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WHITE-COLLAR EXEMPTION CHANGES

By: Sidney F. Lewis, V

The United States Department of Labor (“DOL”) recently issued proposed changes to the regulations governing which employees are entitled to overtime. The comment period closed on June 30, 2003. While organized labor opposed the new changes, the House, on July 10, approved the fiscal 2004 labor appropriations bill which will help fund the implementation of the new regulations. The Senate will take up the matter in September. Business leaders feel that the proposed changes represent a significant improvement over the current regulations. The regulations should be in effect by the early part of next year.

There are some significant changes proposed with regard to the overtime regulations covering executive, professional, administrative, outside sales, and computer employees, typically known as “white collar” employees. Beginning on the next page are charts comparing the current exemption requirements with the new regulations proposed by the DOL. Further information can be gathered from the DOL’s web site at www.dol.gov.

Please review the proposed regulations and contact one of our attorneys if you need any assistance preparing for the new regulations. Please note that the weekly minimum salary for white collar workers will be revised to \$425 per week. This may exclude certain employees that are currently classified as salaried exempt.

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Executive Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	\$155 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p> <p>Customarily and regularly exercises discretionary powers.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p>	<p>Primary duty of the management of the enterprise or a recognized department or subdivision.</p> <p>Customarily and regularly directs the work of two or more other employees.</p> <p>Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees are given particular weight).</p>

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Administrative Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	\$155 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p> <p>Regularly and directly assists a proprietor, or exempt executive or administrative employee; or performs specialized or technical work requiring special knowledge under only general supervision; or executes special assignments under only general supervision.</p> <p>Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.</p>	<p>Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.</p> <p>Customarily and regularly exercises discretion and independent judgment.</p>	<p>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 customers.</p> <p>Holds a "position of responsibility" with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training.</p>

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Learned Professional Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	\$170 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of performing 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.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work.</p>	<p>Primary duty of performing 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.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty of performing of-fice 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, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.</p>

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Creative Professional Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	\$170 per week	\$250 per week	\$425 per week
Duties	<p>Primary duty of performing work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination, or talent of the employee.</p> <p>Consistently exercises discretion and judgment.</p> <p>Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.</p> <p>Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.</p>	Performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

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Computer Employees

	Current Long Test	Current Short Test	Section 13(a)(17) Test	Proposed Standard Test
Salary	\$170 per week	\$250 per week	\$27.63 an hour	\$425 per week or \$27.63 an hour
Duties	<p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.</p> <p>Consistently exercises discretion and judgment.</p> <p><i>continued on next page</i></p>	<p>Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.</p> <p>Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.</p> <p>Consistently exercises discretion and judgment.</p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or (C) design, documentation, testing, creation or modification of computer programs related to machine</p> <p><i>continued on next page</i></p>	<p>Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or (C) design, documentation, testing, creation or modification of computer programs related to machine</p> <p><i>continued on next page</i></p>

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Computer Employees *(continued)*

	Current Long Test	Current Short Test	Section 13(a)(17) Test	Proposed Standard Test
Duties <i>continued</i>	Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time. Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.		operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.	operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

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Outside Sales Employees

	Current Long Test	Current Short Test	Proposed Standard Test
Salary	None required.	None required.	None required.
Duties	<p>Employed for the purpose of and customarily and regularly engaged away from the employer's place of business in making sales; <i>or</i> in obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.</p> <p>Does not devote more than 20 percent of the hours worked by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations.</p>	No separate "short" test.	<p>Primary duty of making sales; <i>or</i> of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.</p> <p>Customarily and regularly engaged away from the employer's place or places of business.</p>

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FOR LOUISIANA COMPANIES NONCOMPETITION AGREEMENTS RESTORED

By: *Jennifer A. Faroldi*

House Bill 1770, which legislatively overrules the Louisiana Supreme Court's 2001 *SWAT 24 v. Bond* decision, was signed into law by Governor Foster on June 18, 2003. The revisions to the noncompetition law will be effective August 15, 2003. As you may recall from our previous issues, the Supreme Court, in *Swat 24*, concluded that any provision of a noncompetition agreement that prevents an employee from going to work as an employee for a competitor is invalid. HB 1770, enrolled as Act No. 428, clarifies the noncompetition law by specifically providing that working as an employee for a competing business may be prohibited by an otherwise valid noncompetition agreement.

There are several additional requirements that must be in a noncompete agreement for it to be valid. Please contact one of our attorneys if you have any questions related to noncompete agreements.

NEW COBRA REGULATIONS AND SAMPLE NOTICES

By: *Timothy P. Brechtel*

On May 28, 2003, the DOL issued proposed regulations that address the timing and content of COBRA notices for employees, employers, and plan administrators. The guidance also adds two new notice requirements and revokes the "model" COBRA notice issued in 1986 (the 1986 notice was already obsolete, but the DOL has now specifically stated that plan sponsors still using the old model notice should cease doing so).

Finally, the guidance requires health plan sponsors to include in the COBRA section of the summary plan description (SPD) information about a new tax credit available to trade-displaced workers. Plan sponsors may have to issue a summary of material modifications (SMM) describing the change, unless a restated SPD is issued. The Trade Act of 2002 provides tax credits for certain health insurance costs (including COBRA premiums) for individuals who are determined to have lost their jobs due to the effects of international trade and provides a second chance for such individuals to elect COBRA. More information on the tax credit is available online at www.irs.gov/individuals/article/0,,id=109960,00.html.

The regulations require two new notices under certain circumstances. First, if a participant applies for COBRA continuation coverage but the plan sponsor determines that he or she is not eligible for COBRA (e.g., if there is no qualifying event), the participant must be notified of the determination within 14 days. The notice must explain why the individual is ineligible for COBRA.

Second, if COBRA coverage terminates prior to the end of the applicable coverage period (e.g., due to nonpayment of premiums), the plan administrator must, as soon as practicable, provide a notice informing the participant why the coverage is being terminated and describing alternative coverage, if any, that is available under the health plan or applicable law (such as an option to convert to an individual policy).

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The proposed regulations are to be effective on the first day of the first plan year that begins on or after January 1, 2004. However, plan sponsors should make changes now to include the new tax credit information and cease using the 1986 model notice (if they have not already done so). Other changes and the new model COBRA notice are addressed in the 28 pages of DOL guidance, which is available online at www.dol.gov/ebsa/regs/fedreg/proposed/2003013057.pdf. Note that the DOL's sample COBRA notices must be tailored to fit the health plan and employer at issue.

DEPARTMENT OF LABOR ADOPTS INTERIM FINAL RULE IMPLEMENTING WHISTLEBLOWER PROTECTION PROVISIONS OF SARBANES-OXLEY ACT

By: *Sidney F. Lewis, V*

On May 28, 2003, the DOL adopted an interim final rule protecting the employees of publicly traded companies who are retaliated against for blowing the whistle on corporate securities fraud or other securities violations. Specifically, the provisions state that no publicly traded company may "discharge, demote, suspend, threaten, harass or in any manner discriminate against an employee" who legally provides information about what that employee "reasonably believes" is a securities law violation to a federal agency, Congress, or the employee's supervisor. Employees who allege they are retaliated against may file a complaint with the Secretary of Labor for remedies including reinstatement, back pay with interest, and compensation for any "special damages sustained as a result of the discrimination, including litigation costs, expert witness fees and attorney's fees."

In order for the whistleblower protection provisions to apply, the complaining employee must report conduct that the employee reasonably believes is a securities law violation. A question for litigation would be whether such a belief is reasonable.

Employees must file their complaints within 90 days of the date the alleged violation occurs. The date of the violation is defined as the date the discriminatory decision has been both made and communicated to the employee. The limitations period commences once the employee is "aware or reasonably should have been aware of the employer's decision." Investigations will be conducted by the Occupational Safety and Health Administration ("OSHA"). Employers or persons named in the complaint will be notified regarding the allegations made, the substance of the evidence presented in the complaint (redacted to protect the identify of any confidential informants), and the rights of the named person. OSHA will also provide a copy of the notification to the Securities and Exchange Commission.

The complaining employee must make a *prima facie* case that the prohibited behavior was a contributing factor in the adverse action complained of. Otherwise, the agency will terminate the investigation and dismiss the complaint. Under this standard, the complaining employee must show that: 1) the employee engaged in a protected activity or conduct; 2) the named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; 3) the employee suffered an unfavorable personnel action; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. The DOL rules state that a complainant will "normally" satisfy this burden by showing that the adverse personnel action took place shortly after the whistleblowing conduct.

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The defending person has to demonstrate by clear and convincing evidence that the same personnel action would have taken place in the absence of the whistleblowing conduct. It must present this evidence in writing within 20 days of notice from the agency that evidence is being requested. The named person may also request a meeting with the OSHA Assistant Secretary within this 20-day period to present its position.

Within 60 days of the filing of the complaint, the OSHA Assistant Secretary will issue written findings as to whether or not there exists reasonable cause to believe that the named person has discriminated against the complainant. If the Assistant Secretary finds that reasonable cause exists, a preliminary order will be issued that will include all relief necessary to make the employee whole, including reinstatement, back pay, and special damages. The preliminary order will become final within 30 days unless any party seeks judicial review of the order by an administrative law judge by filing objections to the findings and preliminary order and a written request for a hearing.

If you have any questions concerning this new law, please feel free to contact one of our labor attorneys.

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