

# ARTS Law Memo

## New Overtime Rules Take Effect

The Bush administration's new overtime regulations contain major changes to the white-collar exemption rules. The controversial rules were designed to modernize standards that have been in place for decades. They took effect on Aug. 23, but Congress may decide to block some of the provisions.

Corporations sought the overhaul, arguing that the antiquated regulations were not keeping pace with the changing workforce. They claimed the rules were confusing and spurred too many unnecessary lawsuits brought by workers claiming they were cheated out of overtime.

Although their members will not be affected by the new rules, organized labor was vocal in its opposition. Unions say the regulations will make it more difficult for many workers to earn overtime.

**Contrary to popular belief, simply being salaried does not determine whether or not an employee is entitled to overtime.**

Estimates of how many employees will lose their overtime eligibility vary from 107,000 to 6 million. But more than one million workers could become newly eligible.

This issue of *Arts Law Memo* summarizes the Department of Labor's 500-page rule, emphasizing what the changes mean for nonprofit arts organizations in Missouri. The federal regulations did not take effect automatically in Illinois and 17 other states, which have their own overtime requirements.

### **FAIR LABOR STANDARDS ACT**

The Fair Labor Standards Act of 1938

(FLSA) established the minimum wage, restricted child labor, defined the 40 hour workweek, and set requirements for overtime pay. Although the FLSA technically applies to employers with annual sales of more than \$500,000 or those who are engaged in interstate commerce, it actually covers most businesses.

Under the FLSA, employers must pay at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. The FLSA does not require overtime pay for work on weekends or holidays.

State and local governments may give their employees comp time, but private employers (including nonprofits) are not permitted to use comp time in lieu of cash overtime payments.

Contrary to popular belief, being salaried does not determine whether or not an employee is entitled to overtime.

Being designated exempt from overtime protection generally requires meeting three tests. First, is the "salary-level test." It stipulates that employees who earn less than a certain level each week cannot be exempt. Until last month, the level was set at \$155 a week or \$8,060 annually. Second, is the "salary-basis test." In order to be exempt, employees are required to be paid a set salary (or fee), not an hourly wage. Third, the "duties test" denies overtime protection to workers whose duties are primarily "administrative," "professional," or "executive" in nature.

### **MAJOR CHANGES**

The new regulations made significant changes in the salary level and duties tests. They also created a new exemption for highly compensated employees.

The most dramatic change is to the salary level. It increased to \$455 per week or \$23,600 annually, bringing more

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- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national volunteer lawyers for the arts network.

This issue was written by VLAA Executive Director Sue Greenberg. Special thanks to Lindsay A. Bleier, a student at Washington University School of Law.

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## Highlights

The Fair Labor Standards Act (FLSA) requires most employees to be paid at least the federal minimum wage of \$5.15 per hour for hours worked and overtime pay at time and one-half the regular rate for all hours worked over 40 hours in a workweek.

However, many workers are designated as exempt from overtime protection. The Bush administration's new rules make significant changes to long-standing rules governing overtime for white-collar employees.

In order to be exempt from overtime, the new rules require that employees earn a minimum salary of \$455 a week. That's triple the old level of \$155 a week. Some low- and mid-level managers are newly eligible for overtime pay.

Under the new rules, white collar workers who earn more than \$100,000 a year are automatically exempt from overtime pay.

The obligation to pay overtime does not apply to workers employed in executive, administrative, and professional positions. The new rules revamp the definitions of these terms. Some workers will end up earning less money while working longer hours.

Employees whose jobs require imagination, invention, originality, or talent in a recognized field of artistic or creative endeavor are not entitled to overtime.

Employees with specialized knowledge whose main duties are computer-related are probably ineligible for overtime.

Manual laborers or other blue-collar workers who perform work involving repetitive operations with their hands, physical skill, and energy remain entitled to overtime pay no matter how highly paid they might be.

Few union workers are covered by FLSA overtime pay regulations. Nothing in the new regulations relieves employers from their contractual obligations under collective bargaining agreements.

When state law differs from the federal FLSA, an employer must comply with the standard most protective to employees.

Job descriptions should reflect the appropriate exempt criteria, as should the actual duties performed by exempt employees.

workers under the overtime umbrella. Labor advocates applaud this broader coverage but note that its impact will be short-term because the salary floor will not rise with inflation.

At the other end of the spectrum is a new exemption for highly paid employees. Any white-collar employee who earns more than \$100,000 a year is now ineligible for overtime.

The duties test is where the rules get more complicated (and more

controversial), although the three categories — “executive,” “administrative,” and “professional” — have not changed.

Working supervisors and employees with some executive duties will be more easily exempted under the new definition of “executive.” For example, to be exempt from overtime, a manager must be involved in key staffing decisions like hiring, firing, and promotion. Previously, the manager

had to have the actual power to make those decisions.

Significant changes were not made in the definition of “administrative.” Generally, employees such as comptrollers or development directors, or people who constitute “one person” departments are included in this exemption. Bookkeepers, secretaries, and administrative assistants do not fall within this exemption because they are policy implementers rather than policymakers.

Under the new rules, the exercise of discretion and independent judgment must involve “matters of significance.” Having the discretion to perform mundane office functions would not be considered significant.

The new rules defining “professional” allow employers to substitute knowledge gained from work experience for knowledge gained through prolonged courses of instruction.

### **SPECIFIC JOBS ADDRESSED**

The new rules specifically address jobs that are often targets of workers' overtime lawsuits. They include more extensive criteria for computer programmers, outside salespeople, pharmacists, funeral directors, journalists, insurance claims adjusters, dental hygienists, and chefs.

Other sections make it clear that police, firefighters, paramedics, and other first responders are not exempt from overtime, regardless of rank or pay level.

Nothing in the new regulations relieves employers from their contractual obligations under collective bargaining agreements. Manual laborers or other blue-collar workers remain entitled to overtime pay no matter how highly paid they might be.

### **MORE INFORMATION**

The distinction between exempt and non-exempt workers can be confusing, so employers should reevaluate their job descriptions and pay policies to make sure they are in compliance with the new regulations. For more information, visit the U.S. Department of Labor's website ([www.dol.gov/fairpay](http://www.dol.gov/fairpay)) or consult an attorney.

# Side-By-Side

## Old Rules

## New Rules

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### Executive Employees

Whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and

Includes the customary and regular direction of the work of two or more other employees therein.

Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; Who customarily and regularly directs the work of two or more other employees; and

Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees is given particular weight.

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### Administrative Employees

Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and

Which includes work requiring the exercise of discretion and independent judgment.

Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and

Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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### Professional Employees

Whose primary duty consists of the performance of 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; and

Which includes work requiring the consistent exercise of discretion and judgment; or

Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

Whose primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

Whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

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Source: U.S. Department of Labor

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## ELECTION YEAR REMINDER FROM THE IRS

In its presidential election-year advisory, the Internal Revenue Services reminded charities that they should be careful that their efforts to educate voters comply with its requirements concerning political campaign activities.

Organizations described in section 501(c)(3) of the IRS Code that are exempt from federal income tax are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office.

These organizations cannot endorse any candidates, make donations to their campaigns, engage in fund raising, distribute statements, or become involved in any other activities that may be beneficial or detrimental to any candidate. Even activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria violate the political campaign prohibition of section 501(c)(3).

Whether an organization is engaging in prohibited political campaign activity depends upon all the facts and circumstances in each case. For example, organizations may sponsor debates or forums to educate voters. If the debate or forum shows a preference for or against a certain candidate, however, it becomes a prohibited activity.

If the IRS finds a section 501(c)(3) organization engaged in prohibited campaign activity, the organization could lose its tax-exempt status and it could be subject to an excise tax on the amount of money spent on that activity.