

## NEW FAIR LABOR STANDARDS ACT OVERTIME RULES

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The Fair Labor Standards Act (FLSA) governs the payment of minimum wage and overtime compensation to covered employees. Generally, employers with two or more employees (regardless of whether they are FLSA exempt employees), who are engaged in interstate commerce are subject to the FLSA. Enterprises with less than \$500,000 in gross annual sales volume, however, are not covered by the FLSA unless they are engaged in an industry not subject to this dollar value test (e.g. hospitals, schools and state and local government). Michigan's state wage and hour law fills this gap in the federal law by requiring employers not covered by the FLSA to pay a minimum wage and overtime compensation to eligible employees. In interpreting Michigan's state wage and hour laws, FLSA regulations are generally followed.

On April 20, 2004, the United States Department of Labor published "final" regulations governing "white collar" exemptions to overtime compensation under the FLSA. These new regulations took effect on August 23, 2004. The new regulations are intended to clarify the requirements for satisfying the exemptions to the overtime compensation regulations, revise the "salary basis test" regarding deductions and provide a new "safe harbor" provision designed to insulate employers from inadvertent improper deductions that could make employees non-exempt. Be aware, however, that the debate over the new regulations in

Washington continues. On September 9, 2004, the House of Representatives passed an appropriations bill containing a rider that repeals the new FLSA regulations. President Bush has promised to veto the legislation if it reaches him. For the time being, however, the new regulations are in effect and employers must comply with them.

The new rules are very clear on the following points:

- Employees paid by the hour are entitled to overtime compensation except certain computer professionals, and individuals employed in certain exempted industries (e.g. seasonal amusement or recreational establishments; agricultural, domestic service, etc.)
- Blue-collar and manual laborers are entitled to overtime compensation, unless employed in an exempted industry.
- All salaried workers earning less than \$455 per week or \$23,660 annually are entitled to overtime compensation.
- Salaried workers earning more than \$455 per week or \$23,660 annually must be paid overtime compensation unless they perform executive, administrative, professional, certain computer-related duties or outside sales duties.
- Salaried workers earning more than \$100,000 who regularly perform at least one exempt duty need not be paid overtime compensation.

The primary compliance challenge to employers will be reassessing which employees qualify as exempt Executive, Administrative, computer or Professional employees. Below is a summary of the new tests for determining whether an employee qualifies as an Executive, Administrative, computer or Professional employee. With regard to the computer employee and outside sales employee exemptions, no significant changes in the regulations were

made. Following the summary is a chart of these and other changes to the FLSA regulations:

### **A. Executive Employees**

- Primary duty is management of the enterprise or a recognized department or subdivision of the enterprise;
- Customarily and regularly directs the work of two or more employees; and
- Authority to hire and fire employees, or makes suggestions regarding hiring, firing, and other status change decisions regarding employees that are given particular weight

Particular weight: factors include whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; the frequency with which the employee's suggestions and recommendations are relied upon. It does not include an occasional suggestion with regard to the change in status of a co-worker. "Particular weight" is given even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

- Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements are otherwise met.

### **B. Administrative Employees**

- Primary duty consists of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers (i.e., "directly related to assisting with the running or servicing of the business, as distinguished from working on a manufacturing production line", and

i.e., tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and similar activities)

- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (“matters of significance” refers to “the level of importance or consequence of the work performed”)

Factors to consider when determining whether an employee exercises discretion and independent judgment: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to the operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

## C. Professional Employees

### 1. Learned Professional:

- Primary duty is the performance of work requiring advanced knowledge (work that is intellectual in character and which requires the exercise of discretion and independent judgment); and
- Advanced knowledge must be in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction

Includes: law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades.

Includes: Registered or certified medical technologists, registered nurses, dental hygienists, physician assistants, accountants, chefs, funeral directors and embalmers, athletic trainers, all may meet the

requirements provided they have acquired the requisite specialized intellectual instruction.

Does not include: Licensed practical nurses and other similar health care employees; accounting clerks, bookkeepers and other employees who perform a great deal of routine work; cooks who perform predominantly routine manual, mechanical or physical work; paralegals and legal assistants

- Advanced knowledge cannot be attained at the high school level. It is generally restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession; usually appropriate academic degree required.
- Exemption also available where employee has substantially the same knowledge level and performs substantially the same work as the degreed employee, but where advanced knowledge attained through a combination of work experience and intellectual instruction, but not where most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction

## **2. Creative Professional:**

- Primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

Includes: Musicians, composers, conductors, soloists, painters, cartoonists, essayists, novelists, short-story writers, screenplay writers, and graphic artists; journalists who conduct investigative interviews, analyze or interpret public events, write editorials, opinion columns or other commentary.

Does not include: Newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events

<u>EXEMPTION</u>	<u>OLD REGULATION</u>	<u>NEW REGULATION</u>
	<p>Compensated on a salary basis at not less than \$155 per week on a "salary basis" (long test) or \$255 per week on a "salary basis" (short test) (\$8,060 per year minimum)</p>	<p>Regulatory changes appear in italics:</p> <p><i>Executive, administrative, and professional employees who earn more than \$455 per week on a "salary basis" (\$23,660 per year)</i></p> <p><i>Long and Short Tests eliminated</i></p>
<p>Executive</p>	<p>§541.100</p> <ul style="list-style-type: none"> <li>● Primary duty consists of the management of the enterprise or of a customarily recognized department or subdivision of the enterprise; and</li> <li>● Customarily and regularly directs the work of two or more employees; and</li> <li>● Authority to hire or fire other employees <u>or</u> whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight.</li> <li>● Does not devote more than 20 percent of his/her working hours to activities which are not directly and closely related to the performance of</li> </ul>	<p>§541.100</p> <ul style="list-style-type: none"> <li>● Primary duty is management of the enterprise or a recognized department or subdivision of the enterprise;</li> <li>● Customarily and regularly directs the work of two or more employees; and</li> <li>● Authority to hire and fire employees, <u>or</u> makes suggestions regarding hiring, firing, and other status change decisions regarding employees that are given <i>particular weight</i></li> <li>● <i>Particular weight: factors include whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; the frequency with which the employee's suggestions and recommendations are relied upon. It does not include an occasional suggestion with regard to the change in status of a co-worker. Deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status</i></li> <li>● <i>Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if</i></li> </ul>

	<p>executive work</p>	<p><i>the requirements are otherwise met</i></p> <ul style="list-style-type: none"> <li>▲ Deletes special rules for exemption available to "sole charge" executives</li> <li>▲ Owners of at least 20 percent equity interest in an enterprise are exempt only if they are "actively engaged in its management".</li> </ul>
<p>Administrative</p>	<p>§541.200</p> <ul style="list-style-type: none"> <li>● Primary duty consists of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers; <u>and</u></li> <li>● Work customarily and regularly involves the exercise of discretion <u>and</u> independent judgment; <u>and</u></li> <li>● Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity, <u>or</u></li> <li>● Performs under only general supervision work along specialized or technical lines requiring specialized training, experience or knowledge, <u>or</u></li> <li>● Executes under only general supervision special assignments and tasks; <u>and</u></li> </ul>	<p>§541.200</p> <ul style="list-style-type: none"> <li>● Primary duty consists of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers (i.e., "directly related to assisting with the running or servicing of the business, as distinguished from working on a manufacturing production line", i.e., tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and similar activities); and</li> <li>● Primary duty <i>includes</i> the exercise of discretion and independent judgment <i>with respect to matters of significance</i> ("<i>matters of significance</i>" refers to "<i>the level of importance or consequence of the work performed</i>")</li> <li>● Factors to consider when determining whether an employee exercises discretion and independent judgment: <i>whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects</i></li> </ul>

	<ul style="list-style-type: none"> <li>● Does not devote more than 20 percent of his/her working hours to activities which are not directly and closely related to the performance of administrative work.</li> <li>● Discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.</li> <li>● Discretion and independent judgment implies that the person has the authority to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.</li> </ul>	<p><i>business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.</i></p> <ul style="list-style-type: none"> <li>▲ Deletes the requirement that the exercise of discretion and independent judgment be "customary and regular"</li> <li>▲ Deletes the requirement that the employee perform work of "substantial importance to the management or operation of the business"</li> <li>▲ Deletes the category of work that is routine but is so directly and closely related to administratively exempt work that it is considered exempt, i.e., (1) work which "necessarily arises out of the administrative duties work and routine work without which the employer's more important work cannot be performed properly"; and (2) routine tasks which may not be essential to the proper performance of more important duties but which is "functionally related to them directly and closely"</li> <li>▲ Regulations fail to clarify the "production worker/ administrative worker dichotomy"</li> </ul>
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<p>Professional</p>	<p>§541.300</p> <ul style="list-style-type: none"> <li>● Primary duty consists 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 study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; <u>or</u></li> <li>● Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training) and the result of which depends primarily on the invention, imagination, or talent of the employee; <u>and</u></li> <li>● Work requires the consistent exercise of discretion and judgment in its performance; <u>and</u></li> <li>● Work is predominantly intellectual and varied</li> </ul>	<p>§541.300</p> <p><i>Learned professional:</i></p> <ul style="list-style-type: none"> <li>● Primary duty is the performance of work requiring advanced knowledge (<i>work that is intellectual in character and</i> which requires the exercise of discretion and independent judgment); and</li> <li>● Advanced knowledge must be in a field of science or learning that is customarily acquired by a prolonged course of <i>specialized intellectual</i> instruction</li> <li>● Includes law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades.</li> <li>● Advanced knowledge cannot be attained at the high school level.</li> <li>● Generally restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession; usually appropriate academic degree required</li> <li>● But, exemption also available where employee has substantially the same knowledge level and performs substantially the same work as the degreed employee, but where advanced knowledge attained through a combination of work experience and intellectual instruction, but not where most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction</li> <li>● Registered or certified medical technologists, registered nurses, dental hygienists, physician assistants,</li> </ul>
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	<p>in character (as opposed to routine mental, manual, mechanical or physical work) and is such that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and</p> <ul style="list-style-type: none"> <li>• Does not devote more than 20 percent of his/her working hours to activities which are not an essential part of and necessarily incident to professional work</li> </ul>	<p>accountants, chefs, funeral directors and embalmers, athletic trainers, all may meet the requirements provided they have acquired the requisite specialized intellectual instruction</p> <ul style="list-style-type: none"> <li>▲ Licensed practical nurses and other similar health care employees do not qualify as exempt professionals</li> <li>▲ Accounting clerks, bookkeepers and other employees who perform a great deal of routine work do not qualify</li> <li>▲ Cooks who perform predominantly routine manual, mechanical or physical work do not qualify</li> <li>▲ Paralegals and legal assistants do not generally qualify</li> </ul> <p>OR</p> <p><i>Creative Professional:</i></p> <ul style="list-style-type: none"> <li>• Primary duty is the performance of work requiring invention, imagination, <i>originality</i> or talent in a recognized field of artistic or <i>creative</i> endeavor</li> <li>• Included are musicians, composers, conductors, soloists, painters, cartoonists, essayists, novelists, short-story writers, screenplay writers, and graphic artists</li> <li>• Journalists are exempt if they conduct investigative interviews, analyze or interpret public events, write editorials, opinion columns or other commentary; Newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt</li> </ul>
<p>Computer Professional</p>	<p>Originally a sub-section of the professional exemption (originally enacted 11/15/90)</p>	<p>§541.400 [new sub-section; same general provisions]</p> <ul style="list-style-type: none"> <li>• Computer systems analysis, computer</li> </ul>

<ul style="list-style-type: none"> <li>● Primary duty consists of work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; <u>and</u></li> <li>● Work requires the consistent exercise of discretion and judgment in its performance; <u>and</u></li> <li>● Work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is such that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and</li> <li>● Does not devote more than 20 percent of his/her working hours to activities which are not an essential part of and necessarily incident to</li> </ul>	<p>programmers, and software engineers or other similarly skilled workers in the computer field are eligible</p> <ul style="list-style-type: none"> <li>● Primary duty is the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or</li> <li>● 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; or</li> <li>● The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or</li> <li>● A combination of the above</li> <li>● Not available to employees engaged in manufacture or repair of computer hardware and related equipment</li> <li>● Not available to engineers, drafters and others skilled in computer-aided design software, but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations</li> <li>● Systems analysts and computer programmers generally also meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling and coordinating activities required to develop systems to solve complex business, scientific or engineering problems</li> <li>● Must either be compensated on a salary basis at a rate of not less than \$455 per week; or on an hourly basis at a rate not less</li> </ul>
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	<p>professional work</p> <ul style="list-style-type: none"> <li>• Salary requirements do not apply if computer professional is compensated on an hourly basis at a rate in excess of 6 ½ times the minimum wage. i.e., currently \$5.15/hr x 6 ½ = \$35.75</li> </ul>	<p>than \$27.63 per hour</p>
<p>Outside Sales</p>	<p>\$541.500</p> <ul style="list-style-type: none"> <li>• Customarily and regularly engaged away from his/her employer's place of business in making sales or obtaining orders; and</li> <li>• Hours of work other than sales may not exceed 20 percent of a normal workweek</li> </ul>	<p>\$541.500</p> <ul style="list-style-type: none"> <li>• Primary duty is making sales or obtaining orders; and</li> <li>• Customarily and regularly engaged away from the employer's place of business</li> <li>• <i>Work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, writing sales reports, updating or revising the employee's sales or display catalog, planning itineraries, attending sales conferences are regarded as exempt work</i></li> <li>• Sales made on the Internet, by mail or telephone do not qualify</li> <li>• <i>No salary requirement</i></li> <li>• <i>20 percent test eliminated</i></li> </ul>
<p>Highly Compensated Employees</p>		<p>\$541.601 [new]</p> <ul style="list-style-type: none"> <li>• An employee with total annual compensation of at least \$100,000 is deemed exempt if the employee customarily and regularly performs <u>any one or more</u> of the exempt duties or responsibilities of an executive, administrative or professional employee</li> <li>• Non-management production-line workers and non-management employees in</li> </ul>

		<p>maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt</p>
<p>Deductions from pay for disciplinary reasons</p>	<p>Not permitted</p>	<p>§541.602 [new]</p> <ul style="list-style-type: none"> <li>• <i>Deductions from pay may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules</i></li> <li>• <i>Must be imposed pursuant to a written policy applicable to all employees, e.g., sexual harassment or violence in the workplace</i></li> </ul>
<p>Effect of improper deductions from salary</p>	<ul style="list-style-type: none"> <li>• Window of correction</li> </ul>	<p>§541.603 [new]</p> <ul style="list-style-type: none"> <li>• <i>Improper deductions result in loss of the exemption <u>during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions</u> if the facts demonstrate that the employer did not intend to pay employees on a salary basis; an actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis</i></li> <li>• <i>Factors: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic locations of managers responsible for taking the improper deductions; and whether the</i></li> </ul>

		<p><i>employer has a clearly communicated policy permitting or prohibiting improper deductions</i></p> <ul style="list-style-type: none"> <li>● <i>Isolated or inadvertent improper deductions will not result in loss of the exemption for any employees subject to such improper deductions if the employer reimburses the employees</i></li> <li>● <i>Partial day deductions continue to be prohibited</i></li> <li>● <b>SAFE HARBOR:</b> <i>If an employer has a clearly communicated policy that prohibits the improper pay deductions specified above, and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints</i></li> </ul>
<p>Payment of additional compensation</p>	<p>Not discussed, but some courts found that this practice violated the salary basis requirement</p>	<p>§541.604 [new]</p> <ul style="list-style-type: none"> <li>● <i>An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis</i></li> <li>● <i>For example, an employee may receive additional compensation based on hours worked for work beyond the normal workweek; such additional compensation may be paid on any basis, e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half, paid time off, or any other basis</i></li> </ul>
<p>Scope: Excluded employees</p>	<p>The old regulations addressed the status of Team Leaders (usually nonexempt), Working</p>	<p>§541.3(b) [new]</p> <ul style="list-style-type: none"> <li>● <i>Not mentioned in new regulations: Team Leaders, Working Foremen, Assistant</i></li> </ul>

	<p>Foremen (nonexempt), Assistant Managers (sometimes non-exempt) and Working supervisors (sometimes non-exempt).</p>	<p>Managers and Working supervisors.</p> <ul style="list-style-type: none"> <li>• <i>Under the “concurrent duties” rule, the concurrent performance of exempt and non-exempt work does not disqualify an employee from the executive exemption provided other requirements are met</i></li> <li>• <i>Exemptions do not apply to: police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level</i></li> </ul>
<p>Other Laws</p>		<p>§541.3(b) [new]</p> <ul style="list-style-type: none"> <li>• <i>FLSA provides minimum standards that may be exceeded</i></li> <li>• <i>FLSA may not be waived or reduced</i></li> <li>• <i>State laws providing establishing a higher minimum wage or lower maximum workweek must be followed</i></li> </ul>