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New USDOL Overtime Regulations.

The US Department of Labor ("DOL") has released the final version of the new overtime regulations, officially known as the "Fair Pay Overtime Security for the 21st 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 regu-

lations 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, municipalities 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 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 infractions 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. Before making the above deductions, the employer should ensure compliance with state law.

The new rules also provide a safe harbor that 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.



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USDOL Final Rules cont.

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, the employee: 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 provide that an exempt executive 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 management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; 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, promotions 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 related 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 1) requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or 2) 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. For more information, contact attorney Douglas M. Mansfield at Donahue, Tucker and Ciandella, PLLC.

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