

Making sense of the new wage and hour regulations

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The U.S. Department of Labor's (DOL) new "whitecollar" regulations went into effect August 23, 2004. While the regulations are more of a cosmetic touch-up as opposed to an extreme makeover, many of you have questions about their implementation and effect on your full-time and part-time employees. We're here to shed some light on some of the most frequently asked questions regarding the new regulations.

Q: I have many part-timers who earn less than \$455 per week but would exceed \$455 per week if their pay was annualized. And they pass one of the exempt-duties tests. How do I handle those employees?

A: With all the hoopla surrounding the implementation of the DOL's new overtime regulations, it's easy to lose sight of the things that haven't changed. The most basic principle regarding overtime remains the same — you're required to pay overtime only to employees who work more than 40 hours in a given workweek. Part-time employees, regardless of their pay or job duties, aren't entitled to overtime. It doesn't matter that their pay exceeds \$455 per week on an annualized basis or that they perform some exempt duties. Part-time employees will never be entitled to overtime because they don't work more than 40 hours per week.

Q: Does anyone know about restrictions on the suspension of exempt employees? Can we suspend them for a full week? Also, if the suspension occurs during the day, do we have to pay the employee for the whole day?

A: It goes without saying that you can always suspend an employee with pay without running afoul of wage and hour laws. You can get into trouble, however, by suspending an exempt employee without pay. Depending on the circumstances, the DOL may consider an unpaid suspension to be an improper deduction from an exempt employee's salary.

The new regulations explain in very clear terms when you can legally impose an unpaid disciplinary suspension on an exempt employee. Deductions may be made for disciplinary suspensions of one or more full days for violating "workplace conduct rules." The suspensions can be taken against employees only if the "workplace conduct" rule is a written policy applicable to all employees. The DOL offers two examples of appropriate unpaid disciplinary suspensions: (1) an employer may suspend an exempt employee without pay for one or more full days for violating its written sexual harassment policy; and (2) an employer may suspend an exempt employee without pay for one or more full days for violating its workplace violence policy.

In the introduction to the new regulations, the DOL explains that it doesn't intend the term "workplace conduct" to be interpreted broadly. Rather, it says workplace conduct means just that, conduct — not performance or attendance issues. It isn't a stretch to conclude that the examples described in the regulations were chosen for a purpose. The DOL intends for unpaid disciplinary suspensions to be reserved for "serious" workplace misconduct like sexual harassment, violence, drug or alcohol policy violations, or violations of state or federal laws.

Although the DOL limits suspensions to those types of serious workplace misconduct, the misconduct doesn't necessarily have to take place on the employer's premises. If the employer has a bona fide workplace conduct rule that covers off-site conduct, it's allowed to impose unpaid disciplinary suspensions for such conduct. An example, you ask? Imagine discovering your company's public relations manager in the next episode of *Working Girls Gone Wild* — clearly a personal pursuit on her off time but not one that will necessarily reflect well on your company.

So in answer to the question about whether you can suspend an exempt employee for a full week, the answer is yes — if the suspension is for a violation of a written policy that applies to all employees. In fact, under the former regulations, if you suspended an exempt employee at all, the suspension had to be for one week or more. The new regulations allow employers more flexibility to suspend exempt employees in full day increments rather than the extreme one-week suspensions required by the former regulations. According to the DOL, this is a commonsense change that permits employers to hold exempt employees to the same standards of conduct as nonexempt employees. It allows employers to avoid the harsher treatment of exempt employees in the form of a full-week suspension when a shorter suspension would be appropriate.

Do you have to pay an exempt employee for the whole day if the suspension begins at some point during the workday? Yes. The new regulations clearly state that an employee may be suspended without pay in increments of one full day or more. Therefore, if an employee works for part of the day but then is suspended for violating the employer's sexual harassment policy, the employee must be paid his full pay for that day.

Q: What do the new regulations mean for professionals who are hired to work only two or three days a week for a fee? We have part-time instructors who may teach only one or two courses per term. Must we pay them hourly to keep from having to pay full-time wages for a part-time instructor?

A: Employees who are paid on a "fee basis" that would amount to at least \$455 per 40-hour workweek are exempt from overtime. An employee will be considered to be paid on a fee basis if she's paid an agreed sum for a single job regardless of the time required for its completion. Payments based on the number of hours or days worked rather than the accomplishment of a given task aren't considered payments on a fee basis. So if the fee paid to the instructors who work only two or three days a week is equivalent to at least \$455 per week, the instructors will be exempt from overtime. Under these circumstances, you don't have to convert them to an hourly pay method to avoid overtime. □