VIRGINIA ALERT
FLSA REGULATORY REFORM

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I.

NEW RULES ON SALARY

Proposed Rule: Salary Regulations for Exemptions: Administrative, Executive, and Professional

Authority: 29 U.S.C. 213 (a) power of the Secretary of Labor to "define and delimit" these "white collar" exemptions. Not requiring Congressional review.

The Secretary of Labor announced the Proposed Rules on June 30, 2015. The "Notice and Comment" period ran through September 4, 2015; an extraordinary number of public comments met the deadline, 289,942. DOL must review the comments, incorporate them, or explain why it disagrees with such comments. Final Regulations could come into effect by **April 1, 2016** (with a **compliance date of May 31, 2016**) and the salary figures used will be adjusted to that date. There may be a phase-in period, however. Updated salary minimums shall be published annually.

Salary minimums are ordinarily part of each exemption. By increasing the level of salary required for the exemption, many individuals meeting the "tasks" of AEP will be removed from exemption and able to earn federal overtime pay. See 29 CFR § 541.100 (executive), .200 (administrative), .204 (educational establishments), .300 (professionals), .400 (salaried computer

employees). The hourly exemption for computer professionals at $27.63/hr. remains. Similarly, doctors, lawyers, and teachers are exempt from the FLSA regardless of salary.

MINIMUM SALARY FOR EXEMPT EMPLOYEES

Current Minimum: $455/week or $23,660 annually (since 2004).

Projected Minimum: $970/week or $50,440 annually (for 2016). This figure reaches to the 40th percentile of the earnings of full-time salaried workers according to USDOL.

MINIMUM SALARY FOR THE HIGHLY-COMPENSATED EMPLOYEE EXEMPTION

Proposed Rule: Revision of the Highly Compensated Employee regulation will be more favorable to the employee.

An "automatic" exemption for any employee performing any single AEP task is currently available if the employee is paid $100,000 per year. (Such individuals are ones that do not meet the entirety of an AEP exemption by virtue of their tasks.) New level for this exemption would be **$122,148.** See 29 CFR § 541.601. This represents the 90th percentile of earnings of full-time salaried workers.

Proposed Rule: The Salary and Compensation figures would automatically update annually.

No Proposed Rule: There were no specific proposals to change the task descriptions of the administrative, executive, professional, or computer employee tests. The most discussed possible change had been for the term "primary duty," which *might* nonetheless be redefined to include only those employees performing the exempt duty 50% of the time.

II.

OCCUPATIONS AND JOB CATEGORIES MOST LIKELY TO BE AFFECTED BY THE NEW MINIMUM SALARY FOR EXEMPT WORKERS

The Pew Research Center conducted a nationwide analysis to project the occupational categories most likely to be affected by the increase in the required minimum salary to maintain the FLSA white-collar exemptions. Since the Commonwealth of Virginia has an array of different job categories, the following is my predicted list of job categories to be reviewed:

Auditors
Accountants
Managers of Office and Support Workers

Operations and General Managers
Financial Managers
Designers
Human Resources Workers, Managers
Computer and Information Systems Managers
Food Service Managers
Medical and Health Service Managers
Community Service and Social Service Managers
Counselors
Sales Managers

III.

PAY REDUCTIONS WHICH DESTROY THE EXEMPTION

The exemptions are not available, for employees in most occupations, unless the employee is paid a salary not subject to reductions. 29 C.F.R. § 541.600 *et seq.*

Reductions in pay *that are allowed without destroying the exemption* in the private sector are these:

A. For absences for the employee's personal reasons for a full day (if for reasons other than sickness or disability). Not absence for a few hours.

B. For absences due to sickness or disability if absence covered by a compensation plan.

C. For penalties imposed upon the employee in good faith for infractions of major safety rules.

D. For full day(s) discipline because of infractions of workplace conduct rules (something short of major safety rules).

E. For leave under the Family & Medical Leave Act.

F. For a full week of absence.

However, these rules are relaxed in several ways for government employers. Such relaxation is found in 29 C.F.R. § 541.710:

The Commonwealth of Virginia is governed by principles of public accountability. For this reason, public employers need not pay employees, even those who are exempt from eligibility for overtime pay, who have available leave to use. When the employees have permission to use sick or personal leave, their accrued leave has not been exhausted, and they have not indicated that they choose to go without pay, leave should be used without compromising later use of the exemption.

When a furlough is required by the State budget, proportionate budget-required reductions may be made.

The salary basis test prohibits deductions in pay for absences for jury duty and temporary military leave.

IV.

THE CONCEPT OF PRIMARY DUTY

The "primary duty" of an employee might be altered as the time spent on managerial tasks decreases as a percentage of the total time in the working week. However, additional duties will not ordinarily involve mutation of the "primary duty." The "primary duty" test need not be performed each workweek. Sporadic non-exempt work would not alter an individual's status. The weight or importance given by the agency to the tasks is more important than the duration of time devoted.

During a period of financial restraint, exempt employees may be asked to perform tasks ordinarily done by non-exempt workers. Some examples would be clerical, data entry, record-keeping, or receptionist duties. The issue is whether the employee's primary duties are no longer those "exempt" administrative duties that assured the exemption. During a labor shortage, an otherwise exempt employee may concurrently perform non-exempt duties. Addition of such duties does not necessarily change the "primary duty." An individual's status should be determined by the character of the position with consideration given to the employee's relative freedom from direct supervision and his relative wage compared to others. The weight or importance given by the agency to the tasks performed is more important than the amount of time devoted to them. *See* 29 C.F.R. § 541.700; *Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 456-67 (4th Cir. 2003); *Jones v. Va. Oil Co. Inc.*, 69 Fed. Appx. 633 (4th Cir. 2003); *In re Family Dollar FLSA Litigation*, 2014 U.S. Dist. LEXIS 31247 (W.D.N.C. Mar. 11, 2014).

Therefore, exempt faculty members would ordinarily not lose exemption by the performance of additional duties not considered "exempt." For such an employee, it might be possible that he or she is not entitled to overtime beyond salary while working for the employer beyond 40 hours in a week.