

Recent Developments Regarding the “White Collar Exemptions”
To the Fair Labor Standards Act

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This paper will highlight developments under the “white collar” exemptions to the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (“FLSA”) in year 2003 and first two months of 2004 and will summarize the key issues addressed in the Department of Labor’s proposed changes to the Part 541 Regulations.¹ On February 19, 2004, Steven Mandel, Associate Solicitor, U.S. Department of Labor, indicated the DOL received over 8,000 comments to the proposed regulations including 600 to 700 substantive suggestions. Mandel indicated DOL planned to implement the proposed regulations by March 31, 2004. Mandel also stated that, pursuant to the Congressional Review Act, every major rule change must be submitted to Congress. Congress has 60 days to introduce a resolution of disapproval. If introduced, Congress has until the end of the session to act. The proposed rule goes into affect after 60 days, but if Congress acts then it is retroactively made to have no affect. Any resolution of disapproval must be signed by the President to be effective. Because President Bush has indicated that he

¹ See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 68 Fed. Reg. 15560 (proposed March 31, 2003)(to be codified at 29 C.F.R. pt. 541).

will veto any resolution of disapproval, it is unlikely that DOL's proposed rule will be held up by this process.

I. The Current White Collar Exemptions

A. The Requirements of the Salary Basis Test

Courts continue to read the salary basis requirements narrowly and are expanding the use of the window of corrections. Decisions of note include the following:

In *Hogan v. Allstate Ins. Co.*, ___ F.3d ___, 2004 U.S. App. LEXIS 3824 (11th Cir. February 27, 2004), the Eleventh Circuit held that Allstate had met its burden of establishing that it paid its agents on a salaried basis by paying the agents on a commission basis with a monthly minimum salary guarantee that exceeded \$155 per month. The court rejected the agents' argument that the monthly minimum was subject to improper deductions because the agents were subject to paying office expenses from the monthly minimum. The court held that these expenses were voluntarily paid and were not deductions based on the quantity or quality of work performed as required by 29 C.F.R. 541.118.

In *Shaefer v. Indiana Michigan Power Co.*, ___ F.3d ___, 2004 WL 256991 (6th Cir. 2004), the Sixth Circuit rejected the plaintiffs' argument that he was not paid on a salaried basis because he was required to account for 40 hours of work per week on his timesheet and was required to make up partial-day absences by either working extra hours on another day or using part of a vacation day. The court held that salary status is only affected by monetary deductions for work absences and not by non-monetary deductions from fringe benefits such as personal time or sick time. *Id.* at *2.

In *Moore v. Hannon Food Service, Inc.*, the Fifth Circuit held that the window of corrections could be applied to maintain the exempt status of the company's managers in spite of

the employer's policy and practice of making improper deductions from the managers' salary for a four-month period. The company paid its managers \$300 per week plus a percentage of the gross sales of the restaurants; however, during the four-month period, the company made deductions for cash register shortages from the managers' salaries. A total of 17 deductions were made to four of the seven plaintiffs. The district court had granted summary judgment to the plaintiffs finding that they were not paid on a salaried basis because they were subject to improper deductions and rejected the company's attempt to use the window of corrections to preserve the exempt status of the managers.

In reviewing the district court's decision, the Fifth Circuit noted that four circuit courts of appeal had followed the DOL's amicus briefs and ruled that the window of corrections could not be used when a company has a policy or practice of making improper deductions. However, the Fifth Circuit departed from these courts by first finding that DOL's interpretations of its window of correction regulation, 29 C.F.R. 541.118(a)(6), were not entitled to deference because it was not ambiguous. The Court held that DOL's subsequent interpretation of this regulation in amicus briefs was only entitled to respect to the extent that it had a power to persuade. The Court analyzed the window of corrections regulation and held that it allows for corrections if the deductions were inadvertent or made not for lack of work regardless of whether a policy or pattern of improper deductions had occurred.

In *McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997 (8th Cir. 2003), the plaintiffs' annual salary exceeded \$40,000. On appeal, the plaintiff argued that she was not paid on a salary basis because she was required to work "overtime." The Eighth Circuit rejected this argument. The court noted that the company never disciplined the plaintiff regarding her overtime work, docked the plaintiffs' pay for missing work, or threatened her with a dock in pay

for missing work. The court stated that nothing in the record supported any argument that her salary was in jeopardy of being reduced based on the quality or quantity of the work she performed.

B. Timeframe for Determining the Primary Duty

Courts continue to disregard short periods of changes in job duties in determining the primary duty of employees. For example, in *Counts v. South Carolina Elec. & Gas Co.*, 317 F.3d 453 (4th Cir. 2003), the Fourth Circuit held that the plaintiffs' status as exempt administrative employees under the FLSA does not change merely because they perform some nonexempt labor for five weeks during each eighteen month cycle of plant operation. Approximately every eighteen months, the company's nuclear plant was shut down for approximately five weeks for the performance of routine maintenance. During these outages, the plaintiffs who were normally employed in administratively exempt positions were reassigned temporarily to perform non-exempt duties. The Fourth Circuit rejected the plaintiffs' argument that each workweek should be analyzed independently such that the plaintiffs would have been entitled to overtime compensation for the work performed during the outages. Rather, the court stated that a holistic approach to determining an employee's primary duty should be taken such that the primary duty is determined under the natural cycle of the employer's business (eighteen months in this case).

C. The Executive Exemption

1. Determining Which Test Applies

Courts continue to hold that only the salary portion of an employees pay is considered in making the determination of whether the long test or short test applies under the executive

exemption. *See e.g., Chao v. Vidtape, Inc.*, 66 Fed Appx. 261, 8 Wage & Hour Cas. 2d (BNA) 1344 (2d Cir. 2003).

2. Applying The Executive Exemption Duties Test

Courts continue to reject time spent performing non-exempt duties as the determining factor as to whether an employee is properly classified as an exempt executive.

In *Jones v. Virginia Oil Co.*, 69 Fed. Appx. 633, 2003 WL 21699882 (4th Cir. 2003), the Fourth Circuit applied the “short test” to determine whether an assistant manager and later a manger of a Dairy Queen store attached to a service station was an exempt executive. Under the “Short Test” for the executive exemption the employer is required to show that: (1) the employee's primary duty consists of the management of the enterprise or of a customarily recognized department or subdivision thereof, and (2) the employee customarily and regularly directs the work of two or more other employees. The court noted that the parties had stipulated that the plaintiff supervised two or more employees so that the only issue to be determined was whether the plaintiffs’ primary duty was management.

The Fourth Circuit affirmed the district court’s grant of summary judgment against the employee in spite of the employees’ testimony that she performed “line-worker” tasks such as cooking burgers, taking customer orders, cleaning the store, stocking shelves, and sweeping the parking lot during 75-80 percent of her time. The Fourth Circuit found that the manager also performed management related duties, which included doing the daily cigarette count, the daily sales paperwork, the invoice paperwork, the monthly fast food inventory, the monthly gas and lottery inventory, the weekly schedule and payroll, the weekly truck order, the daily drawer change, and the close out of drawers. The plaintiff also changed gas prices on the computer, greeted vendors, conducted convenience store inventory and ordering, and handled customer

complaints. The plaintiff was also responsible for hiring, training, evaluating, and firing employees. She set salaries for the hourly employees and made recommendations to upper management about employee raises. She also had a key to the store and access to the safe, which was only available to persons in management. As a manager, she generally worked an opposite shift from an assistant manager and worked alongside four to six regular employees. A district manager stopped by the store one to four times per week. On these facts, the Fourth Circuit affirmed the grant of summary judgment for the employer finding that the manager's primary duty was management because she was able to perform management duties while performing her non-exempt duties.

The Seventh Circuit came to an opposite result on similar facts when reviewing whether a car wash "manager" was exempt under the executive exemption in *Jackson v. Go-Tane Services, Inc.*, 8 Wage & Hour Cas. 2d (BNA) 1472, 2003 WL 151270 (7th Cir. 2003). The Seventh Circuit first noted that the car wash manager's testimony that he spent approximately 95 percent of his time performing the same tasks as other car wash attendants was un rebutted by the company at trial. The court also noted that during only 67 percent of the workweeks at issue did the car wash manager work with the equivalent of two or more full-time employees as required under the short test. The court noted that the "primary duty" determination must be made on a case-by-case basis pursuant to 29 C.F.R. § 541.103, but "it may be taken as a good rule of thumb that primary duty means the major part, or *over 50 percent* of the employee's time." *Id.* at **3. (emphasis in original). The court noted that additional factors that may be considered in the "primary duty" analysis include: (1) the relative importance of the managerial duties as compared to other types of duties, (2) the frequency with which the employee exercises discretionary powers, (3) the employee's relative freedom from supervision, and (4) the

relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. *Id*

Applying the above test, the court found that the company had failed to refute the car wash manager's testimony that he spent 95 percent of his time performing the same duties as other car wash attendees. The court found that the company had failed to establish that any management duties performed by the car wash manager were "overwhelmingly" important and that he was not compensated for performing such duties as his salary worked out to pay him an hourly rate close to the rate paid to non-management car wash attendees. The court also found that the car wash manager had little "meaningful" discretion because he could only make recommendations regarding hiring, pay determinations, and terminations for employees. On this record, the court found that the car wash manager's primary duty was not management. The court also held that the company failed to meet the short test requirement of establishing that an executive supervise the equivalent of two full-time employees because the car wash manager only supervised the equivalent of two full-time employees during 67 % of the time at issue.

D. The Administrative Exemption

1. Determining Which Test Applies

In *Hogan v. Allstate Ins. Co.*, ___ F.3d ___, 2004 U.S. App. Lexis 3824, *10 (11th Cir. 2004), the Eleventh Circuit applied both the long test and short tests to determine whether insurance agents were administratively exempt under the FLSA. The court noted that the agents were paid a minimum monthly guaranteed salary plus commissions. The court only considered the minimum monthly guarantee in determining the appropriate test to apply and applied the long test when the agents' guarantee was less than \$250.00 per week and the short test when it exceeded \$250.00 per week.

2. Applying the Administrative Exemption Duties Test

In *Hogan*, the Eleventh Circuit noted that the long and short tests require that the plaintiffs' primary duty be office or non-manual work directly related to management policies or general business operations of his employer or the employer's customers. *Id.* at * 11. The court noted that persons who are involved in "production" functions or sales functions in a retail or servicing company are not administrative employees. However, the court distinguished the sales functions of the agents at issue because under 29 C.F.R. § 779.316 insurance companies are not retail or servicing companies. The court stated that administratively exempt employees include those employees who are responsible for "servicing" a business. The court found that the agents at issue spent the majority of their time performing "servicing" functions, which included, promoting sales, advising customers, adapting policies to customer's needs, deciding on advertising budget and techniques, hiring and training staff, determining staff's pay, and delegating routine matters and sales to staff. *Id.* at 13.

The court next addressed whether the agents "customarily and regularly exercise[d] discretion" as required by the long test.² The court held that although the agents did not have "limitless" discretion, sufficient discretion was found due to the servicing functions performed by the agents.

In applying the remaining long test factors, the court found that the agents performed special assignments under only general supervision because they were visited by an area manager on an average of once a month. The Court also found that the agents performed non-exempt duties in less than 20 percent of their work because work involving sales in a non-retail establishment is considered exempt work. *Id.* at *15-16.

² The "short test" only requires that the employee "use[] discretion and independent judgment in his work." 29 C.F.R. § 541(e)(2).

In *McAllister v. Transamerica Occidental Ins. Co.*, 325 F.3d 997 (8th Cir. 2003), the Eighth Circuit affirmed a district court's grant of summary judgment on the overtime claims of a "claims coordinator," who had responsibility for handling the "most complex life claims." The plaintiff did not contest that her primary duty consisted of the performance of office work directly related to management policies or general business operations of the company or its customers. Instead, she asserted that she merely applied skills in applying detailed standards and procedures set forth in manuals. The court rejected this argument finding that the claims manuals themselves emphasized that a rule book could not guide most of the claims work, and employees must use "good common sense judgment." *Id.* at 1001. The court also found that the plaintiff had the authority to approve contestable claims up to \$150,000 and incontestable claims up to \$250,000, and had disbursement authority up to \$50,000, which the court found were matters of significance as defined by the DOL regulations. *Id.* The court also found that she was effective in interpreting contract law and insurance statutes and in advising the company in what course of action to take on an insurance claim. The court found on these facts that the claims coordinator had sufficient discretion and independent judgment to meet the short test of the administrative exemption.

In *Howell v. Ferguson Enterprises, Inc.*, 2004 U.S. App. LEXIS 1820 (5th Cir. 2004), the Fifth Circuit affirmed summary judgment against an account manager for a wholesale distributor. The account manager was responsible for managing the account of one of the largest customers of the wholesaler, including ascertaining what materials the customer needed, quoting prices for the materials, exercising discretion over the prices and discounts quoted, purchasing special materials for the customer, and resolving disputes with the customer. The court found that the account manager's primary duty was to service one of the company's largest accounts

and that he spent 80 to 90 percent of his time doing so. The court found the account manager's duties of negotiating, managing and promoting sales with the major customer to be administrative tasks. The court also found the necessary discretion and independent judgment because the account manager was able to give discretionary discounts on the company's products.

The Fifth Circuit also affirmed summary judgment against event coordinators employed by the City of Dallas in *Bondy v. City of Dallas*, 2003 U.S. App. LEXIS 20708 (5th Cir. 2003). The court noted that the uncontested facts showed that the event coordinators were responsible for planning most aspects of events held at the city's convention center. They arranged for in-house contactors to meet the needs of the customers, coordinated utilities and parking, made sure pre-event and post event billing payments were made, and resolved disputes with customers. The court held that these facts established that the event coordinators carried out work that is directly related to management policies or general business operations of the employer or its customers. The Fifth Circuit also found that the event coordinators exercised sufficient discretion and independent judgment to meet the short test standard for the administrative exemption to apply because the event coordinators decided whether the proposed events comported with the city's policies and procedures; recommended whether non-compliance should be excused; recommended whether a show should be canceled for non-payment, failure to submit proper paperwork, or other reasons; and recommended changes in the policies and procedures used by the city. The court noted that the fact that the event coordinators could only make recommendations did not eliminate their exercise of discretion and independent judgment.

Hogan, McAllister, Howell, and Bondy stand in contrast to *Schaefer v. Indiana Michigan Power Co.*, ___ F.3d ___, 2004 WL 256991 (6th Cir. 2004). In *Schaefer*, the Sixth Circuit

reversed summary judgment in favor of the employer in a case where the employee claimed that he spent 80 percent of his time on tasks related to shipping radioactive materials and waste. These tasks including setting up the shipment with a transporter, determining the type of packaging, preparing manifests, and inspecting containers, trucks and load bracing. *Id* at *2. The court noted that in analyzing the job duties of the plaintiff, the focus is on the actual duties rather than the more general job descriptions contained in resumes, position descriptions, and performance evaluations. *Id.* at *3. The court stated that the employer may still establish that an employee is administratively exempt when the employee performs non-exempt duties during more than fifty percent of his time as long as the employer establishes that the duty that occupies less than fifty percent was of principal importance to the employer. The court held that summary judgment was improper here because the company did not show that the tasks which the employee performed for less than fifty percent of his time were most important to the company.

The Sixth Circuit also rejected the companies attempt to argue that waste disposal work could not be production work because an employee performing this type of work is not engaged in the production function of a power company, which is to produce electricity. The court noted that the administrative/production dichotomy is not useful in all cases. The court stated that this test is only useful to the extent the test helps identify employees whose work is directly related to the management policies or general business operations. *Id.* at *4-5.

The court next analyzed whether shipping radioactive waste was an administrative servicing function similar to advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research as set forth in 29 C.F.R. § 541.205(b). The court contrasted duties of the plaintiff which involved benchmarking or making recommendations regarding unique shipments from day-to-day shipping work. The court held

the summary judgment was inappropriate here because the plaintiff infrequently performed benchmarking or made recommendations regarding unique shipments. *Id.* at *5.

The court next addressed whether the plaintiff had sufficient discretion under the short test. The court noted that it was bound by a prior panel decision to apply the more rigid “customarily and regularly exercised discretion” standard of the long test. It then stated that even if it applied the less restrictive short test, the plaintiff at issue did not have sufficient discretion to meet the short test requirement of using some discretion. The court pointed out that discretion under the regulations does not include applying knowledge of prescribed procedures or specified standards. The court also noted that the exercise of discretion must be done in performing the primary duty of the plaintiff and not his secondary tasks. *Id.* at 8. The court found summary judgment inappropriate under this standard because the plaintiff had testified that his job duties were highly regulated by the standards of the Nuclear Regulatory Commission. *Id.* at 6.

D. The Professional Exemption

1. The Learned Professional Exemption

No circuit level decisions were found during 2003 and early 2004 interpreting the learned professional exemption; however, district courts and the DOL generally require an advanced degree to find the learned professional exemption applicable. *Compare Henkin v. Forest Laboratories, Inc.*, 8 Wage and Hour Cas.2d (BNA) 950, 2003 WL 749236 (S.D.N.Y. 2003)(summary judgment granted against chemist employed in a pharmaceutical lab); *Williams v. The Thomson Corp.*, 91 FEP Cas. (BNA) 760, 2003 WL 1571559 (D. Minn. 2003)(summary judgment granted against reference attorney) *with* WH. Admin. Op. (Oct. 15, 2003)(OSHA

training officer not an exempt professional because he was not employed in a field that required specialized knowledge of science or prolonged specialized instruction).

E. The Outside Sales Exemption

No circuit level opinions were discovered interpreting the outside sales exemption. Only one district court opinion was located. In *Fields v. AOL Time Warner, Inc.*, 261 F.Supp.2d 971 (W.D. Tenn. 2003), the district court granted summary judgment against sales representatives who sold cable services door to door. The court identified the legal standard as:

An "outside salesman" is an employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

29 C.F.R. § 541.5. To determine whether work is "incidental to and in conjunction" with the employee's sales or solicitations, the regulation provides that [w]ork performed "incidental to and in conjunction with the employees own outside sales or solicitations" includes not only incidental deliveries and collection which are specifically mentioned in § 541.5(b), *but also any other work performed by the employee in furthering his own sales.*

29 C.F.R. § 541.503 (emphasis added by district court).

The court rejected the plaintiffs' attempt to use the companies internal job descriptions showing the positions at issue were non-exempt and required the plaintiffs to focus on the actual job duties performed. The Court found the sales representatives admitted that they were hired to sell and "customarily and regularly" did sell cable services door-to-door. The court also noted that the Plaintiffs spent a majority of their time working away from the Time Warner office and without supervision. Plaintiffs also

determined their work hours and work schedules. Furthermore, the majority of Plaintiffs' compensation came from sales commissions. The court found that these facts established that Plaintiffs were employed for the purpose of and did regularly and customarily engage in selling services away from the Time Warner office. The court next addressed the plaintiffs argument that the real function of the sales representative position was to audit for illegal cable and collect bad debt. The court concluded that audits performed and collection efforts were "incidental to and in conjunction with" plaintiffs' sales of cable services or did not consist of work that "exceed 20 percent of the hours worked in the workweek by nonexempt employees."

II. Proposed Amendments to the White Collar Exemptions

On March 31, 2003, the Wage and Hour Division of the Department of Labor published proposed new rules, which would replace the current 541 Regulations interpreting the FLSA. In the summary to the proposed regulations, the DOL stated that the duties test was last modified in 1949, the salary basis test was last modified in 1954, and the salary levels contained in the salary basis tests were last updated in 1975. The proposed regulations eliminate the current distinction of the regulations being contained in Subpart A and interpretations of the regulations in Subpart B of the Part 541 regulations. Instead, in the proposed regulations, there are eight Subparts (five dealing with specific white collar exemptions, two containing general information and definitions, and one addressing the salary basis test).

A. Proposed Executive Exemption

Proposed section 541.100 eliminates the short and long test of the current exemption. Instead, to qualify as exempt under the executive exemption, an employee

would have to be paid \$425 per week (\$325 in American Samoa), have a primary duty of management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof, customarily and regularly direct the work of two or more other full-time employees, and have authority to hire or fire other employees or whose suggestions regarding hiring and firing are given particular weight. If an employee spends more than 50 percent of his time performing exempt work, he will be considered to have exempt work as his primary duty. The primary duty of an employee who works less than 50 percent of their time on exempt work will be decided on a “case-by-case” basis. Proposed 541.700. The proposed regulations make clear that an employee who merely assists the manager of a particular department only in the actual manager’s absence does not meet this requirement. Proposed § 541.105(c). In addition, shared supervision of the same employee is not allowed. Proposed § 541.105(d). A person who owns 20 percent or more of a business is considered exempt under the executive exemption. Proposed § 541.101. In addition, an individual who is in charge of the activities performed at the location where he is employed is exempt under the sole charge exemption regardless of the number of employees he supervises. Proposed § 541.103. Working supervisors who do not have management as their primary duty and who perform similar work to their subordinates are not exempt. Proposed § 541.106. Supervisors in retail establishments who perform customer service, stocking, and cleaning do not lose their exempt status as long their primary duty includes such activities as scheduling employees, assigning work, overseeing product quality, ordering merchandise, managing inventory, handling customer complaints, authorizing the

payment of bills even if the supervisor spends the majority of time on non-exempt work.
Proposed § 541.107.

B. Proposed Administrative Exemption

The proposed administrative exemption eliminates the short and long tests. Instead, to be administratively exempt, an employee paid a salary of \$425 per week, have as his primary duty the performance of office or non-manual work related to the management or general business operations of the employer or the employer's customers; and hold a "position of responsibility" with the employer. Proposed § 541.200. The proposed regulations exclude production or sales work versus work related to assisting the running or servicing of the business. Proposed § 541.201(a). A list of types of employment is included. Proposed § 541.201(b). "Position of responsibility" refers to the importance to the employer of work performed or the high level of competence required by the work performed. The employee must customarily and regularly perform work of substantial importance or perform work requiring a high level of skill or training. Proposed § 541.202. Work of substantial importance includes work that affects the employer's general business operations or finances to a significant degree. Proposed § 541.203(b). Examples of the type of work that will suffice are given. *Id.* The fact that many employees perform the same work does not mean that the work of each employee is not of substantial importance. Proposed § 541.203(d).

The proposed regulations define "work requiring a high level of skill or training" to require specialized knowledge or advanced training. Proposed § 541.204(a). The specialized knowledge need not be acquired through any particular course of academic training or study. It may include academic training or advanced on-the-job training. *Id.*

Examples of different fields of training that are sufficient are discussed in the proposed regulations.

The proposed administrative exemption also exempts individuals who are paid on a salaried basis of \$425 or the minimum salary paid to entry level teachers at the educational establishment, who have a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment.

C. The Proposed Professional Exemption

To be exempt under the professional exemption, an employee must be paid on a salary or fee basis at least \$425 per week, and have a primary duty of performing office or non-manual work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or other alternative means, or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Proposed § 541.300.

Examples of learned professionals are listed in the proposed regulation. Proposed § 541.301. Knowledge of an advanced type is defined to mean knowledge that cannot be attained at the high school level. Employees who have substantially the same knowledge as the degreed professional are included. Proposed Regulation § 541.301(d).

D. The Proposed Computer Exemption

The proposed computer exemption is met if an employee is paid on a salaried basis at least \$425 per week, has a primary duty of systems analysis procedures, design of computer systems, design of computer programs, or a combination of these duties. Proposed § 541.400. The exemption only applies to highly skilled employees who have

achieved a level of proficiency in theoretical and practical application of computer systems, programming and software engineering. The exemption does not apply to employees engaged in the operations of computers or in the manufacture, maintenance and repair of computers. Proposed § 541.402.

E. The Proposed Outside Sales Exemption

An employee is exempt as an outside salesman if he has a primary duty of making sales or obtaining orders or contracts for services and who if customarily and regularly engaged away from the employer's place of business in performing that primary duty. Work performed incidental to and in conjunction with the employee's own sales is considered exempt. The requirement of spending no more than 20 percent of the workweek performing non-exempt duties has been eliminated.

F. The Proposed Salary Basis Regulations

The proposed regulations significantly modify the affect of making improper deductions to an exempt employee's salary. Under the proposed regulations, the employer only loses exempt status for a manager if the facts show a pattern and practice of not paying the manager on a salaried basis. Improper deductions which are inadvertent or isolated do not affect the exempt status of the employees at issue. A pattern and practice is determined by considering the number of deductions made, the time period they were made in, the number and geographic location of the managers' responsible for the deductions, the size of the employer, whether the employer has a written policy prohibiting such deductions, and whether the employer has corrected the improper pay deductions. If a pattern and practice of improper deductions is established, then the exemption is lost during the time deductions were made for employees working

in the same job classification under the same managers responsible for the improper deductions. However, if the employer has a written policy prohibiting improper deductions, then the company only loses the exemption if the employer repeatedly and willfully violates the policy or continues to make improper deductions after receiving employee complaints. The regulation states that it should not be construed “in an unduly technical manner so as to defeat the exemption.”

In addition, proposed section 541.601 automatically exempts “highly compensated” employees, defined under the regulations as those employees earning \$65,000 or more annually who perform non-manual work which includes an “identifiable executive, administrative, or professional function.”

Conclusion

This author’s review of the recent circuit court decisions interpreting the white collar exemptions results in the conclusion that the need for modifications to the white collar exemptions other than raising the salary requirements to today’s level are not necessary. There is a wealth of case law interpreting the white collar exemptions and the DOL’s regulations will result in additional litigation during the period that courts are interpreting the meaning of the new regulations.