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## HOW WILL THE NEW FAIR LABOR STANDARDS ACT REGULATIONS AFFECT SCHOOLS?

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*Editor's Note: The following article highlights the new federal regulations addressing the Fair Labor Standards Act which become effective August 23, 2004. Because the article is rather long, we have included only the portions of it which are most relevant to school boards.*

The Department of Labor has issued new final Fair Labor Standards Act (FLSA) regulations that will be effective August 23, 2004.<sup>1</sup> The new regulations recraft the definitions of the “white collar” exemptions — executive, administrative, professional, outside sales, and computer employees. They replace 30-year-old minimum salary level tests and 55-year-old duties tests. The low salary amounts and the out of date language of these tests have eroded the overtime protections of the FLSA. This article summarizes the main changes in the new FLSA regulations and discusses how these changes might impact school districts.

### A Short Review of the Basics

All employees working over 40 hours a week must be paid overtime under the FLSA unless they are classified as exempt. To be exempt from overtime, employees must meet a two-part test: (1) they must be paid a certain amount on a salary basis and (2) they must perform certain duties. The current regulations have a long and a short duties test for executive, administrative, professional, and computer employees. The minimum weekly salary an employee has to earn to be exempt under the current long test is \$155 and \$250 under the current short test. The new regulations have only one duties test for each exempt category, and the minimum salary an employee must earn per week is \$455. It is noteworthy that the final regulations do not contain many of the changes sought by the Department of Labor in the initially proposed regulation issued March 31, 2003.

### Executive Employees

The new duties test for an executive employee<sup>2</sup> is as follows:

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. § 541), available at <http://a257.g.akamai.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/pdf/04-9016.pdf>.

<sup>2</sup> Final 29 C.F.R. § 541.100.

- Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- Customarily and regularly directs the work of two or more other employees; and,
- Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

In school districts, exempt executive employees are typically department supervisors of support staff employees such as food service managers, transportation supervisors, office managers, and custodian and maintenance supervisors. It is unlikely that many of these employees will lose their exempt status under the final regulations...

While the language of the final regulations appears very similar to the existing regulations, in a number of instances, the Department of Labor has changed or elaborated on what these terms mean. A discussion of some of the department's major changes and how they may impact schools follows.

Primary duty<sup>3</sup> – The primary duty requirement in the final regulations is not significantly different than the primary duty requirement in the current regulations. Employees who spend more than 50 percent of their time performing exempt work are generally exempt. Employees who spend 50 percent or less of their time on exempt work may be exempt depending on (1) the relative importance of the exempt duties compared to the other duties, (2) time spent on exempt work, (3) the employee's relative freedom from supervision, and (4) the relationship of the employee's salary to wages paid to other employees performing the kind of nonexempt work performed by the employee. The trickiest part of the executive test is determining if an employee spends enough time performing exempt duties. For example, it is common for a food service manager to help prepare food or a bus driver supervisor to cover routes if a driver is absent. Under the new regulations, school districts will continue to have [to] balance factors, rather than apply a bright line rule, when employees spend 50 percent or less of their time on exempt duties.

Management<sup>4</sup> – The Department of Labor expanded the definition of management to include “planning and controlling the budget” and “monitoring or implementing legal compliance measures.” The current definition focuses on supervisory duties. This change may make more employees eligible for the executive exemption and may be particularly useful in making the case that “borderline” employees with these responsibilities are exempt.

Directs the work of two more employees<sup>5</sup> – Under the final regulations, two or more employees can include two full time employees or their equivalent (for example, one full time employee and two half time employees)... To qualify for this exemption, supervision of employees cannot be shared, and employees who supervise only in the absence of another supervisor (lunch breaks, vacation) are not exempt...

Whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status<sup>6</sup> – The Department rejected the suggestions that the phrase should be “hiring *or* firing *and* advancement, promotion or any other change of status” and that the amount of hiring, firing, etc. had to be “significant.” The final language illustrates that the amount and frequency of this duty is not as great as it could be; therefore, more employees may be exempt.

Change of status<sup>7</sup> – The term “change of status” is not defined in the regulations, but the Department of Labor intends the definition to mean “tangible employment action” as defined by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998), which is a “significant change in employment status, such

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<sup>3</sup> Final 29 C.F.R. § 541.700. The new definition of primary duty applies to all exemptions not just the executive exemption.

<sup>4</sup> Final 29 C.F.R. § 541.102.

<sup>5</sup> Final 29 C.F.R. § 541.104.

<sup>6</sup> Final 29 C.F.R. § 541.100(a)(4).

<sup>7</sup> *Id.*

as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” This definition is broad, indicating that more employees may be exempt.

Particular weight<sup>8</sup> – A number of commenters, including NSBA, asked for a definition of particular weight. NSBA expressed concern that in schools, state laws, unionization, and other factors have led to only employees at the highest levels or boards actually having the authority to hire or fire, etc. employees. Consequently, giving “particular weight” to the suggestions of employees might be too stringent of a requirement to include; for example, a bus supervisor who recommends to the superintendent who recommends to the school board to fire an employee. The Department wrote a rather broad definition of “particular weight”<sup>9</sup> and responded directly to NSBA’s comment by stating: “As the National School Boards Association comments, although state law may vest the school board with the exclusive authority to discharge an employee, such an action is precipitated by a department supervisor who evaluates the employee’s performance and recommends the action, and the superintendent’s recommendation to the board is based on the department supervisor’s recommendations. In addition, such employees may also qualify for exemption as administrative or professional employees [in addition to qualifying as an executive employee].” This statement indicates that this regulation covers the circumstances in which many school district supervisors make employment- related decisions.

## Administrative Employees

The new duties test for an administrative employee<sup>10</sup> is as follows:

- 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Administrative employees in school districts include “academic” administrators like superintendents, assistant superintendents, principals, and assistant principals and other positions like business managers, human resource and employee benefits managers, public relations directors, etc. The new administrative test will not significantly impact school districts...

The Department made some noteworthy changes to the second prong of the duties test.<sup>11</sup>

Discretion and independent judgment<sup>12</sup> – ... Unfortunately the “discretion and independent judgment” standard is one of the most difficult to apply. Under the final regulations, an employee’s primary duty must “include” the exercise of discretion and independent judgment; however, employees do not have to “regularly and customarily” exercise discretion and independent judgment. The latter requirement is contained in the current long test and courts have improperly applied it the short test. Finally, the final regulations contain a list of factors to determine if an employee exercises discretion and independent judgment.<sup>13</sup> These factors came from the

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<sup>8</sup> Final 29 C.F.R. § 541.105.

<sup>9</sup> *Id.*...

<sup>10</sup> Final 29 C.F.R. § 541.200.

<sup>11</sup> The Department did make some changes to the first prong of the administrative duties test. However, it is very unlikely these changes will impact school districts...

<sup>12</sup> Final 29 C.F.R. § 541.202.

<sup>13</sup> *Id.* Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or

existing regulation and case law. In general, courts have held that employees must meet two or three of the factors to be exempt. In short, the final regulations clarify the discretion and independent judgment standard rather than change it.

With respect to matters of significance<sup>14</sup> – The requirement that discretion and independent judgment must be used “with respect to matters of significance” is new to the regulations. The existing interpretive guidance uses the phrases “work of substantial importance” and “with respect to matters of significance.” The Department wanted to incorporate the concept of important or high-level work in the regulations, but concluded that use of two different phrases describing the same concept was confusing and so combined these two ideas into one. In theory, this change could narrow this exemption a little because it emphasizes that the work performed must be significant. Practically speaking, “with respect to matters of significance” is not a bright line test; therefore, it will be difficult to determine which positions will be affected by this change.

The Department of Labor provides a number of examples of employees who will or will not be exempt as administrative employees under the final regulations. The following examples may be applicable to school districts:

- Employees who lead teams of other employees to complete major projects such as purchasing, selling or closing all or part of a business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvement are exempt.<sup>15</sup>
- Executive assistants or administrative assistants to senior executive are exempt if without specific instructions or prescribed procedures they have been delegated authority regarding matters of significance. This exemption does not include secretaries or other clerical employees. In other words, the superintendent’s secretary is not an exempt employee.<sup>16</sup>
- Human resource managers who formulate, interpret, or implement employment policies are exempt, while personnel clerks who screen applicants to determine if they meet minimum qualifications are not exempt.<sup>17</sup>
- Purchasing agents who can bind a company on significant purchases are generally exempt even if they must consult with top management when making purchases in excess of needs.<sup>18</sup>

School districts with employees in any of the above positions should compare the employees’ duties with the descriptions of the positions in the regulations to determine if such employees are exempt.

Academic Counselors<sup>19</sup> – The final regulations make clear that academic counselors “who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements” are exempt. However, enrollment counselors who engage in general outreach and encourage students to apply to schools will not be exempt under the academic administrative exemption because their work is not sufficiently related to the school’s academic operations. But they may be exempt under the general administrative exemption because their work involves the school’s general business operations.

## **Learned Professional Employees**

The new duties test for learned professional employees<sup>20</sup> is as follows:

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short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

<sup>14</sup> Final 29 C.F.R. § 541.200(a)(3).

<sup>15</sup> Final 29 C.F.R. § 541.203(c).

<sup>16</sup> Final 29 C.F.R. § 541.203(d).

<sup>17</sup> Final 29 C.F.R. § 541.203(e).

<sup>18</sup> Final 29 C.F.R. § 541.203(f).

<sup>19</sup> Final 29 C.F.R. § 541.204.

<sup>20</sup> Final 29 C.F.R. § 541.301

- Primary duty is work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

School districts hire a number of learned professional employees including teachers, school psychologists, nurses, and athletic trainers. It is not likely that the new professional employee test will significantly impact school districts...

While the language from the existing regulations has not changed, there are new definitions. The major changes are summarized below.

Work requiring advanced knowledge<sup>21</sup> – The Department states that this phrase means “work which is predominately intellectual in character, and which includes work requiring consistent exercise of discretion and judgment.” ... In theory, this exemption could be narrowed by the predominately intellectual requirement, as this part of the definition was not in the short test.

Field of science or learning<sup>22</sup> – The Department did not change the exempt professions (law, medicine, accounting, actuarial computation, engineering, architecture, teaching, physical, chemical and biological sciences including pharmacy, and other similar occupations that have a recognized professional status) except to add theology and address nursing and registered or certified medical technology in separate regulations...

The Department of Labor provides a number of examples of employees who will or will not be exempt as professional employees. The following examples may be applicable to school districts:

- Nurses<sup>23</sup> – Registered nurses are exempt professionals (as long as they are paid on a salary basis); licensed practical nurses are not.
- Physicians assistants, registered or certified medical technologists, dental hygienists, or chefs<sup>24</sup> – These employees are exempt provided they meet particular education and/or certification requirements.
- Accountants<sup>25</sup> – Certified public accountants and “many others” who perform similar job duties are exempt. Accounting clerks, bookkeepers, and others who perform a great deal of routine tasks are not exempt...
- Athletic trainers<sup>26</sup> – Athletic trainers who have completed four years of pre-professional and professional study in a program accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board Certification generally are exempt professional employees. This regulation affirmed the holding in *Owsley v. San Antonio Independent School District*, 187 F.3d 521 (5th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000), that held school athletic trainers certified by the state of Texas are professional employees.

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## Teachers

The new duties test for teachers<sup>27</sup> is as follows:

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<sup>21</sup> Final 29 C.F.R. § 541.301(b).

<sup>22</sup> Final 29 C.F.R. § 541.301(c).

<sup>23</sup> Final 29 C.F.R. § 541.301(e)(2).

<sup>24</sup> Final 29 C.F.R. § § 541.301(e)(1), (3)-(4), (6).

<sup>25</sup> Final 29 C.F.R. § 541.301(e)(5).

<sup>26</sup> Final 29 C.F.R. § 541.301(e)(8).

<sup>27</sup> Final 29 C.F.R. § 541.303.

- Primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment.

The primary duty test in the final regulations is the same as the duties test in the current short test except that the consistent exercise of discretion and judgment requirement has been deleted. In short, in the new teachers regulation, the Department combined existing 29 C.F.R. §§ 541.3, 541.301(g), and 514.314 and made only minor editorial changes.

### **Computer Employees**

The new salary and duties test for computer employees<sup>28</sup> is as follows:

- Salary of not less than \$455 a week or compensated on an hourly basis of not less than \$27.63 an hour; and
- Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field whose primary duty consists of:
  - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - 3) The 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.

The new computer exemption combines a patchwork of statutory and regulatory language that has been adopted over the past 14 years. The new regulations are an attempt to implement the statutory requirements and are not intended to depart greatly from the current regulations...

### **Highly Compensated Employees**

The salary and duties test for highly compensated employees<sup>29</sup> is as follows:

- Earn at least \$100,000 in total annual compensation; and
- Customarily and regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee.

In most school districts, few if any employees except the superintendent earn \$100,000 or more a year. Even in districts where some employees earn \$100,000 or more a year, it is very likely that those employees (such as business managers, principals, attorneys, and other administrators) are already exempt as executive, administrative, or professional employees. Consequently, it is unlikely that this regulation will affect most school districts, except maybe those in large urban areas where wages are extremely high. However, districts should look at the duties of all employees who earn over \$100,000 a year who are not currently classified as exempt and determine if such employees meet one of the requirements of the duties test for executive, administrative, or professional employees...

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<sup>28</sup> Final 29 C.F.R. § 541.400.

<sup>29</sup> Final 29 C.F.R. § 541.601.

## School Resource Officers

The final regulations state that a number of law enforcement and emergency workers are not exempt.<sup>30</sup> The Department chose to specifically state in the final regulations that police officers, fire fighters, paramedics, and EMTs are not exempt because no current regulation specifically exempts them and their status has been frequently litigated. The Department does not consider the final regulations to be a departure from case law. While the final regulations do not specifically exempt school resource officers, it is not likely that school resource officers would meet the duties test of the executive, administrative, or profession exemption if police officers, etc. do not.

## Conclusion

In the last few years, school districts in particular have been subject to lawsuits under the FLSA. While these lawsuits did not generally deal with the improper classification of employees, they do indicate that school districts have been lax about complying with the FLSA generally. Before the regulations become effective school districts are advised to take a least three steps. First, districts should make sure that every employee is classified properly according to the new tests and definitions. Second, school districts that want to take advantage of the salary docking rules and the safe harbor provision should adopt policies that allow them to do so. Finally, school districts should make sure they are complying with the overtime requirements of the FLSA applicable to nonexempt employees. While these rules did not change in the new regulations, these are the rules school districts have been recently sued for not following.

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<sup>30</sup> Final 29 C.F.R. § 541.3(b)(1)...