



# Florida EMPLOYMENT

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## Law Letter

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### WAGE AND HOUR LAW

#### **DOL dubs new overtime regulations 'FairPay Initiative,' but opponents cry foul**

The U.S. Department of Labor (DOL) has, at long last, finalized regulations clarifying the white-collar exemptions from overtime pay. Although the DOL says that the new regulations "guarantee and strengthen overtime rights for more American workers than ever before," many Democrats and labor unions disagree. The rhetoric is almost as heated now as it was last year when the DOL first proposed regulations to replace outdated rules, most of which had been in effect since 1954.

Let's take a look at the final regulations, how they differ from the old and proposed regulations, and how to get started on complying with the new standards. As we go along, we'll point out some of the most controversial provisions and what they really mean for you and your employees.

#### **Some background**

As you know, the Fair Labor Standards Act (FLSA) requires most employers to pay overtime to employees who work more than 40 hours a week at a rate of one and a half times the employee's regular rate of pay. There are a variety of exceptions to that requirement, the most notable of which is that employers don't have to pay overtime to white-collar employees who meet the DOL's definition of an exempt executive, administrative, professional, computer professional, or outside sales employee.

Over the last decade or two, employers have found it increasingly difficult to decide which employees are entitled to overtime and which are not. The regulations and case law were imprecise, convoluted, confusing, and often contradictory. The confusion was causing a rapid increase in overtime lawsuits, including a 229 percent increase in

the number of FLSA class-action lawsuits over the last seven years.

In March 2003, the DOL proposed new regulations to try to clean up the mess. Its proposal was met with a storm of criticism from those who argued the agency was trying to deprive hard-working Americans of overtime pay. It has taken over a year for the agency to absorb all the feedback it received and revise the regulations in an effort to address the concerns raised.

#### **Overview of the final regulations**

For the most part, the final regulations have the same structure as the proposed regulations. They take provisions that used to be spread out over the regulatory code and other DOL guidance documents and compile them into one easily accessible section. They also replace the old long and short tests for executive, administrative, and professional employees with a single streamlined test for each. But each test still has two basic requirements for employees to be exempt: (1) they must perform designated *exempt duties* and (2) they must be paid on a *salary basis*.

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**Exempt duties.** The exempt-duties tests have always been the most confusing part of the white-collar exemptions, so it's no surprise that they continue to generate the most controversy. The problem lies in the fact that there are *many* categories of workers that fall into a gray area between exempt and nonexempt. That increasingly led to misclassification of workers and lawsuits for unpaid overtime.

The DOL tried in the proposed regulations to clear up some of the confusion but apparently didn't anticipate the rampant mistrust its proposal would encounter. In short, most of the objections to the proposed regulations were based on a misinterpretation of how they would affect working-class Americans.

The final regulations seem to go to extreme efforts to dispel some of those myths. The preamble to the regulations contains *extensive* charts listing practically every job classification that can be considered clearly exempt or clearly nonexempt. In the regulations themselves, the DOL spells out that blue-collar workers are *never* exempt from overtime pay regardless of their salaries.

They also specifically refute any claims that the regulations take overtime pay away from such nonexempt workers as emergency and law enforcement personnel, licensed practical nurses and other health care workers who don't hold degrees, accounting clerks and bookkeepers, and paralegals and legal assistants.

Unfortunately, the DOL seems to have opened itself up to even more criticism by including specific examples of the types of employees who generally *are* exempt and, therefore, *not* entitled to overtime pay. Although the examples given seem to be fairly straightforward, opponents of the regulations are contending that the DOL is creating entirely new exemptions for those categories of workers, depriving them of overtime for the first time.

The important thing to remember is that the regulations don't provide a blanket exemption for all employees in those job categories. To determine whether they're entitled to overtime pay, you have to look at each individual employee and the employee's specific job tasks.

The changes made to the exempt duties tests have turned out to be a lot less dramatic than some of the language that was included in the proposed regulations. For example, the DOL has abandoned the "position of responsibility" prong of the administrative exemption, reverting back to the requirement that administrative employees exercise discretion and independent judgment that was contained in the old regulations. In an apparent effort to make sure that the work performed by administrative employees is significant enough to qualify them for the exemption, the DOL has added a requirement that their independent judgment and discretion be exercised "with respect to matters of significance."



The DOL has also abandoned controversial language from the proposed regulations that would have allowed employees' military duty and other work experience to be considered in deciding whether they're exempt professionals.

**Money matters.** The minimum salary required for an employee to be considered exempt was last increased in 1975 and was obviously ridiculously outdated. Under the old regulations, only the very lowest-paid workers — those making less than \$8,060 per year — were guaranteed overtime regardless of the types of duties they performed. Under the new regulations, most employees who make less than \$23,660 per year (\$455 per week) are guaranteed overtime pay — even those who clearly perform exempt work. That's not true for all employees because there's no minimum salary for teachers, doctors, lawyers, outside salespeople, and certain business owners.

The DOL says that raising the minimum salary requirement alone will guarantee overtime pay to millions of people who didn't receive it under the old rules. While that may be true, it's not good enough for the DOL's most ardent critics, who claim a figure of \$28,000 would have been more appropriate.

At the other end of the salary scale, the new regulations retain an exemption — originally unveiled in the proposed regulations — for “highly compensated” employees who perform minimal exempt duties or responsibilities. For such employees to be exempt from overtime pay, they must make at least \$100,000 per year, a dramatic increase from the figure of \$65,000 that was initially proposed. The new provision isn’t expected to deprive many employees of overtime pay because: (1) it doesn’t apply to blue-collar workers no matter how much money they make and (2) most people in that pay range would qualify as exempt under one of the other white-collar exemptions.

One complaint from opponents of the regulations is that the salary requirements aren’t indexed for inflation. That’s a puzzle, and one of the few legitimate complaints that critics of the regulations have raised. In light of the fact that the regulations were last revised in 1975 and that revisions are historically bitterly opposed, it seems odd that the DOL hasn’t taken this chance to provide for automatic increases in the minimum salary requirements. It may not get another chance to increase them anytime soon.

**Deductions from pay.** Two provisions dealing with allowable deductions from an exempt employee’s paycheck remain unchanged in the final regulations. In general, exempt employees must be paid a set salary that can’t be reduced because of variations in the quality or quantity of their work. There have long been several exceptions to this “no pay-docking” rule, most of which have to do with employee absences.

But in the past, employers who wanted to suspend employees without pay for workplace misconduct had to do so for *an entire week* (because you don’t have to pay exempt employees for any week in which they perform no work). That rule really hampered employers in finding meaningful ways to discipline their employees for a variety of policy violations, such as harassment or Internet abuse.

The final regulations allow employers to suspend exempt employees for workplace misconduct without pay in one-day increments. In addition, the regulations provide a new “safe harbor” making it easier for employers to fix improper deductions from an exempt employee’s pay.

## Getting started

The final regulations give employers a mere 120 days to comply with the new requirements. Unfortunately, jumping right in to reclassify workers as exempt is a little risky since some Democrats in Congress still hope to block the new rules from taking effect. But it would be even riskier not to comply, so we recommend that you get started on an exemption audit under the new regulations while keeping a close eye on the situation in Congress.

The first step in any employment self-audit is to define its scope. Because the new regulations deal primarily with the white-collar exemptions, you might want to limit your audit to an immediate review of the exempt and nonexempt status of employees under the new rules. If, however, you don’t think you’ll have any trouble meeting the deadline — for example, if you don’t have many employees or most of them are clearly nonexempt — you might want to conduct a broader self-audit covering wage and hour practices that aren’t affected by the new regulations. In any event, be sure to keep an eye out for and reimburse employees for past overtime violations.

Once you’ve decided on the audit’s scope, you need to:

- compile a list of all your employees, their job titles, job descriptions, salaries, and how they’re currently classified;
- verify the accuracy of the information collected — especially job descriptions;
- identify and set aside employees who are easy to classify as exempt or nonexempt — such as doctors and department managers;
- identify the remaining employees as those whose classifications need to be reviewed and possibly changed under the new regulations; and
- get down to the nitty-gritty of deciding whether the new regulations warrant a change in specific employees’ job classifications.

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