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## New USDOL Overtime Regulations

The US Department of Labor (“DOL”) has released the final version of the Fair Pay Overtime Security for the 21<sup>st</sup> Century Workforce revised rules. These rules clarify the definitions of those employees under the executive, administrative, professional, outside sales and computer employee exemptions. These new rules took effect on August 23, 2004. The US House of Representatives recently attempted to block enforcement of the new regulations by adding an amendment to a budget bill. The regulations however are still in effect and remain enforceable by both the DOL and private litigation. Indications are that this attempt to block the regulations will likely fail.

To ensure compliance with these new rules, employers need to review the new rules; determine the impact on current compensation practices; conduct a compliance review of existing employee classifications and pay practices; revise affected policies and practices in light of the new rules; and implement changes throughout the workforce.

The rules have made several significant changes. The minimum salary level for

exempt employees has been raised from \$155/week (or \$8,060/year) to \$455/week (or \$23,660/year). The salary basis test, which is a component of all exemptions, has been rewritten to define situations when an exempt employee’s salary status could be lost by unlawful deductions. An employee’s exempt status will be defeated if unlawful deductions are made from his or her predetermined salary. The new



rules contain seven circumstances for permissible deductions to the salary of otherwise exempt employees. They are 1) for absences from work for a full day or more for personal reasons other than sickness or disability; 2) for absences of a full day or more (in daily increments) occasioned by sickness or disability, in accordance with a bona fide plan, policy or practice providing wage replacement benefits in the event of sickness or disability; 3) to offset jury or witness fees or military pay received by the employee; 4) for penalties imposed in good faith for in-

fractions of “safety rules of major significance”; 5) for hours not worked in the first or last weeks of employment; 6) for hours taken as unpaid leave under the FMLA; and 7) for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules.

The new rules also provide a “safe harbor” that will preserve an employee’s exempt status in the event impermissible deductions are made. An overtime exempt employee’s salary basis will not be defeated if the employer: (a) has a clearly communicated policy prohibiting improper deductions including a complaint mechanism; (b) reimburses employees for any improper deductions; and (c) makes a good faith commitment to comply in the future. This safe harbor is not available, however, if the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. The new rules have also added a “highly compensated” employee exemption. An employee with “total compensation” of at least \$100,000/year will be considered exempt under this test if, in addition,



“It is wiser to find out than suppose.” Mark Twain

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## Overtime Regulations continued...



she receives at least \$455/week; performs “office or non-manual work” and “customarily and regularly” performs any one or more of the exempt duties of an executive, administrative or professional employee on a regular and recurring basis. The new rules have changed the duties tests which now incorporate the following: An exempt executive employee is one: who is compensated on a salary or fee basis at a rate of not less than \$455/week; and whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and who customarily and regularly directs the work of two or more other employees; and who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promo-

tions or any other change of status of other employees are given particular weight.

An exempt administrative employee is one: who is compensated on a salary basis at a rate of not less than \$455 per week; whose primary duty is the performance of office or non-manual work directly re-



lated to the management or general business operations of the employer or of the employer’s customers; and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

An exempt professional employee is one: who is compensated on a salary or fee basis at a rate of not less than \$455/week; whose primary duty is the performance of work i) requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or ii) requiring invention, imagination, originality or talent in a “recognized field of artistic or creative endeavor.”

The DOL has developed a web page which explains in more detail the new overtime rule changes and is available at [www.dol.gov/fairpay](http://www.dol.gov/fairpay). For further assistance, contact Attorney Douglas M. Mansfield.

## Non-Profit Notes



New Hampshire has a proud tradition of volunteerism, and many of our business clients are part of that tradition, using their skills in business to help a variety of charitable organizations. New Hampshire law has a few peculiarities, though. Those setting up charities should also be aware of the many excellent resources that are available.

**PECULIARITIES:** Many charities choose to form themselves as corporations, which is the best for most. The initial Articles of Agreement for a charitable corporation must be filed first with the NH Secretary of State and then with the City or Town Clerk where the charity is located (this order is the reverse of past practice).

The Secretary of State has forms on its website, including Articles of Agreement. Those Articles, however, do not contain the required “magic” language that would allow the IRS to recognize the group as tax exempt. Charities that contemplate seeking tax exempt status from the IRS, as 501(c)(3) organizations, should seek assistance in crafting customized Articles of Agreement that will meet both NH and IRS requirements for charities. In addition, non-profit, charitable organizations need to register with the Charitable Trusts Unit of the NH Attorney General’s office. The form for that purpose (NHCT-1) is available on the web: [http://doj.nh.gov/publications/charitable\\_forms.html](http://doj.nh.gov/publications/charitable_forms.html).

**RESOURCES:** Although regulation by the Charitable Trusts Unit adds a layer of paper work to the life of a NH charity, there are also benefits to working with that office. The staff is very knowledgeable and helpful at answering questions. They can be reached at 271-3591. In addition, their website has useful forms, plus many resources, including: “Guidebook for Directors of NH Charitable Trusts and Non-Profit Organizations” and “Incorporation and Tax Exemption for NH Arts and Other Organization: An Introductory Guide.” They can be found at: <http://doj.nh.gov/publications/publications.html#ct>. For further assistance contact Attorney Katherine B. Miller.

## Secretary of State - Legal Entity Update

As we previously reported, the New Hampshire Secretary of State has begun automating its systems to allow, in part, the filing of forms via the internet. The first, and currently only, form that may be filed on-line is an entity's Annual Report. The New Hampshire Senate and House of Representatives recently enacted changes to certain RSAs, including RSA 293-A (Business Corporation Act) and 304-C (Limited Liability Company Act); these changes became effective July 1, 2004 (see House Bill 1348). The primary changes in this Bill include a change in how the Corporation Division determines name availability and



changes in certain fees.

The changes regarding name availability, according to the Corporation Division, give them more flexibility in determining whether or not a name is available. They will still check to see if a new filing may potentially conflict with a name currently registered with them; however, they will now take into account the location of the entity or trade name to be registered and its purposes. The final determination as to the availability of the name will be made by the Corporation Division staff.

The fee changes relate primarily to new entity registrations, such as the formation of a new corporation, limited liability company or

limited partnership, or the registration of a foreign entity. In general, these fees increased. The state filing fee to file Articles of Incorporation for a corporation, a Certificate of Formation for a limited liability company, or a Certificate of Limited Partnership (including, in all cases, required Form SRA – the securities addendum) increased from a total of \$85.00 to \$100.00. For an expedited Certificate of Existence, an additional \$30.00 fee is required. The only fees that decreased relate to registering a foreign limited liability company and canceling that registration.

The Secretary of State has also initiated a handling charge of \$2.00 for each on-line transaction. According to House Bill 1348, this fee will be in effect for four (4) years, to be repealed July 1, 2008. Currently, the only on-line transaction available is the filing of annual reports. However, as the Corporation Division's website is developed and more types of filings become available on-line, this handling charge will also apply to all on-line filings.

Perhaps the most significant changes, however, relate to the annual report that must be filed by each entity. These changes are effective with the 2005 annual report. First, there will no longer be a 15-day grace period after April 1<sup>st</sup> to receive annual reports. Annual reports are due by April 1<sup>st</sup> each year. Any annual report received April 2<sup>nd</sup> or later will be assessed a late fee. Second, the late fees are changing. For years through 2004, the late fee due for an annual report is a flat fee of \$50.00. Beginning with the 2005 an-



nual report, for any report received April 2<sup>nd</sup> or later, late fees will accrue at the rate of *\$25.00 per month*. As you can see, this can quickly double the total fee due to the state if an annual report is filed late. The fee for a timely filed annual report remains at \$100.00.

If a New Hampshire entity fails to file its annual report for two years, the Secretary of State may administratively dissolve the entity. The entity can be reinstated, but this can be a lengthy and expensive process. The fees to reinstate an entity dissolved this year can potentially be as much as \$439.00, including all annual report fees, late fees, handling charges and the reinstatement fee. Under the new



late fee structure, reinstatement fees can be as much as \$939.00, including all annual report fees, all late fees, handling charges and the reinstatement fee.

Donahue, Tucker & Ciandella, PLLC can assist you with timely filing your entity's

annual reports on-line. For an annual fee of \$75 per entity, together with a written consent and the applicable state fees, we will ensure that your annual report is filed on time. If you would like us to perform this valuable service for you, please contact our Corporate Paralegal, Elizabeth Wiedmann.





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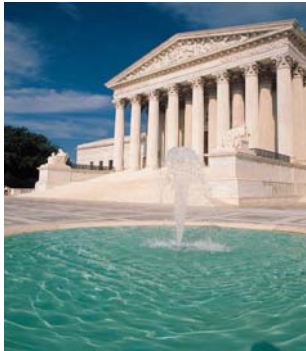
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Established in 1985, Donahue, Tucker & Ciandella, PLLC is one of New Hampshire's leading law firms, with offices in Exeter and Portsmouth. We are a full-service firm with our lawyers offering personalized representation to small businesses, large institutions and individuals. We represent and advise our clients in the areas which include general business and commercial law, municipal, development and real estate law, telecommunications, utility and internet law, employment and labor law, family law, environmental law, appellate, litigation, bankruptcy, and probate/estate planning.

Our attorneys provide affordable, quality legal services and personal attention to small and large businesses, agencies, boards, municipalities and individuals. Our focus on the client has enabled DTC firm to provide general counsel services, as well as, special representation on specific matters to our clients. It allows us to be trusted counselors and advisors as well as advocates.

While situated on New Hampshire's seacoast, our clients come from throughout New England. We represent many firms and individuals relocating to New Hampshire from across the nation.

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