

Client **United States Department of Labor**
Advisory **FairPay Regulations**

April 2004 **The New White Collar Exemptions***

On April 23, 2004, the U.S. Department of Labor issued new regulations regarding the "White Collar" exemptions under the Fair Labor Standards Act. The new regulations entitled "FairPay" dramatically alter the analysis an employer must undertake to determine whether an employee is exempt or non-exempt from the federal minimum wage and overtime requirements.¹

As a general rule, all employees are entitled to receive overtime pay – one and one-half times the regular hourly rate of pay – for each hour worked over forty (40) hours in a work week, unless the employee qualifies under one of the recognized exemptions.² The most common exemptions are the so-called "White Collar" exemptions for Executive, Administrative, Professional, Computer Employees, and Outside Sales Employees.

The new FairPay regulations have clarified the standards by which employees may qualify for one of the "White Collar" exemptions, which are set forth below.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

* The FairPay regulations will become effective on August 23, 2004 unless Congress passes a resolution disapproving them.

¹ Please note that the FairPay regulations pertain to the Federal Fair Labor Standards Act. Before altering your payroll practices, you must review the appropriate wage and hour laws of the state the employee works in.

² In addition to the "White Collar" exemptions, there are several industry specific exemptions including, inter alia, seasonal amusement and recreational establishments and domestic employees.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
- The employee's primary duty must be 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's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned and Creative Professional Exemption

To qualify for the *learned* professional exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

To qualify for the *creative* professional employee exemption, all of the following test must be met:

- The employee must be compensated on a salary or fee basis at rate not less than \$455 per week.
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than \$455 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
 1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems ; or
 4. The combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly Compensated Employee Exemption

Perhaps the most significant change under the new FairPay regulations is the addition of a Highly Compensated Employee Exemption classification. In order to qualify for the Highly Compensated Employee Exemption, an employee must perform office or non-manual work and receive total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) and customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.