

BEWARE OF "FAIRPAY"

Whether or not an employee qualifies to be exempt from being paid overtime (often referred to as "salaried") is determined by guidelines set out in the Fair Labor Standards Act (FLSA). For the first time in decades, the FLSA has been amended, with the changes taking effect on August 23, 2004. The changes are collectively referred to by the Department of Labor as the FairPay Initiative, and employers need to be aware of these changes and determine how, and whether, any of their employees are affected.

As in the past, the FLSA describes 4 categories of exemption; specifically, these are the "Administrative Exemption", "Professional Exemption", "Executive Exemption", and "Outside Sales Exemption". In order to qualify to be exempt from overtime, a given position must pass **both** a salary test and a primary duty test. The FairPay changes have modified both of these tests for all categories of exemption. The salary requirement for all categories is now \$455 per week. In other words, to qualify for exemption from overtime, an employee must be compensated on a salary basis at a rate of not less than \$455 per week, or \$23,660 per year.

It's easy to determine whether a position passes the salary test. It's not so easy to determine whether a position passes the primary duty test. These primary duty tests differ for each category of exemption, and all have been changed with FairPay. In general, the tests have been tightened a bit, with the Department of Labor providing more specific guidance and examples to help employers determine whether a position passes the test. For more information regarding these primary duty tests, visit www.wagehour.dol.gov.

The matter of properly classifying positions is significant, given the penalty of backpay for employees in positions found to be improperly classified as exempt when they were, in fact, eligible for overtime pay. A good starting point for employers in ensuring their compliance with FairPay is accurate job descriptions. Incorporating an annual review of each job description is a good practice that can be done in conjunction with the annual performance appraisal. Once job descriptions are correct, employers can more easily determine whether the primary duty tests are met.