation, testing, or modification of a computer systems or programs, including prototypes, based on and related to user or system design specifications; <i>or</i> (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; <i>or</i> (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.</p>