

# Employment Law Digest

An Update from Thornton, Summers, Biechlin, Dunham & Brown, L.C. Employment Law Department

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## PROPOSED FEDERAL WAGE AND HOUR EXEMPTION REGULATIONS

Last year the U.S. Department of Labor (DOL) issued proposed changes to the federal wage and hour regulations under the Fair Labor Standards Act (FLSA). The new regulations will re-define the existing definitions of *executive*, *administrative* and *professional* exemptions. These exemptions are often called “white collar” exemptions. The proposed changes will make two crucial changes: (1) modify the salary basis test; and (2) change the duties test for the white collar exemptions and other exemptions such as computer employee exemptions and outside sales exemptions. Furthermore, the proposed changes will also create exemptions for highly compensated employees and business owners.

### Standard Test

The current regulations utilize a system of two different tests: a “long test” and a “short test” based on the amount of salary paid to an employee. Currently, the salary levels for the long and short tests are respectively \$155 per week and \$250 per week. In essence, the long test has become non-existent due to the fact that the labor market pays much more than \$155 per week.

The proposed regulations will use the concept of a single “standard test” that will replace the current two tests described above. The standard test will require an employee in an exempt position to be paid a salary of not less than \$425 per week, which is equivalent to \$22,100.00 per year. In other words, anyone earning less than this amount, will be eligible for overtime pay regardless of whether they perform exempt duties or not. This is up from \$13,000.00 per year (\$250.00 per week for one year), a figure that had not been revised since 1975.

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## “White Collar” Exemptions: Executive, Administrative and Professional

### The Executive Exemption

Currently, the short test does not require the employee in an exempt, executive position to have the authority to hire and fire. However, under the standard test in the proposed regulations, the position would involve all of the following duties; to have the primary duty of management, to customarily and regularly direct the work of two or more employees; and to have the authority to hire or fire other employees or have an input in recommendations concerning the hiring, firing, advancement, promotion or any other change of status of other employees.

### The Administrative Exemption

In order to establish the administrative exemption under current regulations, the employer must prove that the employee’s primary duty is to perform “office or non-manual work directly related to management policies or general business operations.” The regulations also require the exempt administrative employee to customarily and regularly exercise discretion and independent judgment in carrying out their job duties.

The proposed regulation keeps the requirement that the exempt employee’s primary duty consists of performing office or non-manual work directly related to management or general business operations but eliminates the requirement that the employee customarily and regularly exercises discretion and independent judgment. The new regulation adds a requirement that the exempt administrative employee hold a “position of responsibility” with the employer. A “position of responsibility” is one that either: (1) performs work of substantial importance or; (2) performs work requiring a high level of skill or training.

Needless to say, it remains to be seen what types of positions are of “substantial importance” or are those requiring a high level of skill or training. Obviously this will need to be sorted out unfortunately in litigation.

The regulations to provide some examples of positions that meet the administrative exemption. These

are: tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar activities.

### The Professional Exemption

Currently, the exemptions require an employee to have an advanced formal education to qualify for the exemption as a learned professional with advanced education beyond four years. The proposed regulations on the other hand recognize that experience acquired on-the-job, technical skill training, or equivalent experience may satisfy the requirements for an employee to be classified as an exempt “learned professional” even if the employee does not hold a college degree. This change will likely result in a greater number of employees who may qualify for this type of exemption.

Another change to this exemption is the elimination of the requirement of constant exercise of independent judgment and discretion. To qualify for the now renamed “learned exemption”, an employee must instead perform “office or non-manual work”. In essence, this renders the exemption unavailable to those employees who work in unconventional settings despite having an advanced education, such as applied scientists doing laboratory or field work.

### Other Exemptions

Other exemptions include: computer employee exemption and outside sales exemptions.

The proposed exemption for computer employees, will eliminate the “consistent exercise of discretion and independent judgment” element of the exemption. The proposed rule will keep the current standard that an hourly wage \$27.63 per hour for all hours worked will satisfy the exemption, or a weekly salary of \$425.

Current regulations for outside sales limit an employee within the outside sales exemption to spend no more that twenty percent (20%) of hours worked on non-exempt tasks. However, the DOL has eliminated the 20% limitation in the proposed regulations. Now




the primary duty of making sales or obtaining orders continues from the current regulations to the proposed regulations, but the elimination of the 20% limitation could expand the exemption to more workers.

In addition, there are new categories of exemptions for highly compensated employees and business owners.

The new classification for highly compensated employees includes employees who earn more than \$65,000.00 per year performing office or non-manual work. Under this salary level, an employee would qualify as an executive, administrative or professional if they have one identifiable function (executive, administrative or professional) under the standard duties test.

The executive exemption under the proposed regulations would automatically extend to any employee who owns an equity interest of 20% or more in the individual's employing enterprise. The exemption would apply even if the employee met none of the salary requirements in the regulations. The restriction under the current regulations with respect to the amount of time that can be spent on non-exempt work is eliminated under the proposed regulations.

### **When The Changes Become Effective**

These changes have been in the works for months but it is not clear when they will go into effect. However in mid January of this year, the DOL announced its intention to put the new regulations into effect on March 31, 2004. 

*For complete details about these and other Department of Labor (DOL) regulations, please see the DOL website: [www.dol.gov](http://www.dol.gov)*

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## **Trends In The Law**

### **Can FMLA Rights be Waived?**

The general rule with respect to the Federal Medical Leave Act (FMLA) is that an employee cannot waive his/her rights in exchange for money. This usually occurs

in the form of a release signed upon termination of employment as part of a severance package. However there appears to be an exception as a result of a recent case.

*Facts:* Employee, who was discharged for poor performance accepted \$4,000.00 in severance pay for signing a waiver not to sue. Later, the employee sued and claimed that the employer cannot ask the employee to waive his/her FMLA rights. The company's attorneys argued that the Plaintiff was no longer an employee when she signed the waiver because she had already been discharged.

A federal court agreed with the employer and dismissed the employee's case. The key to winning on this issue in addition to the "not an employee" argument, the company showed that it followed all the rules when asking the employee to sign the waiver, specifically giving the employee 45 days to consider the terms of the release and 7 days to change her mind altogether.

### **Don't Use the "Y" word**

The Nestle Co. recently learned the two rules of avoiding an age discrimination lawsuit: (1) don't use the word "young" in official company documents discussing promotion; and (2) See rule no. 1.

An older employee sued the company because he claimed to have been passed up for job promotions in favor of younger employees. The smoking gun was a company memo that instructed managers to emphasize "developing young people...for future management." An appeals court in California upheld a \$6.8 million award for the employee.


*Note:* Don't use the word "young" or similar words in company communications and don't have a company policy that favors young employees over older employees. The above case underscores the importance of providing proper training for supervisors and executives in order to avoid age discrimination lawsuits.

### **Pregnancy Discrimination**

In considering issues of discrimination, courts closely consider managers' comments that would



indicate displeasure that an employee is pregnant. For example, Gap, Inc., recently got in trouble because a manager told a pregnant employee that he “didn’t appreciate the fact” that he would have to find someone to replace the woman while she was on leave. The employee sued after she was disciplined numerous times for apparently minor infractions. Gap countered by saying that the disciplinary actions were separate from the manager’s comments. However, the employee claimed that the manager’s comments were a key part of a pattern of discrimination against her. The Court agreed with the employee and ordered Gap to pay \$394,000.00 in damages.

*Note:* The above case underscores the importance of providing proper training for managers and supervisors in order to avoid pregnancy discrimination lawsuits. 

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## For Your Information

### EEOC: Records for EEOC Monetary Damages


The U.S. Equal Opportunity Commission (EEOC) announced that a record was set in awarding \$385 million to victims of discrimination for fiscal year 2003. This includes \$236 million at the administrative level and almost \$149 million through litigation. The 2003 amount is up from \$301 million in fiscal year 2002. The 2003 amount paid is particularly interesting because the number of charges filed with the EEOC declined during 2003. The total charges in 2003 were 81,293, down from the 84,400 filed in 2002 and a similar amount in 2001.

Types of charges in 2003: 29,961 (35%) of the charges in 2003 were race discrimination charges; 25,927 (30.3%) were sex/gender discrimination; 20,248 (23.6%) were for age discrimination; 15,433 (19%) were for disability discrimination; and 8,970 (10.4%) were for national origin discrimination. Also, there were 2,646 religious discrimination charges and 2,327 “other” charges.

87,755 cases were resolved in 2003: 17,134 (19.5%) charges had no merit; 55,359 (63.1%) charges were found

to have “no cause;” and other charges were resolved by settlement, withdrawals, conciliations, and administrative resolution on the merits. The average processing time for a discrimination case in 2003 was 160 days as opposed to 174 days in 2002. The case backlog (inventory of pending cases) was 29,300 in 2003 as in 2002. 

### DOL Reports Results for Fiscal Year 2003

Not to be outdone, the U.S. Department of Labor has also announced a record setting year for 2003. The Wage and Hour Division set a record 11 year high by collecting \$212.5 million in fiscal year 2003, which is up 21% from fiscal year 2002’s total of \$175.6 million. The number of employees receiving back wages in 2003 increased almost 30% over 2002, from 263,593 workers to 342,358 workers in 2003. 

- Claudia G. Arrieta

## UPCOMING SEMINARS

- 3-16-04 Practical Applications of Employment Law  
Location: Doubletree Hotel San Antonio  
37 NE Loop 410  
San Antonio, Texas  
Sponsored by Sterling Education Services
- 3-18-04 Employee Discharge and Documentation  
Location: Holiday Inn Downtown  
318 West Durango Boulevard  
San Antonio, Texas  
Sponsored by Lorman Education Services
- 6-24-04 Human Resource Audits  
Sponsored by Lorman Education Services



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our website at:  
[www.thorntonsummers.com](http://www.thorntonsummers.com)  
for the most recent  
significant changes  
in the law  
that affect you.

*The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.*

The employment law section of Thornton & Summers represents management in a wide variety of employment law matters. Because we have offices located in Austin, Corpus Christi and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission, Texas Commission on Human Rights and Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

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*If you, or anyone in your office, would like a copy  
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