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Work Session XIII: Personnel

UNDERSTANDING THE NEW FAIR LABOR STANDARDS ACT OVERTIME REGULATIONS

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On March 31, 2003, the United States Department of Labor issued proposed regulations under the Fair Labor Standards Act which would significantly modify the "white collar" exemptions to the FLSA overtime requirements under 29 C.F.R. Part 541 for executive, administrative, professional, and outside sales employees. The regulations were published at 68 Fed. Reg. 15560 (3/31/03), and are available for download on internet sites including the **www.dol.gov** and **www.VirginiaLaborLaw.com**. Some significant aspects of the proposed regulations are:

- They would increase the minimum salary required for the executive, administrative, and professional exemptions to apply.
- They would modify the salary basis test.
- They would broaden the duties considered exempt.
- They would replace the "long test" and the "short test" with a single test for each category of exemption.
- They would create a new exemption for highly compensated employees.

The proposed regulations have met heated resistance, and have been the object of considerable controversy. In July of 2003, the House of Representatives voted 213 to 210 to support the proposed regulations. On September 10, 2003, the Senate voted to block the proposed regulations through measures in the 2004 Labor, Health and Human Services and Education bill, H.R. 2660. On October 2, 2003, the House of Representatives reversed its previous position, approving by a vote of 211 to 203 a "motion to instruct" which directs House members of the House-Senate conference committee merging the House and Senate versions of H.R. 2660 to agree to the provisions in the Senate's version of the bill that bans the new regulations. The White House has indicated it would veto the spending bill if the measure banning the regulations is included in it.

A summary of the changes made by the proposed regulations is provided below. A detailed analysis of the proposed regulations is available on **VirginiaLaborLaw.com** (click the link to "Proposed Fair Labor Standards Act Overtime Regulations"). Also available on **VirginiaLaborLaw.com** are the proposed regulations, related documents, links to relevant government websites, and regularly-updated information regarding the current status of the regulations.

Executive Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	$155 per week	$250 per week	$425 per week
Duties	Primary duty of the management of the enterprise or a recognized department or subdivision. Customarily and regularly directs the work of two or more other employees. Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight). Customarily and regularly exercises discretionary powers. Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.	Primary duty of the management of the enterprise or a recognized department or subdivision. Customarily and regularly directs the work of two or more other employees.	Primary duty of the management of the enterprise or a recognized department or subdivision. Customarily and regularly directs the work of two or more other employees. Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).

Administrative Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	$155 per week	$250 per week	$425 per week
Duties	Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers. Customarily and regularly exercises discretion and independent judgment. Regularly and directly assists a proprietor, or exempt executive or administrative employee; o*r* performs specialized or technical work requiring special knowledge under only general supervision; *or* executes special assignments under only general supervision. Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.	Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers. Customarily and regularly exercises discretion and independent judgment.	Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. 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.

Learned Professional Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	$170 per week	$250 per week	$425 per week
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. Consistently exercises discretion and judgment. Performs work that is predominantly intellectual and varied in character and is of such character that the output	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. Consistently exercises discretion and judgment.	Primary duty of performing office or 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.

	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 an essential part of and necessarily incident to exempt work.		

Creative Professional Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	$170 per week	$250 per week	$425 per week
Duties	Primary duty of performing work that is original and creative in character in a recognized field of 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.	Performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employees

	Current Long Test	Current Short Test	Section 13(a)(17) Test	Proposed Standard Test
Salary	$170 per week	$250 per week	$27.63 an hour	$425 per week *or* $27.63 an hour
Duties	Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer	Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge	Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware,	Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware,

	systems analysis, programming, and software engineering. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field. 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.	in computer systems analysis, programming, and software engineering. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field. Consistently exercises discretion and judgment.	software or system functional applications; *or* (B) 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* (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; *or* (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.	software or system functional applications; *or* (B) 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* (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; *or* (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

Outside Sales Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	None required.	None required.	None required.
Duties	Employed for the purpose of and customarily and regularly engaged away from the employer's place of business in making sales; *or* in obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Does not devote more than 20 percent of the hours worked by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations.	No separate "short" test.	Primary duty of making sales; *or* of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Customarily and regularly engaged away from the employer's place or places of business.

Source: United States Department of Labor, Employment Standards Administration, Wage and Hour Division