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Employment Law Update

ON AUGUST 23, 2004, THE NEW OVERTIME RULES UNDER THE FAIR LABOR STANDARDS ACT WENT INTO EFFECT. The new regulations, proposed in April of this year by the Department of Labor (“DOL”), significantly alter the rules for overtime and overtime exemptions under the Fair Labor Standards Act (“FLSA”). The changes generated a firestorm of controversy and have been a fertile source of election-year rhetoric. Despite threats to the contrary, however, Congress failed to block or otherwise change the final regulations before the August 23 implementation date. Uncertainty regarding whether the DOL’s proposed changes would take effect or whether Congress would alter some or all of the proposed changes led many employers to delay examining the new regulations and their FLSA practices. Now that the regulations have gone into effect, employers should carefully review their current administration of the FLSA to ensure compliance with the new regulations. Below are some important highlights:

Minimum Salary Level Increased. Under the old rules, an employee earning only \$155 a week could qualify as a “white collar” employee not entitled to overtime pay. The new rules raise this minimum “salary test” to \$455 a week (\$23,660 per year), the largest increase since the FLSA was enacted in 1938.

Highly-Compensated Workers. The new regulations contain a specific exemption from overtime for “highly-compensated” employees who are paid total annual compensation of \$100,000 or more. An employee meets this exemption if: (1) he/she earns total annual compensation of

\$100,000 or more, which includes at least \$455 per week paid on a salary basis; (2) the employee's primary duty includes office or non-manual work; and (3) the employee customarily performs any one or more of the duties of an exempt executive, administrative or professional employee.

Simplified Exemption Tests With New Emphasis on "Primary Duty". The new regulations combine elements of the current "short" and "long" tests into one simplified test for each "white collar" exemption, but insert some new requirements for the exemptions from overtime to apply. The current "short test" reliance on an employee's primary duty is retained, but the long test restriction on an exempt employee devoting more than 20% of their time in a workweek to non-exempt duties is eliminated.

- *Executive Exemption.* To qualify as an exempt executive, an employee must meet the salary test and the following three requirements: (1) managing the enterprise or a division; (2) directing the work of two or more full-time employees; and (3) having authority to hire or fire (or such recommendations are given particular weight). This third factor was in the old long test, but not in the old short test, and was almost never applied by most employers. Be sure that your exempt executive employees have the necessary authority or influence to meet the requirements of the newly crafted exemption.

- *Administrative Exemption.* To meet the requirements of the new administrative exemption, the employee must meet the salary test and the following requirements: (1) the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (2) the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. The "matters of significance" requirement is new. Generally, the employee must make choices and evaluations regarding the administration of the business that,

although they may be reviewed at a higher level, can still, by their nature or consequences, affect the employer's business to a significant degree.

- *Professional Exemption.* The new regulation breaks down this exemption into categories for Learned Professionals and Creative Professionals. An employee can be classified as an exempt Learned Professional if he/she meets the salary test and the following requirements: (1) the employee's primary duty must be the performance of work requiring advanced knowledge, which is defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. An employee may meet the requirements for the Creative Professional exemption if the employee meets the salary test and his/her primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Generally, most employees that are currently classified as exempt professionals will continue to meet the exemption. Be sure, however, that the salary test is met.

Other Significant Changes. The new regulations also clarify the exemptions for computer personnel and outside sales personnel, and state that the exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Examples of such workers include non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers. The new regulations also clarify that the

exemptions do not apply to police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees.

Finally, the new regulations clarify the exempt status of certain categories of employees where there had been controversy under the old regulations. For example, insurance claims adjusters and many employees in the financial services industry will now typically meet the administrative exemption. Registered or certified medical technologists, registered nurses, dental hygienists, physician assistants, certified public accountants, chefs, athletic directors, and funeral directors or embalmers with advanced degrees will typically meet the requirements of the learned professional exemption.

Lowered Potential Liability For Employers. Under the old regulations, an employer that made improper deductions from an exempt employee's pay could potentially lose the exemption for an entire class of employees. Under the new regulations, however, an exemption is lost only if there is an "actual practice" of improper deductions, and then only for employees in the same job classification who work for the manager responsible for the improper deductions. To qualify for the protection of this new provision, employers must: (1) have a "clearly communicated policy" that prohibits improper pay deductions and includes a complaint mechanism; (2) make a good faith commitment to comply with the regulations once complaints are received; and (3) reimburse employees for any improper deductions.

Recommendations. Employers should review all job classifications to ensure compliance with the new regulations. At a minimum, however, employers should:

- *Review Jobs Paying Less Than \$23,660 Per Year.* Employers should review any jobs they treat as exempt where the employee is paid less than \$23,660 per year, and consider either raising the employee's salary or changing their status to non-exempt.

- *Collect and Review Job Descriptions and Primary Job Duties.* Job descriptions and primary job duties should be examined to determine whether employees currently treated as exempt should continue in that classification, and whether current non-exempt employees can now be treated as exempt.

- *Amend Pay Policies.* The new regulations contain a revised safe harbor provision for employers who have policies that prohibit unlawful deductions from the pay of exempt employees. Employers should consider adding such policies to their written employee handbooks and personnel manuals.

This overview is not intended to be an exhaustive review of the DOL's new regulations and is for informational purposes only. Questions about the new regulations should be addressed to the Hunter Maclean attorney with whom you normally work or to:

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