THE NEW 541 REGULATIONS:
A COMPARISON OF THE OLD, THE PROPOSED AND THE NEW

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Attached is a handy reference guide to the new 2004 Fair Labor Standards Act (FLSA) white collar regulations. Absent legislative action to stop them, these regulations are scheduled to take effect on August 23, 2004. The attached guide compares the long and short tests contained in the current regulations to DOL’s proposed regulations, published in the Federal Register on March 31, 2003, and the final regulations issued in April. It is useful to compare these four different tests to help understand how DOL arrived at the result that it did in its final regulations.

Until new litigation fleshes out the courts’ interpretations of these new rules, it is difficult to predict which of DOL’s new rules will have the greatest impact on workers’ rights to overtime pay. We anticipate that the most significant changes will be:

- Raising the minimum salary threshold for exempt status from $8,000 to approximately $23,600 dollars per year;
- The elimination of the long test and the accompanying percentage of work time tolerance test for determining exemption status;
- The creation of a new test for so-called “highly compensated” employees in which employees need only meet one of the tests for an exemption and, worse, need only “customarily and regularly” perform the exempt work rather than have it as their primary job duty to be considered FLSA exempt;
- The creation of a new method by which employers may insulate themselves from salaried basis test challenges;
- A revised definition of the primary duty test; and
- The creation of new exemption rules pertaining to public sector employees.

The design of the new regulations departs radically from the previous regulations in a manner clearly intended to benefit employers’ efforts to deny overtime pay to their workers. DOL has eliminated the long test in which employees paid below certain salary levels must spend at least 80 percent of their time performing exempt duties. DOL has
adopted many, but not all, of the features of the old short test for workers who make less than $100,000. However, DOL has created a new test for workers who are allegedly highly compensated — they make more than $100,000 per year — in which an employee need only customarily perform one of the duties of an administrative, executive or professional employee to be denied overtime pay. This latter test is obviously the result of the Administration’s frustration at being unable to deny workers overtime pay based on income alone. Of course, denying employees’ right to overtime pay based on income would violate the Secretary’s statutory mandate under section 213(a) of the FLSA to define the terms administrative, executive and professional. As a result, rather than create an income based test, DOL has created a test for “highly compensated” workers so they can be denied overtime pay based on job duties that otherwise would not come close to meeting one of the exemptions. In other words, DOL now permits employees, who do not otherwise meet the tests for exemption, to be denied overtime pay because of how much money they make.

Given that the salary levels of the current regulations have not been changed for almost thirty years, the creation of such a test and its potential for taking away workers’ overtime pay is frightening. Unless future Administrations are vigilant and proactive in raising this salary level for highly compensated employees, more and more workers will fall under this extremely weak test for exempt status and, as a consequence more and more workers will lose their right to overtime pay under the FLSA.

On a more positive note, for the first time since the 1985 amendments were passed (which provided for FLSA coverage of public employees), DOL specifically addresses whether certain government employees fall within the white collar exemptions.
The existing regulations contain nothing which specifically addresses the application of these exemptions to public sector employees. The new regulations explain that the performance of law enforcement and fire protection work is not exempt work. They provide examples of specific positions within the police and fire departments such as fire lieutenants or police sergeants who direct the work of two or more employees who do not meet the tests for any of these exemptions. In addition, DOL further explains that such employees cannot qualify for the test for highly compensated employees because they do not perform office or other non-manual work.

DOL also provides assistance with respect to other government occupations. DOL explains that employees in jobs such as inspectors, environmental specialists and similar types of public sector occupations do not meet the tests for the administrative or professional exemptions.

In considering the new regulations, practitioners should be alert to two important caveats. First, in many instances, these regulations cannot be adequately understood without reviewing DOL’s 278 page preamble published in the Federal Register regarding the reasons the new regulations were adopted and DOL’s intent with regard to their application. In many cases, the preamble helps illuminate and define the terms that are contained in the text of the regulations themselves. Courts will likely defer to the statements in the preamble in interpreting the regulations. They are available on DOL’s website at www.dol.gov/fairpay.

Second, practitioners should be aware that many states have their own overtime laws and exemption regulations. Pursuant to 29 U.S.C. § 218(a), if state laws and regulations provide greater protections to employees than the FLSA, employers are
obligated to follow the state laws and regulations. The large overtime pay verdicts that have been greatly publicized the past several years, such as *Bell v. Farmers Insurance*, have all been pursued under state law. There are currently 18 states alone that have their own white collar regulations, none of which are identical to the new regulations. As a result, it is likely that many employees who are now exempt from FLSA overtime pay will nonetheless be entitled to overtime pay under applicable state laws.

Contrary to the Secretary Chao’s claims, the new regulations are likely to lead to an increase in litigation as courts struggle with the new definitions of the white collar exemptions. In addition, as states wrestle with the issue of whether to follow all or in part the new DOL regulations, litigation is likely to ensue under state laws. Such litigation should not be surprising given that DOL is changing regulations that have been in effect for decades, with decades of court interpretation.
### Executive Employees
29 C.F.R. §§ 541.100 - .106

<table>
<thead>
<tr>
<th>Salary</th>
<th>Current Long Test</th>
<th>Current Short Test</th>
<th>2003 Proposal</th>
<th>2004 Final Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>$155 per week</td>
<td>$250 per week</td>
<td>$425 per week</td>
<td>$455 per week</td>
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</tbody>
</table>

**Duties**

- Primary duty of management of enterprise or of a customarily recognized department or subdivision.
- Who customarily and regularly directs the work of two or more other employees.
- Who has authority to hire or fire other employees or whose suggestions or recommendations as to hiring, firing, advancement and promotion or other change of status of other employees will be given particular weight.
- Customarily and regularly exercises discretionary powers.
- Does not devote more than 20 percent (40 percent in retail or service establishments) of work hours to activities which are not directly and closely related to exempt work.
- For this percentage of time test for employees “in sole charge” of independent establishment or branch or who owns 20% of interest in enterprise.

**Current Long Test**

- Primary duty of management of the enterprise or a recognized department or subdivision.
- And
- Customarily and regularly directs the work of two or more other employees.

**Current Short Test**

- Primary duty of management of the enterprise or a recognized department or subdivision.
- And
- Customarily and regularly directs the work of two or more other employees.

**2003 Proposal**

- Primary duty of the management of the enterprise or a recognized department or subdivision.
- Has authority to hire or fire other employees (or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees are given particular weight).
- Employees solely in charge considered to have

**2004 Final Regulations**

- Primary duty of 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.
- Has authority to hire or fire other employees (or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees are given particular weight).
- Includes owner/employee with 20% equity interest in enterprise in which the employee is employed and who is actively engaged in its management. (No salary requirements apply in this case).
### Administrative Employees
29 C.F.R. §§ 541.200 - .204

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</tbody>
</table>

**Duties**

- Primary duty of performing office or non-manual work directly related to management policies or general business operations of employer or employer’s customers.
- Customarily and regularly exercises discretion and independent judgment.
- Regularly and directly assists a proprietor, or exempt executive or administrative employee; or performs under general supervision work along specialized or technical lines requiring specialized knowledge, training or experience or who executes under only general supervision special assignments and tasks.
- Does not devote more than 20 percent (40 percent in retail or service establishments) of work hours to activities that are not directly
- Primary duty of performing office and non-manual work directly related to management policies or general business operations of employer or employer’s customers.
- Primary duty of performing work of substantial importance or performing work requiring a high level of skill or training.
- Holds a “position of responsibility” with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
and closely related to administratively exempt work.
### Learned Professional Employees
29 C.F.R. § 541.301

<table>
<thead>
<tr>
<th>Salary or Fee Basis</th>
<th>Current Long Test</th>
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<th>2003 Proposal</th>
<th>2004 Final Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$170 per week</td>
<td>$250 per week</td>
<td>$425 per week</td>
<td>$455 per week</td>
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</table>
| Duties              | Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. As distinguished from general academic education or apprentice, teaching also exempt.  
Work requiring consistent exercise of discretion and judgment.  
Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.  
Does not devote more than 20 percent of time to activities that are not essential part of and necessarily incident to exempt work. Salary/fee test not apply to holder of valid license or certificate practice law or medical and actually practices in field. | Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study and (teaching exempt).  
Performs work requiring exercise of discretion and judgment.  
And  
Performs work requiring exercise of discretion and judgment. | Primary duty of performing office and non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. | Primary duty of 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 and which includes work requiring the consistent exercise of independent judgment and discretion. |
## Creative Professional Employees
29 C.F.R. § 541.302

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<thead>
<tr>
<th></th>
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<th>2004 Final Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Salary or Fee</strong></td>
<td>$170 per week</td>
<td>$250 per week</td>
<td>$425 per week</td>
<td>$455 per week</td>
</tr>
<tr>
<td><strong>Duties</strong></td>
<td>Primary duty of performing work that is original and creative in character in a recognized field or artistic endeavor, and the result of which depends primarily on the invention, imagination, or talent of the employee. Consistently exercises discretion and judgment. Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time. Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.</td>
<td>Performs work requiring invention, imagination, or talent in a recognized field or artistic endeavor. (As opposed to work produced by person with general manual or intellectual training) and the results depend primarily on the invention, talent, or imagination of the individual.</td>
<td>Primary duty of performing office or non-manual work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. As opposed to routine mental, mechanical or physical work. Does not apply to a person with general manual ability and training.</td>
<td>Primary duty of performance of work requiring invention, imagination, originality or talent in a recognized field or artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. Exemption does not apply to person with general manual or intellectual ability and training.</td>
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</tbody>
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## PUBLIC SECTOR

<table>
<thead>
<tr>
<th>Requirements</th>
<th>Previous Regulations</th>
<th>Proposed Regulations</th>
<th>Public Safety Regulations</th>
<th>Other Government Employees New Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>§553.216. Nothing unique. Apply part 541 regulation. High ranking police officials who are engaged in law enforcement <em>may</em> qualify for §13(a)(1). Certain criminal investigators may qualify as “administrative”. Salaried basis test different from private sector in that deductions for leave without pay made pursuant to pay system established by law or regulation or principles of public accountability do not affect salaried status.</td>
<td>No change from prior regulations for any government employees.</td>
<td>Section 13(a)(1) exemptions do not apply to police officers, detectives . . . investigators, inspectors, parole officers . . . fire fighters, paramedics, . . . hazardous materials workers and similar workers, regardless of rank or pay level who perform such work as preventing, controlling or extinguishing fires, rescuing fire, crime or accident victims, preventing or detecting crimes, preparing investigative reports or similar work. Not exempt because direct two or more employees work if law enforcement or fire protection activities are primary duty. Nor are such employees professionals.</td>
<td>541.203(j). Public Sector inspectors or investigators such as fire inspectors, prevention, building or construction inspectors, health and sanitation inspectors, environmental or soils specialists and similar employees not exempt because their work is not directly related to management or business operations of the employee and they use skills and technical knowledge.</td>
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### PRIMARY DUTY

<table>
<thead>
<tr>
<th>Requirements</th>
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<tr>
<td>Administrative, executive or professional activities must compromise 80% or more of work time (60% in retail) for administrative and executive exemptions; or, for executive exemption, in sole charge</td>
<td>§541.103: Primary duty test required for administrative, executive or professional, and computer professional exemption. Primary duty defined at 541.103: “amount of time” spent in the performance of exempt duties is a useful guide. In the ordinary case it is “a good rule of thumb that primary duty means the major part or over 50 percent of time. Time alone, however, is not sole test: relative importance of exempt duties as compared to other duties, frequency with which exercise discretionary powers; relationship between exempt employee’s salary and wages paid other employees to do same non-exempt work are also considered.</td>
<td>§541.700: Primary duty means principal, main, major or most important duty. Factors to consider are relative importance of exempt versus non-exempt duties; amount of time spent performing exempt work; relative freedom from supervision; relationship between salary and non-exempt employee’s salary. Expressly state exempt employee need not spend 50 percent of time performing exempt work. Determination of status based on facts as a whole.</td>
<td>§541.700: Changes from proposed reg: 1. Determination is based on the facts “with the major emphasis on the character of employee’s job as a whole”. Amount of time spent performing exempt duties is a useful guide. 2. New regulation at 541.106 entitled “concurrent duties” provides the illustration of retail and food service managers who “can serve food and supervise employees at the same time without losing the exemption”.</td>
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## TEST FOR “HIGHLY COMPENSATED EMPLOYEES”

### 541.601

<table>
<thead>
<tr>
<th>Current Regulations</th>
<th>Proposed Regulations</th>
<th>Final Regulations</th>
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<tbody>
<tr>
<td>No such test</td>
<td>Employee who performs office or non-manual work and is guaranteed a total annual compensation of at least $65,000 is exempt if the employee performs any of the one or more exempt duties of an administrative, executive or professional employee.</td>
<td>Employee with an annual compensation of at least $100,000 exempt if “customarily and regularly” performs any one or more of the exempt duties of an executive, administrative or professional employee and has office or non-manual work as their primary job duty.</td>
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