



## Ask the Lawyer

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## COMPLYING WITH NEW MINIMUM WAGE AND OVERTIME REGULATIONS

The U.S. Department of Labor revised its Fair Labor Standards Act (FLSA) regulations on April 23, 2004, changing some of the standards used to determine which employees are “exempt” from the minimum wage and overtime provisions. The regulations become effective on August 23, 2004. If an employee is found to be exempt according to the new regulations, they won’t have a right to be paid the minimum wage or overtime pay.

### Minimum Salary Requirements

The regulations change the minimum salary requirements that determine executive, administrative and professional exemptions.

To qualify, such employees must receive at least \$455 per week in addition to other requirements.

However,

such minimum pay doesn’t apply to holders of at least a 20% equity interest in a business provided they’re actively engaged in the management of the business. In addition, certain professionals don’t have to meet any minimum salary requirement to be considered exempt. This increase in minimum salary tests may require employers to either reclassify some of their formerly exempt employees as non-exempt, or increase certain employees’ salaries to the \$455 benchmark to maintain the exemption.

### Exemptions

The regulations also create a new “highly compensated” exemption for office or non-manual employees who earn annual compensation of at least \$100,000 who customarily and regularly perform one or more of the exempt duties of an executive, administrative or professional employee.

Payment alone is not sufficient. A threshold requirement for exempt status under the “executive” exemption calls for the employee be paid “on a salary basis,” meaning their pay is not reduced because of variations in the quality or quantity of the work performed (e.g., they’re not docked for missing an hour of work). The “administrative” and “professional” exemptions require the employee to be paid “on a salary or fee basis.” Employees are paid on a “fee basis” when they’re paid for the completion of a specific job, rather than on a weekly or monthly basis.

### Permissible Salary Deductions

Under the new regulations, an employer may make

deductions from an exempt employee’s salary when the employee is absent in a full-day increment for personal reasons, or due to sickness or injury if the employer has a *bona fide* plan, policy or practice providing for such deduction. An employer also may make full or partial day deductions for intermittent leave under the Family and Medical Leave Act (FMLA) without jeopardizing the salary test.

Additionally, the new regulations allow employers to make a salary deduction for unpaid disciplinary suspensions of one or more full days, as long as the deduction is applied uniformly to all employees found in violation of the employer’s written conduct policy.

Under the old regulations, employers had to be cautious about falling into an “actual practice” of making improper deductions. The new regulations provide employers with a

“safe harbor” if they have a clearly communicated policy prohibiting improper pay deductions from exempt employees’ salaries; a complaint process for employees who feel they were



subject to an improper deduction; reimbursement for any improper deduction; and commits itself to compliance. Employers are well advised to institute such a policy, train their managers regarding its application, and make sure it’s followed.

### Duties Tests

Beyond salary requirements, the FLSA also uses “duties” tests to determine whether employees qualify for exemptions from minimum wage and overtime. The new regulations create single duties tests for each of the executive, administrative, professional and outside salesperson exemptions. The “executive” exemption applies to an employee if:

- Their primary duty is the management of the enterprise or of a recognized department or subdivision of the enterprise;

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- They customarily and regularly direct the work of two or more other employees; and
- They have the authority to hire or fire other employees, or the employee's suggestions and recommendations for hiring, firing, promotions, etc., are given particular weight.

An employee qualifies for the "administrative" exemption if:

- 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
- The employee exercises discretion and independent judgment with respect to matters of significance.

An employee qualifies for the "learned professional" exemption if their 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. The new regulations require a "creative professional" to be primarily engaged in "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."

There are rules affecting specific classes of employees, such as professionals, computer employees, and outside salespersons. For an in-depth review of such employees, see [www.labor.gov](http://www.labor.gov).

**I**n order to bring your business into compliance with these new regulations, you should:

- Examine the payrolls for employees you currently classify as exempt to determine which should now be classified as non-exempt due to the increase in the minimum salary level;
- Revise employment manuals and other sources of policies to include information about disciplinary deductions as well as the employer's "improper deductions" correction policy;
- Examine the duties of all employees who meet the minimum salary level and salary basis tests to make sure that they are properly classified as exempt or non-exempt under the new regulations; and
- Revise employees' "duty descriptions" where necessary to emphasize exempt duties, discretion in hiring decisions and independent judgment. Seek the advice of your accountant and attorney to assist in these often complicated determinations. □

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