O'N E I L L & B O R G E S
LABOR & EMPLOYMENT LEGAL ALERT
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DOL'S NEW RULES REDEFINE OVERTIME EXEMPT EMPLOYEES

INTRODUCTION

On April 23,2004 the United States Department of Labor ("DOL") published new final regulations redefining who will be considered an "executive", "administrator", "professional" or "outside salesperson" exempt from the "Fair Labor Standards Act" ("FLSA"), the federal minimum wage and overtime law. The new rules become effective on August 23, 2004.

These exemptions are commonly referred to as the "white-collar" exemptions. Employees meeting the definitions established in the regulation may work any number of hours in the workweek and are not entitled to weekly overtime pay required under the FLSA.

The FLSA generally requires covered employers to pay their non-exempt employees overtime premium pay of time~and~one-half (1 ½) the regular rate of pay for all hours worked in excess of 40 in a workweek.

Although the final rules scale down several of the proposed rules supported by employer groups, they continue to provide important guidance on the requirements for employee exemption under the FLSA. The rules are expected to impact employee exemption eligibility, particularly in Puerto Rico, where a greater percentage of employees presently treated as "exempt" are paid below the new federally required minimum weekly salary of *$455 per week*.

Puerto Rico law also recognizes these "white collar" exemptions. The terms " executive", "administrative" and "professional" under Puerto Rico law are presently defined by Regulation 13, Fourth Revision (1990). This regulation has not been amended to incorporate the language of its federal counterpart.
(*Note: On December 23, 2005 The Puerto Rico Secretary of Labor and Human Resources amended Regulation 13, to essentially incorporate all of the amendments made by the U.S. DOL, with regard to "executive", "administrator", "professional" or "outside salesperson." Accordingly, the comments in this newsletter regarding the Fourth Revision's provisions are no longer applicable.*)

The term "outside salesman" lacks local a detailed regulatory definition.

As explained below, there are differences between the local and the new federal definitions for the same terms.

Accordingly, the availability of an exemption under federal law (for weekly overtime purposes) does not ensure exemption for all the other matters covered by local law. In addition, as noted below, exemption under Puerto Rico law does not ensure exemption for purposes of weekly overtime under federal law.

Additionally, exemptions under local law apply to daily and weekly overtime, mandatory meal period(s), extra pay for work on the seventh consecutive day worked, mandatory vacation and sick leave, Sunday work for employees of retail (or combined retail and wholesale) establishments, restrictions on permissible payroll deductions, and others. Thus, exemption classification has broader consequences under local law than under federal law.

Further, FLSA weekly overtime exemption impacts weekly overtime exemption under Puerto Rico law. This results from a Puerto Rico Supreme Court decision, which held that if an employee is "covered"by the FLSA, but by the terms of the federal law, the employee is

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"exempted" from weekly overtime entitlement, then the employee will be equally exempted from weekly overtime (excess of 40 hrs) entitlement under Puerto Rico law. *Vega v. Yiyi Motors*, 146 D.P.R. 373 (1998).

Absent action by the Puerto Rico Secretary of Labor to harmonize Regulation 13 with the federal rules, employers operating in Puerto Rico will need to apply both set of regulations, in order to determine whether an employee is totally or partially exempt from wage and hour legislation.

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In General

First, the final rules provide that job titles or job descriptions do not determine exemption; nor does paying a "salary" rather than an hourly rate. Whether an exemption applies depends on: (1) the specific duties and responsibilities of the employee's job (the "duties" test); (2) how much salary the employee is paid (the "salary" test); and (3) whether the salary is guaranteed without regard to the quality or quantity of work performed (the "salary basis" test).

While not identical, the federal and local regulations previously were substantially similar with regard to the "duties" required for each exemption category. Both established two different salary levels for the executive, administrative, and professional employee exemptions. The salary requirement did not apply to doctors, lawyers (nor for teachers under the federal regs), or to outside sales employees. Employees paid below the applicable lower salary rate were not exempt, regardless of their duties. Those paid above the higher (or "upset") salary rate were exempt if they met a "short" (simplified) duties test. Those paid between the higher and lower salary rates were required to meet a more detailed and demanding "long" duties test.

The new federal regulations streamline the prior federal rules by eliminating the separate "long" and "short" tests, based on the guaranteed salary levels and substituting them with a single "standard" duties test. Puerto Rico Regulation 13, however, presently maintains the two tier tests.

The following is provided as general information on the new federal rules and how they compare to the local rules for exemption purposes.

NEW SALARY LEVELS

$455 Weekly Minimum. The final rules increase the previously proposed minimum salary level for exempt employees from $425 to $455 per week. With very limited exceptions, any worker earning less than $455 per week ($23,660 annually; $1,971.66 monthly; and $985.83 semimonthly) cannot be exempt from weekly overtime pay under the FLSA.

Employers subject to the FLSA will need to apply the new federal salary levels, if they intend to claim weekly overtime exemption.

Regulation 13, on the other hand, still maintains the $295 weekly level under the "short" test for executives, administrators and professionals. Under the more demanding "long" test, the minimum weekly salary level is $200 for executives and administrators, and $250 for professionals.

Unless Regulation 13 is amended to adopt the federal salary test, partial exemption can be continued for other than weekly overtime purposes. However, although weekly overtime exemption will be recognized under local law, the federal weekly overtime exemption will not be available unless the federal salary level is met.

Highly Compensated Employees. The final

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rule also exempts from weekly overtime employees paid a total compensation of $100,000 or more annually, who "customarily and regularly" perform non-manual work and have *at least one* identifiable executive, administrative or professional function, as described in the standard duties tests (see below). The "total annual compensation" must include at least $455 per week paid on a salary or fee basis. Highly compensated employees do not have to meet all the elements of the standard duties test to qualify for this exemption.

In addition, the new rule for highly compensated employees permits counting base salary, commissions, non-discretionary bonuses and other non-discretionary compensation in determining whether an employee earns $100,000 or more annually.

The regulations also permit the employer to make an additional payment at the end of a year to raise the employee to $100,000. For example, if an employee's compensation is based on commissions and is usually above $100,000, but in a particular year the employee's compensation only reaches $94,000, the employer can make an additional $6,000 payment to ensure that the employee remains exempt from overtime (assuming other requirements are also met). This could be a useful feature for employees whose compensation is based on unknown variables, such as commissions or bonuses.

The employer is not required to make this supplemental payment. However, if the employer elects not to make the one-time payment, the employee will not qualify for this specific exemption. Of course, if all of the requirements in either the executive, administrative or professional employee tests are satisfied, the employer still can claim the appropriate exemption.

Regulation 13 does not recognize this exemption. Accordingly, while exemption from <u>weekly</u> overtime under federal law is available (and by virtue of the *Yiyi Motors* rule, also under local law), said employee will remain subject to all other local wage and hour provisions.

"SALARY BASIS" TEST

New Salary Basis Rules. A significant change to the exempt-status regulations are the DOL's revisions to the "salary basis" test.

The "salary basis" test requires that the exempt employee "regularly receive each pay period on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." With a few exceptions, an exempt employee must receive his or her full salary for any week in which the employee performs any work, without regard to the number of days or hours worked.

The salary basis test prohibits deductions from pay for disciplinary problems, performance issues or for absences caused by jury duty, attendance as a court witness, or temporary military leave (although employers may take offsets for jury or military pay) in any week in which an employee performs any work.*

**(Employers in Puerto Rico must be aware, however, that Law No. 281 of September 27, 2003, grants a paid jury duty leave, which in the case of private sector employees, is of 15 days, which cannot be reduced by the jury pay.)*

The salary basis test also prohibits an employer from making deductions from salary for absences caused by the employer or by the operating requirements of the business. In other words, "if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available." However, the employee does not have to be paid for any work week in which he or she performs no work.

The new federal regulations continue to recognize all the previously accepted exceptions to the salary basis rules. An employer may continue to make deductions from the guaranteed pay "when the employee absents himself from work for a day or more for personal reasons, other than sickness or

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accident."

Deductions also are permitted for absences of a day or more due to sickness or disability, if taken in accordance with a *bona fide* plan, policy or law (workers' accident compensation, for example) providing wage replacement benefits. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder.

Employers also may make deductions from an exempt employee's salary for any hours not worked in the initial and final weeks of employment or for hours taken as unpaid FMLA leave, without affecting the exempt status of the employee. Finally, the new rule also continues the prior rule permitting less than full week or full day deductions from pay for violations of major safety rules.

The significant changes to permissible salary reductions are discussed below.

Disciplinary Deductions. As indicated, employers generally risk losing the exemption classification by making deductions from an exempt employee's salary for disciplinary problems or performance issues. This is the so-called "no disciplinary docking" rule. Such deductions were permitted under the prior regulations only for penalties imposed for infractions of safety rules of major significance, and for unpaid suspensions of an entire workweek. The new regulation expands the list of reasons for which the exempt employee's salary can be affected without losing the exemption.

The new rule allows an employer to suspend in good faith an exempt employee without pay in full-day (but not partial-day) increments, instead of merely in full week increments. However, to qualify under this exception, the disciplinary rule, along with the potential for a penalty of suspension without pay, has to be stated in a written policy. This allows employers to hold exempt employees to the same standards of conduct as nonexempt employees, without violating the "salary basis" test. Noteworthy is that the exception refers to problems related to "conduct", not issues of performance or attendance.

Finally, the new disciplinary deduction exception only allows deductions for unpaid suspensions of one or more days--not fines, settlements or judgments which could arguably be blamed on an exempt employee.

"Window of Correction" Clarified. Under the prior regulations, an employer making improper deductions from pay jeopardized the exempt status of an entire class of employees, not only of the employee affected by the deduction. The new regulations clarify the circumstances under which an improper deduction will cause groups of employees to lose their exempt status.

Under the new rules, an exemption is lost only when the employer has an actual practice of making improper deductions, and then just for those employees in the same job classification and working for the same manager responsible for the improper pay docking.

For example, if a manager at a company facility regularly docks the pay of supervisors for partial-day absences, then all supervisors at that single facility, whose pay "could have been docked by that manager," lose their exempt status. Supervisors at other company facilities or working for other managers would, however, remain exempt. Finally, the time period in which the exemption will be lost is the time period in which the improper deduction was made.

New "Safe Harbor"rule. Under the prior rules, an employer who inadvertently made impermissible deductions could, in some circumstances, retain the exemption by reimbursing employees for the improper deductions. The new rules create a new "safe harbor" provision.

When an employer has a policy prohibiting improper deductions, which includes a complaint mechanism, notifies employees of that policy and reimburses employees for

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improper deductions, then the employer will not lose the exemption for any employee, unless the employer's policy is repeatedly and willfully violated, or the employer continues to make improper deductions after receiving employee complaints.

As noted, to lose the exemption, there must be an actual practice of improper deductions. This presumably would exclude one-time inadvertent violations. On the other hand, in order to be in a position to invoke this protection, the employer must promulgate a policy prohibiting improper deductions from the salaries of exempt workers. Further, the employer is required to reimburse affected employees for any improper deductions.

Regulation 13 does not define or regulate the meaning of being paid “on a salary basis”. Accordingly, it is highly probable that federal rules will be followed for determining whether the alleged exempt employee has been paid “on a salary basis” for all local law purposes.

SPECIFIC EXEMPTIONS UNDER THE FLSA

EXECUTIVE EMPLOYEE. Under the previous “short” federal duties test for executive employees, (i) the primary duty of the employee must be the “management” of the enterprise or a recognized department or subdivision; and (ii) the employee must also customarily and regularly direct the work of two or more employees.

Additional requirements previously existed under the federal “ long” test, including the requirement that the employee have the authority to hire or fire other employees, or at least that the executive’s recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight. This authority to impact the personnel status or advancement of other employees is commonly referred to as the “hire/fire”authority.

The new federal rule places *all three* of these requirements from the short and long tests into one "*standard duties*" test.

In discussing what is meant by requiring a primary "management" function, the final rules illustrate that such functions include, but are not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

To determine whether an employee's hire/fire suggestions and recommendations are given "particular weight," in order to qualify for the executive exemption, the rule requires examination of whether it is part of the employee's job duties; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which they are relied upon, among others.

Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

As noted, the new federal rule is more demanding than the prior “short”test rule for

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determining exemption. Now greater emphasis is placed on disciplinary authority in order to qualify for the executive employee exemption. As a result, the executive exemption under federal law will be more difficult to maintain in the future.

The inclusion of this more demanding duties test, together with the minimum guaranteed $23,660 yearly salary, will make the executive exemption narrower in actual application.

Regulation 13, on the other hand, continues to recognize the less demanding "short test" (that does not require the hire/fire authority). Therefore, individuals who meet the local "short test" will be exempt from all local wage and hour legislation. However, employers must be cautioned that payment of the higher federal weekly guaranteed salary ($455 per week) will not result in exemption from federal weekly overtime, unless the hire/fire test is also met.

OWNER EXEMPTION. The final rule also restricts the broad exemption that would have been granted to any employee who owns at least a 20 percent equity interest in the business in which the employee is employed (regardless of compensation).

In its final form, the rule requires that the equity owner "actively engage in the management" of the business, in order to qualify for this special "executive"exemption.

Regulation 13 does not recognize this exemption. Therefore, the eligible employee will be subject to all local wage and hour laws, except for weekly overtime (by virtue of the *Yiyi Motors* decision).

ADMINISTRATIVE EMPLOYEE. In its final rule the DOL withdrew from the more controversial administrative exemption definitions, and replaced same with the requirement that (1) the employee's primary duty 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 primary duty include the exercise of discretion and independent judgment with respect to "matters of significance." Contrary to what had been contemplated in the proposed rules, this latter requirement suggests a narrower approach to the administrative exemption under the new rules.

The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

An illustrative list of the types of work that meet this requirement are: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

The office or non-manual work can also be for the employer's customers. Therefore, a tax expert or financial consultant for the employer's customers could also qualify for the administrative exemption.

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

Factors to consider when determining whether an employee exercises "discretion and independent judgment" with respect to "matters of significance" include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;

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whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Administrative employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, it is not necessary that the decisions have a finality that goes with unlimited authority and a complete absence of review. The decisions may consist of recommendations for action rather than the actual taking of action.

The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. However, the use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills, does not preclude exemption. This must be contrasted with the non-exempt function of applying well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.

The term ``matters of significance'' refers to the level of importance or consequence of the work performed. The work performed by an exempt administrative employee must be significant, substantial, important, or of consequence. This means work that, by its nature or consequence, affects the employer's general or business operations or finances to a significant degree.

This test is not met, however, merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

To assist in the comprehension of the definitions, the new rules provide a list of jobs that may be exempt administrative positions, provided the employee performs the duties detailed in regulations. The positions listed are: (a) insurance claims adjusters; (b) financial services employees who collect and evaluate customer information and determine the best financial product for the customer's needs and financial circumstances or marketing, servicing or promoting the employer's financial products; (c) team leaders assigned to complete major projects (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements); (d) executive assistant or administrative assistant to a business

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owner or senior executive of a large business, provided the employee performs without specific instructions or prescribed procedures, and has been delegated authority regarding matters of significance; (e) human resources managers who formulate, interpret or implement employment policies; (f) management consultants who study the operations of a business and propose changes in organization; (f) Purchasing agents with authority to bind the company on significant purchases; and (g) employee's who evaluate competitor prices in order to set the employer's prices.

PROFESSIONAL EMPLOYEE. The exemption for professional employees encompasses different categories. The two main categories of professional employees are "learned professional" employees and "creative professional" employees.

Learned Professional Employee. In its final rule the DOL eliminated the provisions of the proposed rule which would have expanded the "learned professional"exemption. This exemption applies to those employees whose primary duty is performing work requiring knowledge of an advanced type in a field of science or learning, customarily acquired from a prolonged course of specialized intellectual instruction and study.

This exemption is further limited to work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. The rule concludes that an employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.

The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a *standard* prerequisite for entrance into the profession. The best *prima facie* evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.

The learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes.

The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

The DOL also provided an illustrative listing of positions that may qualify as exempt "learned professionals", provided the employee has the education and performs the tasks detailed in the rule. The positions identified are: (a) lawyers (but not paralegals or legal assistants); (b)engineers (but not engineering technicians); (c) certified public accountants, as well as other accountants who perform similar job duties (but not accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work);(d) actuaries; (e) pharmacists;(f) teachers; (g)doctors; (h) registered or certified medical technologists; (i)

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registered nurses who are registered by the appropriate State examining board (licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals); (j) dental hygienists; (k) physician assistants; (l) chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program (but not cooks who perform predominantly routine mental, manual, mechanical or physical work); (m) athletic trainers; and (n) licensed funeral directors and embalmers.

The DOL recognizes the areas in which the professional exemption may be available are expanding. Thus, when an advanced specialized degree has become a *standard* requirement for a particular occupation, that occupation may qualify as a learned profession.

Creative Professional. An employee qualifies as a "creative professional" if the employee performs work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. This exemption covers actors, musicians, composers, painters, novelists, journalists and other similar professionals, but would not extend to such occupations as copyists, animators or writers who primarily collect and record routine facts of data without analysis. According to the DOL, the changes are not intended to make any material change from the prior regulations.

Teacher Exemption. The new federal regulations maintain the prior special exemption for teachers, with the exception of the elimination of the requirement that teachers consistently exercise discretion and judgment. Thus, as before, a teacher generally will have to possess a license or teaching certificate and must primarily be involved in teaching, tutoring, instructing or lecturing.

Also, the new rule continues the prior rule provision that exempts these professionals from the minimum salary level requirement.

Regulation 13, however, does not exempt teachers from the minimum salary level test. Therefore, the flexibility granted under federal law is not presently available under local law, except for weekly overtime purposes (by virtue of the *Yiyi Motors* decision).

COMPUTER EMPLOYEE. The regulations continue and make some changes to the exemptions for computer employees (an exemption specifically created by statute and which does not require compliance with the other "white collar" exemption tests).

In November 1990, Congress enacted legislation directing the DOL to issue regulations permitting computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers to qualify for exemption. This enactment also extended the exemption to employees in such computer occupations if paid on an hourly basis at least 6½ times the minimum wage. Subsequently, in 1996 Congress froze the hourly compensation test at $27.63 (which equaled 6½ times the former $4.25 minimum wage).

The new federal rule consolidates and condenses all of the regulatory guidance on the computer occupations exemption into a new regulatory subpart. It also deletes the requirement that an exempt computer employee must consistently exercise discretion and judgment.

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To qualify for this exemption, employees in computer occupations have to be highly skilled in computer systems analysis, programming, software engineering or similar computer functions. Specifically described functions are: 1) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2) 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; 3) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or 4) combination of the aforementioned duties, the performance of which requires the same level of skills.

This exemption does not apply to computer operators or employees engaged in the manufacture, repair or maintenance of computer hardware.

Regulation 13 does not presently recognize this exemption. Because of this shortcoming under existing local law, exemption must be pursued under the executive, administrator or professional classification tests. Unless exemption is obtainable by these alternate means, the flexibility granted under federal law is not recognized under local law, except for weekly overtime purposes (by virtue of the *Yiyi Motors* rule).

OUTSIDE SALES. The FLSA contains separate exemption for any employee employed "in the capacity of outside salesman." The regulations continue and make some changes to the exemptions for outside sales employees.

In keeping with similar changes to the other exemptions, and to simplify the outside sales exemption, the DOL adopts a primary duty concept similar to the other exemptions, and eliminates the particularly confusing 20 percent restriction on nonexempt work by outside sales employees. The main elements of the duties test; which are requiring the primary duty of making sales or obtaining orders away from the employer's place of business, continue.

PLANNING FOR THE CHANGES

As noted above, compliance with the new federal rules does not ensure exemption for all wage and hour purposes in Puerto Rico. On the other hand, continued compliance with the "short"test under local law, even assuming payment of the higher-federally mandated weekly salary also does not ensure exemption for all purposes.

While awaiting any initiative from the Puerto Rico Secretary of Labor and Human Resources to harmonize Regulation 13 with its federal counterpart, employers in Puerto Rico need to consider the following planning strategies:

- Determine which employees can be exempted from weekly overtime (excess of 40 hours), pursuant to the new federal rules.

- Determine whether the employees identified, will also qualify for exemption under Regulation 13.

- With regard to the employees identified for FLSA exemption, but who do not meet the requirements of Regulation 13, determine whether the job can be modified in order to qualify for total exemption. If not possible, evaluate whether to treat the employee as non-exempt for all purposes except for weekly overtime or whether it is preferable to reclassify the employee as non-exempt for all purposes.

- Determine which employee can be exempted under Regulation 13 for all local law purposes, but who will not qualify for weekly overtime exemption under the FLSA.

- Determine whether the duties or salary of these identified employees can be modified in order qualify for total exemption. If not possible, evaluate whether to treat the employee as exempt for all local law purposes except for weekly overtime or whether to reclassify the employee as non-exempt for all purposes.

MANAGING THE CHANGES

As the effective date for the new federal rules approaches, employers should consider how the

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changes will affect their organization and evaluate the changes they will need to make in the employee classifications. Here are some recommended immediate and long term actions:

• Establish a committee composed by operations and HR personnel to review the classifications, supported by legal counsel knowledgeable in the exemption issues.

• Determine whether there are any individual employment contracts or collective bargaining agreements that will impact the evaluation.

• Review or establish job descriptions for all positions, or at least for those considered for exemption classification. Ensure it reflects the duties actually performed or expected to be performed; the education, knowledge and abilities required to occupy the position.

• Have the manager or supervisor sign off on the job description, indicating that the duties are accurately described and consider having the employee also signing same. This process should be performed periodically.

• The committee should examine each of the strategic planning issues identified above in the preceding section.

• Evaluate the financial impact of increasing the salary or total compensation levels required under the new federal levels.

• Evaluate whether the need for exemption classification can be eliminated by eliminating daily and weekly overtime or establishing control mechanisms.

• Evaluate whether there are positions that should be simply reclassified as non-exempt and "factor in" the impact of overtime payments.

• If overtime cannot be significantly reduced or eliminated for persons previously treated as exempt but who will now be ineligible for said classification, consider converting the existing weekly rate to a reduced hourly rate and "factor in" the average weekly overtime, so that when regular and overtime pay is computed, the total weekly compensation remains the same.

• If there is a need to increase the weekly pay in order to qualify for the exemption, evaluate whether other benefits (such as bonuses or commissions) can be reduced, without significant negative impact, in order to maintain constant the total compensation package.

• Determine whether any reclassification will affect an employee's participation in a retirement or welfare benefit plan, since sometimes eligibility hinges on the employee's status as a "salaried" employee.

• Evaluate the method or manner in which any reclassification is to be notified. For example, reclassification from exempt to non-exempt can be perceived as a "demotion" by some individuals. On the other hand, reclassification from non-exempt to exempt can be perceived as a "promotion"by others, when the employee's performance had no bearing on the reclassification decision.

• Evaluate the employer's policy as to suspensions or payroll deductions for exempt employees. Modify the policies in accordance with the new federal rules.

• Coordinate with the Payroll Department to ensure the correct overtime entitlement status has been assigned to employees.

Our firm can assist you in properly classifying employees (under both Puerto Rico and federal regulations). We can evaluate job duties, analyze these in terms of the FLSA, the regulations, and case law, and recommend appropriate classifications. We can also assist you in making sure your compensation policies (particularly those relating to deductions) do not unintentionally violate the statute or regulations.

FINAL NOTES

Because of the general nature of this Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information about the contents of this newsletter, please contact the firm's Labor and Employment Law Department:

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