

July 2004

Dear National Restaurant Association Member:

New federal rules spelling out who qualifies for overtime pay after working 40 hours in a workweek are set to take effect Aug. 23, 2004. The National Restaurant Association is pleased to offer its members the attached overview of these new regulations.

The change — the first major overhaul of federal overtime rules since the federal Fair Labor Standards Act's (FLSA) overtime-pay standards were enacted in 1949 — will prompt employers all over the country, restaurateurs included, to re-examine how they classify employees.

In general, employees considered to be “executive, administrative or professional” workers — so-called “white-collar” employees — do not have to be paid overtime at time-and-a-half rates under federal law when they work more than 40 hours in a week. Understanding who fits into these exempt categories can be tricky, however. The new rules should offer greater clarity, including updated “tests” for salary thresholds and duties, to help employers understand how to classify their employees.


The project to update federal overtime rules has been in the works for a long time. As far back as the late 1970s, during the Carter Administration, officials at the U.S. Department of Labor (DOL) — the agency charged with writing and enforcing overtime rules — said it wanted to revise the regulations. But for decades the agency took no action. Finally the Bush Administration took on the task. In March 2003 the DOL, under U.S. Secretary of Labor Elaine L. Chao, published a proposal to rewrite the rules. That proposal generated more than 75,000 comments, including from the National Restaurant Association.

After sorting through the comments, the DOL made numerous changes to its proposal and published final regulations in the *Federal Register* on April 23, 2004. (Employers can obtain a copy of the regulations, and other information on the new rules, at www.dol.gov/fairpay.)

The National Restaurant Association applauds the DOL for undertaking this massive project. Current federal overtime regulations have become so outdated and confusing that for years well-intentioned employers — and even the attorneys advising them — have not been clear on how to classify many of their employees. The result has been confusion and costly litigation, with federal overtime cases tripling since 1997 and class-action overtime lawsuits now outnumbering class-action discrimination lawsuits.

As a service to its members, the National Restaurant Association provides the following overview of the new regulations. This information does not substitute for the advice of counsel. Many of the changes in the regulations are complex. In a number of states, employers will have to weigh both federal and state rules on overtime to see which provisions apply. We hope the following information serves as a good starting point for understanding the new federal regulations.

Sincerely,



Steven C. Anderson
President and Chief Executive Officer

Federal Overtime Regulations

A Primer for Restaurant-and-Foodservice Employers • July 2004

New Federal Overtime Rules Take Effect Aug. 23, 2004

Federal minimum wage law—the Fair Labor Standards Act (FLSA)—requires that most employees in the United States be paid 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 work week.

However, the FLSA provides a number of exemptions from overtime-pay requirements, including for individuals employed as bona fide **executive**, **administrative** and **professional** employees. As long as they pass certain “tests” for the salaries they receive and duties they perform, these so-called “white-collar” employees are not required to be paid at premium overtime rates when they work more than 40 hours in a week.

After years in development at the U.S. Department of Labor (DOL), new federal regulations covering these “white-collar” overtime exemptions take effect Aug. 23, 2004. The National Restaurant Association pro-

vides this overview to help its members understand the new regulations. This overview will concentrate largely on the two exempt categories that most affect restaurants: the **executive (managerial) exemption** and the **professional exemption**. We provide brief information on the administrative exemption and do not discuss other exemptions that likely have little or no impact on restaurateurs. We refer you to the U.S. Department of Labor’s Web site—www.dol.gov/fairpay—for full details on all aspects of the new overtime regulations. Employers also can e-mail the DOL at fairpay@dol.gov or call (866) 4-US-WAGE with questions.

Impact of State Law

It is important to remember that as of July 2004 at least 18 states have separate overtime regulations that either track the pre-Aug. 23, 2004, DOL overtime regulations, but that do not automatically change in response to the federal changes, or that differ in some

respect from both the old and new federal regulations.

Until and unless the state legislature (or state DOL) adopts regulations to follow the new federal regulations, employers will have to consider both state and federal regulations.

Those states are Alaska, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Washington, West Virginia and Wisconsin.

Your state restaurant association (see www.restaurant.org/states) likely can refer you to local experts. If not, National Restaurant Association members can contact the Association’s Legal Department at (202) 331-5910 or pkilgore@dineout.org for referral to an expert.

Important Note

Most important, none of the following information is intended to substitute for the advice of counsel. The National Restaurant Association encourages you to read through this overview and then contact your attorney. We offer some practical tips to help you incorporate the new rules into your operations and advise you—with the help of counsel—to conduct a thorough workplace audit to make sure you are comfortable with the new rules.

Wage-and-hour investigations can be costly, and unfortunately, litigation isn’t likely to go away. While the new regulations might provide greater clarity and cut down on some of these lawsuits, plaintiffs’ attorneys are expected to continue taking employers to court. So save yourself some headaches by evaluating your workplace today.

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The following information is prepared as a member service by the National Restaurant Association. Visit www.restaurant.org for more on the benefits of membership.

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Who's Exempt from Federal Overtime-pay Requirements?

The new federal overtime regulations that take effect Aug. 23, 2004, require that each of the following three tests be met for an employee to qualify as exempt from federal overtime-pay requirements.

(Federal overtime exemptions do *not* apply to manual laborers or other "blue-collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. No matter how highly paid these employees might be, they are entitled to premium overtime pay under the FLSA.)

TEST #1: "SALARY-BASIS" TEST IS THE EMPLOYEE PAID ON A SALARY BASIS?

To qualify as exempt, an employee must be paid on a "salary basis." This means employees must receive a predetermined and fixed minimum salary that is not subject to reduction because of variations in the quality or quantity of work performed. Each pay period (either weekly or less frequently), the worker must receive a predetermined amount for any week in which the employee performs work, regardless (except for narrow exceptions) of the actual number of days or hours worked. The logic behind the salary-basis requirement is that if employers can make deductions from salaried employees' pay for periods of one or more full days, the employee is not really paid on a salary basis.

A note on wage deductions: The old regulations defining "salary basis" were so restrictive that they prevented employers from docking salaried employees' pay even for certain serious disciplinary violations. An inadvertent mistaken deduction could jeopardize an employer's ability to classify employees as exempt. The new regulations make two key changes that give employers greater flexibility:

■ The old rules restricted employers from making any deductions of one or more full days from salaried employees' pay except in cases where the employee

Salary levels and exemptions for "white-collar" employees

■ Salary less than \$455 a week (\$23,660 a year)

These employees automatically qualify for overtime pay regardless of their job duties and responsibilities.

■ Earnings between \$455 a week (\$23,660 a year) and \$100,000 a year

These employees *might* be exempt from federal overtime-pay rules if they are paid on a salary basis and if they meet certain job-duties tests (see pages 3-6).

■ Annual compensation of at least \$100,000

To qualify as exempt in this category, a salaried worker must:

- Earn total annual compensation of at least \$100,000.
- Earn at least \$455 per week (\$23,660 a year) on a salary (or fee) basis. The remaining compensation between \$23,660 and \$100,000 may include commissions, non-discretionary bonuses, etc.
- Meet a simplified duty test: The employee must "customarily and regularly" perform at least one exempt duty (e.g., an executive, administrative or professional duty), and have a "primary duty that is non-manual or office work."

The bottom line: A "white-collar" employee who earns more than \$100,000 a year is likely to be exempt from overtime-pay requirements if he or she regularly performs some duties as an executive, administrative or professional employee. The DOL anticipates that the vast majority of white-collar workers earning more than \$100,000 a year will be exempt from overtime.

violated a safety rule of "major significance." The new regulations expand the permissible deductions to also allow employers to make unpaid disciplinary suspensions of one or more full days for violations of workplace-conduct rules, such as violations of written sexual-harassment policies, drug or alcohol rules, or workplace-violence rules. For such deductions to be permissible, the employer must act in good faith and make the deduction pursuant to written workplace-conduct rules that apply uniformly to all workers. Deductions would *not* be permitted for such things as problems with attendance or performance.

■ The new rules also give employers a way to correct certain mistakes. In cases where an employer makes isolated or inadvertent improper deductions, the new rules provide a "window of correction" or "safe harbor" to let the employer correct the mistake. To do so, the employer must have a clearly communicated policy that prohibits improper pay deductions, including a complaint procedure, and reimburses the employee for

the improper deductions. The employer also must make a good-faith commitment to comply in the future. (The DOL plans to offer model "safe harbor" language for employers to use; check www.dol.gov/fairpay for details.)

TEST #2: "SALARY-LEVEL" TEST DOES THE EMPLOYEE RECEIVE AT LEAST \$455 A WEEK (\$23,660 A YEAR) IN COMPENSATION?

Executive, administrative and professional employees must earn a minimum salary to be considered exempt from federal overtime-pay requirements. Under the new rules, the minimum weekly salary level required for exemption is \$455 per week (\$23,660 a year).

TEST #3: DUTIES TEST WHAT ARE THE EMPLOYEE'S DUTIES?

To be exempt, a "white-collar" employee must perform a job that primarily involves executive, administrative or professional duties. See next section for details on the duties tests.

Duties Tests for Exempt Employees

To be exempt from overtime-pay requirements under federal law, employees must perform a job that primarily involves executive, administrative or professional duties. Here are the “duties tests” for each of these categories.

1. EXECUTIVE (MANAGERIAL) EXEMPTION

In the restaurant industry, many employees are exempt from federal overtime-pay requirements because they fall under the executive exemption, also known as the managerial exemption.

Prior to Aug. 23, 2004, federal overtime rules offered two tests—known as the “long” and “short” tests—that employers could use to weigh whether employees met the definition for the executive

(managerial) exemption. The rules were problematic. Often, employers found it difficult to know who to properly classify as exempt managers. Restaurateurs had particular trouble understanding how to properly classify assistant managers and managers who performed so-called “non-exempt” duties, such as seating guests or helping in the kitchen. It didn’t help that over the years the DOL and the courts offered differing interpretations on such issues as how much time managers could spend on non-exempt duties, or what constituted an employee’s “primary duty.”

The new rules get rid of the old “long” and “short” tests and simplify the duties test for executive (managerial) employees into one three-part standard, outlined in the box below. This should

help reduce litigation. However, one price of simplification is that the new test *adds* to the checklist of duties required for the executive exemption. The chart below compares the old short test (the test most commonly used by employers under the old rules) with the new test for the managerial exemption.

A note on business owners: Under the DOL’s new duties test for the executive exemption, an employee who owns at least a 20 percent interest in the business in which he or she is employed is considered an exempt executive employee if he or she is actively engaged in the management of the business. These business owners do *not* need to meet the salary-basis test outlined on page 2.

An overview of the executive (managerial) exemption:

To be exempt from overtime pay requirements, executive (managerial) employees must meet tests for both salary and duties.

	OLD SHORT TEST	NEW STANDARD
SALARY TEST	Employee must be compensated at least \$250 per week on a salary basis to be considered exempt.	Employee must be compensated at least \$455 per week (\$23,660) on a salary basis to be considered exempt.
DUTIES TEST	<p>Employee is considered an “exempt executive” if:</p> <ul style="list-style-type: none"> (1) The employee’s primary duty consists of the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof. (2) The employee customarily and regularly directs the work of two or more other employees. 	<p>Employee is considered an “exempt executive” if:</p> <ul style="list-style-type: none"> (1) The employee’s <i>primary duty</i> is <i>management</i> of the enterprise in which the employee is employed or of a <i>customarily recognized department or subdivision</i> thereof. (2) The employee <i>customarily and regularly</i> directs the work of two or more other employees <i>or their equivalent</i>. (3) The employee has the authority to hire or fire other employees, or his or her suggestions and recommendations as to the promotion, hiring, advancement, or any other change of status of employees are given <i>particular weight</i>.*

Italicized terms are defined on page 6.

* Adding this third requirement to the duties test might mean some employees who had been exempt from overtime-pay requirements before Aug. 23, 2004, become non-exempt. However, the DOL says the number of affected employees is likely to be small. One important factor is how the new rules define “particular weight.” The DOL’s definition for this term (see page 6) does not appear to be too restrictive. For example, the DOL indicates that an employee can be considered to have “particular weight” in influencing personnel decisions even if a higher-level manager’s opinion is given more weight and even if the employee does not have final decision-making authority.

Duties Tests, Continued

The executive (managerial) exemption: How it applies to restaurant managers who perform both exempt and non-exempt duties

In the restaurant industry, managers and assistant managers commonly perform exempt duties—scheduling employees, managing inventory and authorizing bill payments, for example—concurrently with non-exempt duties, such as helping out in the kitchen or manning the cash register.

Does performing non-exempt duties jeopardize an exempt manager's classification? Not necessarily, the DOL says. The new regulations contain a new section—Section 541.106—that specifically addresses the issue of exempt employees who perform multiple duties concurrently.

As long as managerial employees meet the three-part duties test outlined in the chart on page 3, Section 541.106 makes it clear that the concurrent performance of exempt and non-exempt work does not disqualify an employee from the executive exemption.

The DOL offers a clarification to distinguish exempt executives from non-exempt employees. According to the rules, exempt employees generally have the ability to “make the decision when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work.”

The DOL provides an example relevant to the restaurant industry of an assistant manager who performs work such as serving customers, cooking food, stocking shelves and cleaning. The DOL says that performing such non-exempt work does not eliminate the exemption if the

assistant manager's primary duty is management. It concludes: “An assistant manager can supervise employees and serve customers at the same time without losing the exemption.” However, the DOL notes that many situations will require case-by-case determinations.

Time spent on non-exempt duties

Does it matter how much time an exempt employee spends on non-exempt duties? Again, the DOL says that's to be determined case by case. The DOL says time spent on exempt work is one guide, but not the only factor, in determining whether an employee's “primary duty” is management.

The DOL says employees who spend more than 50 percent of their time performing exempt work generally satisfy the primary-duty requirement—but notes that employees who spend less than 50 percent of their time in exempt duties could still qualify as exempt if “other facts” support such a conclusion. If an assistant manager spends more than 50 percent of his or her time on non-exempt work, such as running the cash register, the DOL says it would consider such factors as how closely that employee is supervised or how close his or her pay is to other non-exempt employees. If there is a lot of supervision, or if the exempt employees earn little more than non-exempt employees, the DOL says it's likely that the employee's “primary duty” is actually not management.

2. ADMINISTRATIVE EXEMPTION

The second major exemption from federal overtime-pay rules is for certain “administrative” employees. The new rules make only modest revisions to the old rules in this area.

In general, the rules require that exempt administrative employees have a primary duty of “performing office or non-manual work directly related to the management or general business operations of the employer or the employer's cus-

tomers.” The new regulations also maintain, but clarify, the old requirement that exempt administrative employees exercise “discretion and independent judgment.” The DOL elaborates in the new rules to note that discretion and independent judgment must be exercised “with respect to matters of significance,” which refers to the level of importance or consequence of work performed.

The new rules offer more guidance on what types of job positions fall

under the administrative exemption. The National Restaurant Association refers readers to the regulations at www.dol.gov/fairpay for these extensive guidelines.

As with all other categories of exempt employees, exempt administrators must meet the first two tests outlined on page 2—earning at least \$455 per week, and earning this amount on a salary basis—to be exempt from federal overtime-pay requirements.

Duties Tests, Continued

3. PROFESSIONAL EXEMPTION

Professionals—including both “learned professionals” and “creative professionals”—may be exempt from overtime-pay requirements if they meet certain duties tests and pass the salary-basis and salary-level tests.

To qualify for the **learned professional** exemption:

- An employee’s primary duty must be

the performance of work requiring advanced knowledge (work that is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment).

- The advanced knowledge must be in a field of science or learning.
- The advanced knowledge must customarily be acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** exemption, an employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training.

Chefs and the professional exemption

Under the new rules ...

Prior to Aug. 23, 2004, restaurant employers largely used the executive (managerial) exemption to determine whether chefs were exempt from overtime-pay requirements under federal law. The new rules provide two new ways chefs may be considered exempt employees. Starting Aug. 23, 2004, chefs who meet the definition for either “learned” or “creative” professional may be considered exempt from federal overtime-pay requirements—without the need to meet the managerial requirements of the executive exemption.

CHEFS MAY BE CONSIDERED “LEARNED PROFESSIONALS”

In a new section of the regulations the DOL specifically defines how chefs might meet the definition for “learned professional.” According to Section 541.301 of the regulations, “Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption.” The regulations caution that “the learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.”

OR CHEFS MAY BE CONSIDERED “CREATIVE PROFESSIONALS”

In its discussion of various occupations that may be considered exempt from federal overtime-pay requirements as “creative professionals,” the DOL notes that it “agrees [with the National Restaurant Association] that certain forms of culinary arts have risen to a recognized field of artistic or creative endeavor ...” According to the DOL, “to the extent a chef has a *primary duty* of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, such chef may be considered an exempt creative professional.” In explanatory notes, the DOL cautions that “there is a wide variation in duties of chefs, and the creative professional exemption must be applied on a case-by-case basis with particular focus on the creative duties and abilities of the particular chef at issue. The [DOL] intends that the creative professional exemption extend only to truly ‘original’ chefs, such as those who work at five-star or gourmet establishments, whose *primary duty* requires ‘invention, imagination, originality, or talent.’”

Italicized terms are defined on page 6.

Duties Tests, Continued

Explanation of Key Terms

The DOL's new regulations define the following key terms related to the duties tests for exempt employees. For more details, refer to the regulations, available at www.dol.gov/fairpay.

1. Primary duty

Section 541.700 of the regulations defines an employee's "primary duty" to mean "the principal, main, major or most important duty that the employee performs." Factors to be considered include (1) the relative importance of the exempt duties as compared with other duties of the job; (2) the amount of time spent performing exempt work; (3) the employee's freedom from direct supervision; and (4) the relationship between the employee's salary and wages paid to other employees for the kind of non-exempt work performed by the exempt employee.

The new regulations explain that the amount of time spent performing exempt work is a "guide" in determining if the exempt work is the "primary duty" of the employee. For example, employees who spend more than 50 percent of their time performing exempt work generally will satisfy the primary-duty requirement. However, the DOL explains that time alone is not the sole test. Employees who spend less than 50 percent of their time in exempt duties may still qualify if "other facts" support such a conclusion.

Section 541.700 provides an example of assistant managers in a retail establishment who perform exempt and non-exempt work. The exempt work includes activities such as supervising and directing the work of other employees, ordering merchandise and authorizing payment of bills. The DOL explains that employees having such exempt duties may have management as their primary duty even if they spend more than 50 percent of their time in non-exempt work, such as running the cash register. However, if such assistant managers are closely supervised and earn little more than non-exempt employees, they would not satisfy the primary-duty requirement.

2. Management

The regulations require that "management" be the primary duty for exempt executive (managerial) employees. Section 541.102 of the regulations notes that generally, "management" includes, but is 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 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 and implementing legal compliance measures.

3. Customarily and regularly

Section 541.701 defines "customarily and regularly" (in the context of how often an exempt employee performs exempt duties) to mean a frequency that must be "greater than occasional but ... less than constant." The regulations explain that tasks performed "customarily and regularly" include work "normally and recurrently" performed every work week; it does not include isolated or one-time tasks.

4. Particular weight

Part (3) of the new rules require that an exempt executive must either have the authority to hire or fire, or his or her suggestions and recommendations as to promotion, hiring, advancement, or other job status change must be given particular weight. Part (3), Section 541.105, says that to determine whether an employee's suggestions and recommendations about hiring, firing, advancement or promotion are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make

such suggestions and recommendations; the frequency with which the employee's suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. The regulations indicate that "particular weight" will be satisfied even if a higher-level manager's recommendation has more importance or the employee does not have final decision-making authority.

5. Department or subdivision

An exempt executive (managerial) employee must have as his or her primary duty the management of the enterprise or of a customarily recognized "department or subdivision" thereof. Section 541.103 of the regulations states that a "customarily recognized department or subdivision is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function." In the DOL's preamble to the new regulations, the DOL notes that it agrees with some past court decisions that a shift manager or a front-of-the-house manager (in the context of a store) may meet the criteria for managing a "department or subdivision." However, the DOL cautions that each situation must be decided on a case-by-case basis.

6. Or their equivalent

The new executive (managerial) exemption requires that an exempt executive (managerial) employee customarily and regularly direct the work of two or more other employees "or their equivalent." The DOL explains in the preamble to the new regulations that the phrase "or their equivalent" may encompass half-time or part-time employees. For example, "two" employees may be one full-time employee and two half-time workers, or four half-time employees. While the new regulations envision a standard workweek of 40 hours for a full-time employee, the DOL states in the preamble that a workweek of 35 hours or 37¹/₂ hours may suffice if this is the employer's standard workweek.

Complying with the New Federal Overtime Rules

Here are steps employers can take to properly classify their employees, update their salary-basis and wage-deduction policies, and protect themselves from litigation.

(1) Check state-law requirements.

As mentioned on page 1, employers in many states may have to consider both state and federal regulations. Check with your legal counsel to see how your state law on overtime exemptions is affected by the new federal regulations.

(2) Check employees' salary levels.

Make sure you pay exempt employees at least \$455 a week (\$23,660 a year) on a salary basis. The \$455-a-week salary level is not pro-rated for employees who work less than full time. Employers who allow job sharing or who employ part-time employees should pay particular attention to this requirement.

Note: Any employee who earns less than \$455 a week is entitled to overtime pay under federal law when they work 40 or more hours in a week, no matter what duties they perform.

(3) Audit your payroll practices.

Employers must pay exempt employees on a "salary basis," which has a very specific meaning, as detailed on page 2. Improper payroll-distribution procedures, partial-day salary deductions and other practices could jeopardize employers' ability to classify employees as exempt. If you discover any problems with your payroll and wage-deduction practices, correct them.

(4) Train everyone involved in payroll in the new rules.

Bring everyone associated with payroll in your restaurant up to speed on the new rules. Make sure your payroll specialists, human-resources personnel, supervisors and managers understand the new rules, particularly how state regulations interact with the federal rules, permissible wage deductions and what it means to pay employees on a "salary basis."

(5) Look at highly compensated employees.

Under the new rules, "white-collar" employees who earn at least \$100,000 a year are likely to be exempt from federal overtime-pay requirements as long as they "customarily and regularly" perform at least one exempt duty, and have a "primary duty that is non-manual or office work." Decide whether you need to reclassify any employees as a result of the new regulations.

(6) Revise job descriptions, and document whether positions are exempt or non-exempt.

Employers should review and revise employee job descriptions to ensure that they reflect the actual duties of workers. In doing so, employers would be well-advised to use the DOL's terminology in the new regulations whenever possible.

- For example, employers might want to give executive (managerial) employees the power to hire and fire, or make it clear that these individuals' recommendations as to hiring, firing and other personnel matters are given "particular weight."
- Employers should elaborate on an employee's "primary duty." "Primary duty" is the most important test used in determining whether employees meet the executive and professional exemptions.
- With respect to the "creative professional" exemption for chefs, employers should specify as appropriate in job descriptions that chefs are supposed to create new dishes or embellish existing menu items. When appropriate, the job descriptions should emphasize that this "creative" part of the job is not a rare or isolated occurrence, but a major part of the duties.

When you review a job description, document why a job is considered exempt and which exemption(s)—executive, administrative, professional, etc.—apply. Such documentation bolsters an employer's position if a dispute arises and may help an employer build a good-faith defense that could help limit the amount of damage awards if a court ever rules against the employer.

(7) Revise policies and handbooks.

The DOL says it expects employers to invest substantial effort and resources in revising their employment policies and handbooks. Employers must establish clear policies on such issues as wage deductions and other matters related to paying employees on a "salary basis," ideally separating these policies by exempt and non-exempt categories of employees. Policies should cover such issues as deductions from employee leave accounts; how the employer records and tracks employee hours or work; whether the employer requires specific work schedules; and whether the employer provides some kind of overtime pay for exempt employees, but at a rate less than 1.5 times the regular rate of pay.

When it comes to policies on wage deductions, particularly deductions for disciplinary matters, employers should try as much as possible to incorporate the DOL's new language into their policies and handbooks, making sure to specify that such deductions will be made to a salaried exempt employee's wages only in full-day increments. Employers should take advantage of this opportunity to review their policies and handbooks for other issues as well; consult with your legal counsel for guidance.

(8) Take this opportunity to correct errors of the past.

With DOL's revisions of the white-collar exemption rules, employers have a unique opportunity to ensure they comply with the law. Employers should be truthful with workers, explaining that payroll changes are being prompted by implementation of new government rules.

(9) Consult with outside counsel if needed.

To adjust to the DOL's new rules, employers might find that they need the assistance of outside attorneys. When considering whether to acquire such help, remember that it is better to do so now rather than later, and such action certainly is justifiable given the complexity of the new rules.

Q & A on Federal Overtime Rules

Q: I've heard that because of the new rules, many more restaurant managers and salaried assistant managers now will have to be paid overtime. Is this true?

A: Not necessarily. First, a person's job title isn't what matters — it's the three-part test outlined on page 2 that matters. For a restaurant manager or assistant manager to qualify for the executive (managerial) exemption, the DOL's new rules first require that an employee be paid at least \$455 per week on a salary basis. Then it's a question of looking at the manager's duties: To be exempt, managers paid less than \$100,000 a year must perform primarily managerial duties; customarily and regularly direct the work of at least two employees; and have the authority to hire or fire or make recommendations about hiring and firing employees or other employee changes of status. If a manager or assistant manager meets these criteria, they are exempt and do not have to be paid overtime under *federal law*. (State law may differ, however.)

Q: The DOL's new regulations say certain chefs will be exempt under the "professional exemption." Who does that apply to?

A: First, let's look at the different ways restaurant chefs may be classified as exempt employees. Prior to Aug. 23, 2004, restaurant employers mainly used the executive (managerial) exemption to classify chefs with managerial duties as exempt from federal overtime-pay rules. Many chefs might continue to be exempt under this category under the new rules.

Beyond the executive exemption, however, the DOL's new overtime regulations detail how chefs could be considered exempt as either "creative" or "learned" professionals.

(1) Chefs may qualify as exempt if they meet the definition of a "learned professional." A learned professional generally must meet certain higher educational levels; a four-year specialized academic degree normally is required.

See more details on page 5.

(2) The "creative professional" exemption for chefs is new. While the restaurant industry has many ways of defining such terms as "cook," "chef" and "sous chef," for purposes of this new "creative professional" exemption, the DOL is very specific: In explanatory comments that accompany the new regulations, the DOL says that "ordinary cooks who perform predominantly routine, mental, manual, mechanical or physical work" do NOT meet the DOL's standards for the "creative professional" exemption for chefs. On the other hand, chefs who have a primary duty of work requiring "invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items," are considered exempt as "creative professionals." The DOL also points out that there is a wide variety in duties of chefs, and thus the exemption must be applied on a case-by-case basis.

Note: For the "creative" professional categorization, the DOL does not require the same academic standard as for "learned" professionals. Rather than looking at the educational level, the criteria is the employee's primary duty. If a chef has a primary duty of work requiring invention, imagination, originality or talent, then the chef may be categorized as an exempt professional even if he or she may not have the formal educational background necessary to meet the "learned" professional standard.

Q: How do you classify a manager who cooks or helps serve food?

A: Whether the manager may be classified as exempt depends on the duties and time spent in both exempt and non-exempt work. Exempt employees must have exempt work as their "primary duty." Section 541.700 of the rules defines "primary duty" as the "principal, main, major or most important duty that the employee performs." The rules list a number of factors to consider when determining an employee's primary duty, such as the relative

importance of exempt versus non-exempt duties, the amount of time spent performing each, the employee's freedom from direct supervision and the comparison of the employee's salary to wages paid to other employees performing similar non-exempt work. The DOL states that an employee who spends more than 50 percent of his or her time doing exempt work should satisfy the "primary duty" requirement. However, the DOL also indicates that even persons who spend less than 50 percent of their time in such work are not necessarily precluded from the exemption.

Q: Do I need to keep track of how much time my managers spend on non-exempt duties?

A: As stated above, the time a manager spends in performing exempt and non-exempt work is one of several factors the DOL will look at in determining if the employee's "primary duty" is exempt work. Thus, it would be helpful to track time spent.

Q: Do the new rules mean any employee who earns more than \$100,000 a year does not need to be paid overtime?

A: No. The new rules permit "highly compensated" employees who are paid at least \$100,000 per year (\$23,660 of this amount must be paid at least on a \$455-per-week basis, while the remaining compensation between \$23,660 and \$100,000 may be paid by commission, non-discretionary bonuses, etc.) to be exempt from overtime-pay requirements only if they customarily and regularly perform at least one exempt duty and have as a primary duty non-manual or office work. Absent these factors, the employee may not be considered exempt no matter how high the salary level may be.

Q: How will these rules be enforced?

A: The same as in the past. The U.S. Department of Labor can bring an enforcement action or proceedings may be instituted by individual employees.