

FORTNEY
— & —
SCOTT
—
ATTORNEYS AT LAW

David S. Fortney
Shareholder

dfortney@fortneyscott.com

Admitted in DC and PA

FORTNEY & SCOTT, LLC
1050 CONNECTICUT AVENUE, N.W.
SUITE 1200
WASHINGTON, DC 20036
202.689.1200
202.689.1209 fax
www.fortneyscott.com

**United States House of Representatives
Committee on Education and the Workforce Hearing**

***“Assessing the Impact of the Labor Department’s Final Overtime
Regulations on Workers & Employers”***

April 28, 2004

Statement of David S. Fortney

Mr. Chairman, Members of the Committee. My name is David Fortney, and I am a co-founder of the law firm, Fortney & Scott, LLC in Washington, DC. I am testifying today to provide the Committee with my assessment of the U.S. Department of Labor’s newly promulgated Final Regulations governing overtime in the workplace. My testimony reflects my experience as a practicing labor and employment attorney for twenty four years, as well as my previous experience at the U.S. Department of Labor, where I served as the Deputy Solicitor and Acting Solicitor during the first Bush Administration, under Secretaries of Labor Elizabeth Dole and Lynn Martin. In my positions at the Labor Department, my responsibilities included the interpretation and enforcement of the Fair Labor Standards Act of 1938 (“FLSA”), as amended, and the regulations implementing the FLSA, including the “white-collar” exemption regulations that are the focus of today’s hearing and that provide exemptions from overtime and minimum wage for “white-collar” jobs, including executive, administrative and professional positions. In addition to my government experience, I have extensive experience and expertise in counseling and advising employers to comply with the white-collar regulations and to respond to the

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growing number of class action claims being filed against employers. I will discuss my experience and views on these matters in the context of the newly promulgated white-collar exemption regulations.

Introduction and Overview of the FLSA White-Collar Exemption Regulations

The white-collar exemption regulations are dramatically outdated and have imposed significant confusion and uncertainty in determining who is, and who is not, exempt from the FLSA's minimum wage and overtime requirements. The FLSA imposes minimum wage and overtime requirements on covered employers, but also, in 29 U.S.C. § 213 (a), provides certain exemptions from these requirements. Section 213 (a) states that the minimum wage and overtime requirements shall not apply to any employee employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson. Section 213 also authorizes the Secretary of Labor to "define and delimit" these exemptions. As you know, the regulations for implementing these statutory exemptions – commonly referred to as the "white-collar" exemptions – are codified at 29 CFR Part 541. The white-collar exemption regulations impose two requirements for a job to be classified as exempt. First, the employee must be paid on a salary basis and at the required salary level. And, second, the job duties must involve managerial, administrative or professional skills and duties.

The Current White-Collar Exemption Regulations Are Outdated and Require Comprehensive Reform

The problem that all stakeholders face under the current regulations, including employers, employees and the Labor Department, is in trying to apply the outdated regulations to today's workplace. The duties tests were last modified in 1949 – over 50 years ago – and have remained essentially unchanged since that time. The salary basis was added to the regulations in 1954 and was last updated in 1975 – over 25 years ago. As a result, the long-outdated requirements create uncertainty and frustrate compliance efforts. For example, the "long test" for determining whether an employee is exempt from the overtime provisions of the statute is currently triggered by a weekly salary of only \$155, a figure so out-of-date that it renders the long test meaningless. Virtually every salaried employee earns more than \$155 per week and is therefore potentially outside the overtime protections of the law. Indeed, if an employee is paid the minimum wage of \$5.15 per hour, which equals \$206 for a 40-hour workweek, the long test is met. Moreover, the alternative salary test of \$250 for "highly compensated" exempt employees (the "short test") is nearly met with the minimum wage and, as a practical matter, is not a useful tool. Therefore, as a practical matter, because of the general obsolescence of the salary test, and assuming that the technical salary requirements are satisfied, typically the evaluation of whether jobs properly are classified as exempt primarily turns on the duties requirements.

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The duties tests, however, have proven to be a vast “gray” area, because the current regulations are too vague. As a result, both employers and the Labor Department are faced with inconsistent results that often are no more certain than the next court decision. In particular, the administrative exemption’s requirements, which require exempt employees to perform “staff” rather than production or sales work, and exercise “discretion and independent judgment” on important matters in managing the employer’s general business operations, are particularly difficult to apply. For example, a court ruled that a project superintendent, who supervised three large construction projects for a construction management company, earning an annual salary of \$90,000, was not an exempt administrative employee. The court reasoned that under the staff versus production dichotomy, the employee “produced” construction project management and thus was a nonexempt production employee. See *Carpenter v. R.M. Shoemaker Co.*, 2002 WL 987990, 7 Wage & Hour Cas. 2d (BNA) 1457 (E.D. Pa. May 6, 2002). Similarly, the professional exemption was found not to apply to network communications specialists who had advanced physics, mathematics and engineering degrees, and who trained mission control personnel, because, the court held, the employees failed to exercise discretion, because they used technical manuals and made group decisions. *Hashop v. Rockwell Space Operations*, 867 F. Supp. 1287 (S.D. Texas 1994).

The result is that the current vague regulations result in unintentional noncompliance and resulting liabilities. The significant increase in employment claims is a clear indication that the current rules are not working – why should we have escalating claims when the rules have not changed? Wage and hour class actions now are the *most frequently filed class action claims* employers face, and individual wage and hour lawsuits doubled in 2002.

In my experience, the explanation for these unacceptable developments is simple – plaintiffs’ lawyers have discovered that the outdated regulations provide an excellent basis for filing “gotcha” claims that primarily benefit the attorneys. Moreover, under the current outdated rules, employers often are required to secure expensive legal guidance on what is required to secure compliance, and even then the best that typically can be provided is somewhat guarded advice. As one of our clients once asked me, why should extensive good faith compliance efforts have the same feel as spinning a roulette wheel?

Everyone – perhaps with the exception of a small cadre of plaintiffs’ lawyers who are making huge fees filing these wage and hour class action lawsuits – agrees that the outdated regulations require revision, because the rules are not only vague and ambiguous but also difficult to apply to many positions in today’s modern workplace. The U.S. General Accounting Office (“GAO”) review of regulations in 1999 recommended that the Secretary of Labor comprehensively review and make the necessary changes to the white-

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collar regulations to better meet the needs of both employers and employees in the modern workplace and to anticipate future workplace trends. The GAO's recommendations recognized the problems in achieving compliance. My personal experience has been that it often is difficult to advise employers because the rules are not clear. Additionally, the judicial interpretations vary and compound the problems in securing compliance. Moreover, it is my belief, based on my personal experience, that these same factors pose challenges to the Labor Department's ability to effectively and efficiently enforce these rules in a uniform and consistent manner.

Overview of the Changes in the Final Overtime Regulations

The Final Regulations, to be codified at 29 CFR Part 541, provide clarified tests for the executive, administrative and professional exemptions. See 69 Fed Reg 22122 – 22274 (April 23, 2004). These new regulations should make compliance easier and provide greater certainty. This result directly benefits all stakeholders – employers, employees and the Labor Department. Greater compliance should directly result in lower litigation claims and resulting exposures.

Although the higher standard salary test of \$455 per week (\$23,660 per year), which is nearly a 300 percent increase from the current long test, may impose a hardship on some sectors, this material change is a return to the original exemption criteria that required a salary of sufficient magnitude in order for an employee to be classified as exempt. Thus, the only employees who will be affected by the new higher minimum salary levels are those who will start to receive overtime. The estimates by the Labor Department are that *1.3 million workers now exempt would gain overtime protection* by the new \$455 per week (\$23,660 per year) requirement. These are employees who today are performing jobs with exempt duties but who are being paid below the \$455 per week salary requirement.

The Final Regulations also retain and clarify the two long-standing requirements for classifying employees as exempt – the duties and salary tests. The Final Regulations, however, also impose new duties test for some white-collar exemptions, and some of the changes result in more demanding requirements. For example, under the executive duties test of the Final Regulations, employees are required to (1) have a primary duty of managing the entire enterprise or a department or subdivision, (2) direct the work of two or more other workers *and* (3) have hiring/firing authority or substantial influence over these decisions. This is a more restrictive test, and some executives who currently are exempt will no longer be exempt. The Final Regulations also provide clarification of existing criteria, many of which are retained. Thus, for example, while the Administrative exemption's criteria remain essentially unchanged, the Final Regulations provide extensive, helpful examples of which administrative job duties are exempt and non-exempt. Similarly, under the Professional Exemption of the Final Regulations, the duties

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test is generally retained (the “discretion” requirement of the long test under the Current Regulations is eliminated), but the Final Regulations clarify when education and experience qualify an employee as a professional.

The Final Regulations retain the salary basis requirement that employees be paid a fixed, predetermined salary for each week in which the employee performs work, but allows employers greater latitude in making pay deductions for, for example, employee misconduct and violations of safety and workplace conduct rules. The liability for improper deductions or “dockings” is reasonably limited to the employees who are directly affected.

Finally, the proposed regulations add new eligibility for exempting highly compensated workers with an annual salary of at least \$100,000, if they perform office or non-manual work, are paid on a salary basis at the rate of at least \$455 per week, *and* customarily and regularly meet one of the duties of either an exempt executive, administrative or professional employee. The payment of a salary of \$100,000 or more does not meet the requirements for the highly compensated exemption unless the duties and salary requirements also are satisfied.

The Final Regulations Provide Much Greater Clarity to the Overtime Requirements and Will Result in Greater Compliance and Overtime Protections

The Labor Department deserves significant credit for meeting the challenge of updating the long-ignored overtime rules. Under Secretary Chao’s leadership, the Department successfully has completed a very complex rulemaking. Faced with such clearly outdated regulations and with recommendations by the General Accounting Office and others urging an overhaul of the regulations, the current Secretary of Labor undertook the long-neglected task of providing regulations that are meaningful for the modern workforce. This was a task that earlier Administrations, both Democratic and Republican, had considered but shied away from, undoubtedly over concern that revising these regulations would be controversial.

1. The Rulemaking Process Resulting in the Final Overtime Regulations

In the FLSA, Congress quite consciously left undefined those broad terms describing which jobs were exempt (“any employee employed in a bona fide executive, administrative, or professional capacity”) and explicitly placed on the Secretary of Labor the duty to “define and delimit” the terms used in the exemptions. Congress also explicitly provided that the Secretary’s actions in defining and delimiting the exemptions are subject to the provisions of the Administrative Procedure Act.

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During 2002, the Department initially met with over 40 interest groups, representing employers and employees, to learn of their suggestions and concerns. On March 31, 2003, the Department of Labor published proposed regulations (the “Proposed Regulations”) in the Federal Register, and requested comments on the proposal. See 68 Fed Reg 15560 – 15597 (March 31, 2003). In the preamble to the Proposed Regulations, the Department explained the existing regulations and the changes proposed, and provided comparisons between the two. In accordance with Executive Order 12866, the proposal included a Preliminary Regulatory Impact Analysis, and a regulatory flexibility analysis assessing the impact of the proposed regulations on small businesses, as required by the Regulatory Flexibility Act. The public had an opportunity to comment on these economic analyses, as well as on the substantive provisions of the proposed regulations.

The rulemaking record remained open for 90 days. When it closed on June 30, 2003, the Department of Labor had received more than 75,000 comments from a wide variety of interests, including employees, employers, trade and professional associations, labor unions, small business owners, Members of Congress and others. The proposal also prompted vigorous public policy debate in Congress and the media.

Against this backdrop, the Department issued the Final Regulations, to be codified at 29 CFR Part 541 that provide the much-needed update of the overtime requirements. See 69 Fed Reg 22122 – 22274 (April 23, 2004). The Final Regulations clearly evidence that the Labor Department fully reviewed the comments received in the rulemaking record and carefully determined what changes it should make to the regulations, based on the comments received.

2. The Salary Component Will Again Become a Meaningful Criterion

Among the major improvements achieved by the Final Regulations is the updating of the salary requirements, resulting in a restoration of the salary component as a meaningful criterion in the determination of whether employees receive overtime. The Final Regulations nearly triple the current \$155 per week minimum salary level required for exempt employees to \$455 per week, or \$23,660 per year. 29 CFR §541.600. As a result, any employee earning less than \$455 per week will receive overtime – regardless of their duties or how they are paid. The Labor Department estimates that this change alone results in 1.3 million currently exempt white-collar workers gaining overtime protection. At the same time, employers clearly benefit from having an unambiguous rule that helps facilitate compliance.

The Final Regulations also introduce clarity and common sense to the highly compensated white-collar employees who earn at least \$100,000 per year. 29 CFR §541.601. These highly compensated employees properly can be classified as exempt if

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they “customarily and regularly” perform any one or more of the exempt duties, and receive at least \$455 per week on a salary basis. These salary changes are consistent with the underlying purposes of the FLSA, which are to protect overtime for those workers who earn the least, and presumably are least able to negotiate adequate compensation arrangements.

3. The Administrative Exemption is Clarified

Another improvement implemented by the Final Regulations is the clarification of the Administrative exemption. 29 CFR §§ 541.200 – 541.204. The Proposed Regulations set forth a new duties test for Administrative employees, requiring such employees to hold a “position of responsibility.” Many feared that the introduction of a new standard would have the inevitable effect of triggering significant uncertainty and litigation regarding the scope of the exemption. In response, the Labor Department’s Final Regulations rejected that new standard and, instead, essentially retain the current test for Administrative employees, with significant clarifications and better guidance. The result is that employers and employees now have the benefit of using long established criteria that is further clarified by the numerous examples set forth in the Final Regulations. Thus, under the Final Regulations, a worker who is compensated on a salary or fee basis at a rate of not less than \$455 per week must have as his/her primary duty “the performance of office or non-manual work directly related to the management of the general business operations of the employer or the employer’s customers and whose primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.” The addition of the requirement of “matters of significance” to the former discretion and independent judgment requirement is in keeping with current law and is useful in understanding that the Administrative exemption takes into account the level of importance or consequences of the work performed. 29 CFR §541.202.

Moreover, the listing of examples of the job duties that typically are either exempt or non-exempt under the Administrative exemption is particularly useful. 29 CFR §541.203. The examples essentially codify the major court rulings, and provide much needed clarity and certainty in determining whether employees properly can be classified under the Administrative exemption. The examples of employees who often are exempt include:

- insurance claims adjusters;
- financial services industry employees whose duties include “collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products and marketing, servicing or promoting the employer’s financial products” (*NB*: if the employee’s primary duty is selling financial products, the exemption is not available);

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- employee who leads a team of other employees assigned to complete major projects for the employer;
- executive assistant or administrative assistant to a business owner or senior executive of a large business;
- human resources managers who formulate, interpret or implement employment policies and management consultants who study the operation of a business and propose changes (*NB*: personnel clerks typically are non-exempt); and,
- purchasing agents with authority to bind the company on significant purchases.

On the other hand, examples of workers who typically are *not* exempt include:

- inspectors doing ordinary inspection work along standardized lines involving well-established techniques and procedures;
- examiners or graders;
- comparison shoppers who report a competitor's price, distinguished from the buyer who evaluates the reports on competitors prices; and,
- public sector inspectors or investigators of various types, such as fire prevention or safety, buildings or construction health or sanitation, environmental or soils specialists and similar employees.

These changes to the Administrative exemption in the Final Regulations add much needed clarity and make it much easier for employees to be properly classified as exempt or non-exempt. The result should be greater compliance with the overtime requirements, which is in the interest of employers and employees alike.

4. The Learned and Creative Professional Exemptions Are Clarified

The Final Regulations for the Professional exemption provide much clearer guidance for today and the future, similar in approach to the changes in the Administrative exemption. 29 CFR §§ 541.300 – 541.304. The Professional exemption continues to be divided into the Learned Professional and Creative Professional categories.

The *Learned Professional* test tracks the existing learned professional criteria, and streamlines and summarizes the current criteria without material changes. The Final Regulations focus on employees with the 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. 29 CFR § 541.301. The proposed regulatory language that would have allowed equivalent knowledge “through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction” has not been included in the Final Regulations. This proposed language had been criticized as allowing military training to suffice as training for a learned profession, sufficient to qualify for exemption.

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The Labor Department clarified in the Preamble to the Final Regulations that it "... never intended to allow the professional exemption based on veterans' status." 69 Fed Reg 22123. Also see 69 Fed Reg 22150 ("Thus, a veteran who is not performing work in a recognized professional field will not be exempt, regardless of any training received in the armed forces.").

The Learned Professional regulation includes examples and explanations illustrating the application of the exemption, including occupations that properly are classified as *exempt*, such as:

- Registered or certified medical technologists who have four years of college and course work approved by the Council of Medical Education of the American Medical Association;
- Nurses – registered nurses who are registered by the appropriate State examining board continue to be exempt, as they are and have been under the current regulations. Licensed practical nurses generally do not qualify for the learned professional exemption;
- Dental hygienists who have completed four academic years of study approved by a designated credentialing body;
- Physician's assistants who have completed four academic years of study approved by a designated credentialing body;
- Accountants – certified public accountants generally are exempt, but clerks and bookkeepers are non-exempt;
- Chefs, including executive and sous chefs with specialized, four year degrees are exempt, but fast food cooks and cooks who perform predominantly routine mental, manual, mechanical or physical work are non-exempt;
- Athletic trainers who have four academic years of pre-professional and professional study in a curriculum accredited by the designated credentialing body;
- Funeral directors and embalmers who are licensed in states requiring four years of study and graduation from an accredited college of mortuary science.

The new regulations also provide that paralegals generally do *not* meet the learned professional exemption.

Another significant clarification is that Learned Professionals now can use manuals that provide guidance involving highly complex information pertinent to difficult or novel circumstances. See 29 CFR § 541.704. The preamble explains that this new section is intended to avoid the absurd result reached by a court, ruling that instructors who trained Space Shuttle ground control personnel were non-exempt because they relied on manuals to assist in their training. 69 Fed Reg 22188 – 22189. This welcome change means that scientists and other learned professionals do not become non-exempt technicians if they

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use manuals that provide general guidance on addressing open-ended questions or novel circumstances, as distinguished from directions on routine and recurring circumstances.

Finally, in what will clearly be valuable future guidance, the Final Regulations recognize that the areas in which the professional exemption may be available are expanding. The Final Regulations provide that when specialized curriculum and courses of study are developed by accrediting and certifying organizations similar to those listed in the examples, additional Learned Professional exemptions will be recognized. 29 CFR § 541.301(f). These provisions will help ensure that the Final Regulations continue to be viable and provide guidance for the Learned Professional exemption as our workforce continues to develop and change in the 21st Century.

The *Creative Professional* exemption under the Final Regulations has been modified primarily with respect to journalists. See 29 CFR § 541.302. The Final Regulations specifically recognize that some journalists may qualify for the exemption, while others will not. While the Labor Department did not intend to create an across-the-board exemption for journalists, the Final Regulations reflects the status of case law, which recognizes that "... the duties of journalists vary along a spectrum from the exempt to the nonexempt The determination of whether a journalist is exempt must be made on a case-by-case basis." 69 Fed Reg 22158.

5. The Executive Exemption is More Restrictive

The most significant changes to any exempt classification are those relating to the Executive exemption. 29 CFR §§ 541.100 – 541.106. While the Final Regulations maintain many of the same requirements and definitions of the current regulations, the Final Regulations do make significant changes to the exemption qualification criteria. Most notably, the Final Regulations impose a requirement that executives must have either the authority to hire or fire other employees or that such executives' suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status" be given "particular weight" (the "Hire/Fire Requirement"). 29 CFR § 541.100(a)(4). While this requirement exists under the long test of the current regulations, it is rarely invoked because most executives qualify under the short test that contains no such requirement. Thus, for many employers, this new, more restrictive criterion may limit the number of employees who can qualify as exempt under the Executive exemption. In fact, many executives who currently are exempt may lose their exempt status. Although most employers and their representatives did not favor the restriction of the Executive exemption with the additional requirement of the hire/fire authority, employers at least have the benefit of reasonably clear requirements. Realistically, employers will need to assess whether currently exempt executive employees meet this new criterion.

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The Final Regulations also modify the executive exemption for a business owner by adopting the new classification of exempt executive employee proposed in the Proposed Regulations; i.e., any employee who owns at least a bona fide 20 percent equity interest in the enterprise in which the employee is employed and who is actively engaged in its management. 29 CFR § 541.101. The Final Regulations, however, modify the Proposed Regulations in two material ways. First, the Final Regulations require that an owner/employee's 20 percent business interest be a "bona fide" one. This was designed to insure that the ownership in the business must be genuine, not illusory. Second, the Final Regulations require the owner/employee to be "actively engaged" in the business' management. Moreover, in the case of a 20 percent business owner, the salary threshold of \$455 does not apply.

The Final Regulations make additional changes to the executive exemption. The "sole charge" exemption is eliminated completely. Also, the Final Regulations make clear that performing exempt and nonexempt duties concurrently will not disqualify an employee from the executive exemption, if the employee meets the other requirements of the executive exemption. 29 CFR § 541.106. The determination of whether the employee meets the other requirement when he/she performs concurrent duties is made on a case-by-case basis.

6. The New Regulations Require that the "Primary Duty" be the Performance of Exempt Duties

The Final Regulations adopt the requirement that the "primary duty" constitute exempt duties. 29 CFR § 541.701. The primary duty requirement replaces the current regulations that limited the percentage of time to activities that were not directly and closely related to exempt work, as in the Outside Sales exemption discussed below. Under the current regulations, often there were drawn out disputes requiring expensive time-motion studies or similar efforts in order to determine whether the employee was properly engaged in exempt work. The adoption of the primary duty standard will avoid the need for such expensive and time consuming analyses and promotes greater compliance.

7. Salary Deductions – The Salary Requirements Are Clarified so that Deductions from Pay Now can be Made Due to Suspensions for Infractions of Workplace Conduct Rules, and There is a "Safe Harbor" for Employers to Address Improper Pay Deductions

The salary requirements under the Final Regulations continue to prohibit partial day deductions or "dockings" from exempt employees' pay. The Final Regulations add an exception to the salary basis requirement for deductions from pay due to suspensions for infractions of workplace conduct rules. 29 CFR § 541.602(b)(5). This added exception

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reflects recognition of the growing trend to place increased responsibility and risk of liability on employers for their employees' (exempt and non-exempt) conduct. 69 Fed Reg 22177.

The effect of improper deductions also is clarified. 29 CFR § 541.603. A practice of making improper deductions demonstrates that the employer did not intend to pay on a salary basis, as is the case under the current regulations. If there is an improper practice of deductions, then the exemption is lost during the time period in which the improper deductions were made for the employees in the same job classification working for the same managers responsible for the actual improper deductions. 29 CFR § 541.603(b). This new provision is a significant improvement in the current rules. This currently results in a windfall of overtime payments to exempt employees who were properly paid on a salary basis, simply because, for example, a manager mispaid a small subset or one of the employees. These changes close a loophole that resulted in undeserved windfalls to many properly salaried employees.

Finally, the "safe harbor" provision, codified in 29 CFR § 541.603(d), is a modification of the existing window of correction whereby employers can address improper deductions in salary payments. This provision provides that employers with clearly communicated policies that include a complaint procedure will not lose the exemption for any employees unless the employer violates the policy by continuing to make improper deductions after receiving employee complaints. This provision creates helpful incentives for employers to promulgate clear policies about how employees should be paid, thereby enabling employees to help police compliance. The provision also provides a mechanism for employers to be promptly advised if salary payment discrepancies occur and allows employers to take necessary remedial action.

The revisions to the salary deductions and the safe harbor for investigation and corrections of improper salary deductions are significant steps in enabling employers to comply with the overtime rules, while avoiding disproportionate windfalls to unaffected employees. Similarly, the provisions empower employees, who can take steps to help ensure prompt compliance.

8. There are Limited Changes to the Computer and Outside Sales Exemptions

The Final Regulations make limited changes to the Computer and Outside Sales exemptions, codified at 29 CFR §§ 541.400 – .402 and 541.500 – .504, respectively. The Computer exemption regulation consolidates all of the regulatory guidance on computer occupations into a new regulatory subpart. The consolidation of the Computer regulations will help ensure that the exemption is applied properly. The Outside Sales exemption's

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primary change is the imposition of the primary duties discussed above, and the elimination of the 20 percent limit on duties in the current regulations.

9. Conclusions About the Final Regulations

The Final Regulations are a significant improvement over the current regulations and will result in improved compliance in administering the exempt classifications. The Final Regulations are more concise, easier to understand, clearer in scope, and drafted in a manner that will make them easier to apply in the changing workplaces we face in the 21st Century. The elimination of exemptions for persons making less than \$23,660 (\$455 per week) means that all such employees will be eligible for overtime. The Final Regulations also eliminate many of the technical requirements and are much easier for a human resources representative or business owner to understand and follow. The changes in the salary rules will promote greater compliance and limit overtime payments to those employees who were affected by the practices that violate the salary requirements. The safe harbor changes will encourage employers to have clear compensation practices and complaint procedures to ensure that employees are properly compensated without the delay, costs and uncertainty of litigation.

Misinformation and Confusion Relating to The Final Overtime Regulations

There also has been a significant amount of confusion resulting from inaccurate information and news stories relating to the Final Regulations, and I would like to briefly address some of those matters. One common misconception is that the Final Regulations result in a “take away” of overtime on a widespread basis. This is not the case. Although we can allow economists to project the impact of the Final Regulations, the only changes that are guaranteed are that 1.3 million workers *gain* overtime protection because of the new \$455 per week requirement.

Many employees’ representatives have raised false alarms, claiming that their exempt/non-exempt status will be changed by the Final Regulations. Take nurses, for example. Registered Nurses currently are exempt, even though the overwhelming majority receives shift premiums or similar additional payment as a result of market factors, and that classification remains unchanged. Generally, Licensed Practicing Nurses currently are not exempt, and their status also has not changed. The Final Regulations provide that RNs are exempt, 29 CFR § 541.301(e)(2), and the Preamble provides that the Labor Department “... did not and does not have any intention of changing the current law regarding RNs, LPNs or other similar health care employees...” 69 Fed Reg 22153. Thus, claims by nurses that the Final Regulations have, in some way, negatively affected nurses’ status, are simply not true.

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The Final Regulations also include similar provisions specifying that police officers, firefighters paramedics, emergency medical technicians and similar public safety employees are non-exempt. 29 CFR § 541.3(b). Again, this continues the same status that these occupations have under the current regulations.

Unionized employees will continue to receive overtime as provided by their collective bargaining agreements, and a specific provision has been added to the regulations specifying that “blue collar” workers are not exempt from overtime. 29 CFR § 541.3(a). Again, there is no change from the current regulations. These are, and have always been, the “white-collar” exemption regulations.

Finally, the claim that the Proposed Regulations would have allowed military experience to be used as a course of study sufficient to justify a Learned Professional exempt status has been refuted by the Labor Department. In the Preamble to the Final Regulations, the Labor Department notes that it was “... never intended to allow the professional exemption based on veterans’ status.” 69 Fed Reg 22123. Also see 69 Fed Reg 22150 (“Thus, a veteran who is not performing work in a recognized professional field will not be exempt, regardless of any training received in the armed forces.”). Thus, in order to avoid any confusion on the matter, the language in Section 541.301(d) of the Final Regulations defining the criteria for Learned Professionals was amended to clarify that veteran status alone will not be sufficient, but that a combination of work and experience may allow the employee to qualify for the exemption, determined on a case-by-case basis.

Conclusion

Where do we stand today? The Department of Labor has completed a protracted and long overdue rulemaking process. The current regulations are not serving anyone’s interests except those of class action lawyers. The employment community – employers, employees and government enforcement agencies alike – should embrace the Final Regulations as a great step forward in creating working guidelines that all can understand and implement as we move headfirst into the 21st Century workplace.

Thank you for your time. I will be happy to answer any questions you may have.