

## New FLSA Overtime Rules

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Special Feature

The long anticipated revisions to the Department of Labor's (DOL) overtime rules have been released after extended delay and public safety workers will likely see little change. The Bush administration announced in March 2003 that it intended to update the interpretive guidelines to the Fair Labor Standards Act (FLSA) at the urging of business groups, which sought relief from mounting lawsuits by workers challenging their eligibility for overtime. The proposal drew immediate outcry from organized labor, Democrats, and even some Republicans. Criticism reached such a high level that the Senate voted last year to stop the issuance of the new rules but dropped the matter after intense lobbying by the White House. Over the last year DOL received more than 75,000 comments on the changes. DOL subsequently reshaped the rules to make more lower income white-collar workers eligible for overtime.

Among the critics of the initial guidelines were police and fire labor unions who feared that highly compensated officers and fire fighters might lose their eligibility for time-and-one-half compensation. Such fears have proven to be unfounded.

The new rules require public employers to continue to pay overtime to police officers, fire fighters, emergency medical service personnel, and other first responders even though they may earn relatively high salaries. While the rules permit employers generally to deny overtime to workers earning \$100,000 a year or more, the regulations make it clear that public safety personnel are effectively exempt from this threshold. Thus, even highly compensated public safety line personnel likely will continue to receive overtime pay. The original proposal had set the cap at \$65,000 and would have caused many veteran public safety workers to lose overtime rights. With the exemption for first responders, any officers who might reach the \$100,000 annual compensation threshold will remain eligible for overtime in most instances.

Under the new rules the exemption from overtime liability for bona fide executive, administrative, and professional personnel is continued but the "salary test" element is raised to \$455 a week. This means that any full-time police or fire service manager who earns less than \$23,660 annually must be paid for worked overtime. Likewise, command level personnel will continue to be viewed as exempt from overtime requirements. But, the average patrol officer or suppression fire fighter is unlikely to be considered an exempt employee. In summarizing the regulations, the DOL notes:

“First responders generally do not qualify as exempt executives because their primary duty is not management. They are not exempt administrative employees because their primary duty is not the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers. Similarly, they are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field or learning customarily acquired by a prolonged course of specialized intellectual instruction. Although some first responders have college degrees, a specialized academic degree is not a standard prerequisite for employment.”

The regulations reemphasize that job title alone is insufficient to move an individual into the exempt category. Thus, a police lieutenant who does not actually perform executive or administrative tasks as defined by the FLSA still enjoys overtime compensation rights. Duties, not rank, determine overtime qualifications.

One section of the regulations reaffirms the idea that first line supervisors are also subject to federal overtime guarantees. The rules note that a police officer or fire fighter does not become an exempt employee merely because he or she “directs the work of other employees in the conduct of an investigation or fighting a fire.” Prior case law has generally excluded police sergeants from being considered as exempt employees. The new rule is consistent with that view.

Left unaffected is the 7(k) exemption that defers overtime liability for police officers until the officer has worked over 171 hours in a 28-day period, approximately 43 hours per week. Apparently DOL decided not to revisit the issue of the average workweek of public safety personnel.

However, the regulations do clarify that public safety personnel who are administrative or executive employees and take sick leave or leave without pay for periods of less than one day are still considered salaried and do not lose their exempt status.

The rules become effective in 120 days after publication in the *Federal Register*, which likely means around the middle of August. Under federal administrative rulemaking procedures Congressional approval of the new rules is not required. However, Senator Tom Harkin (D-Iowa), who led the Senate effort to block the original changes, has said he is “skeptical about these so-called revisions” noting, “As we say in Iowa, you can put lipstick on a pig, but guess what? It’s still a pig.” The Senator is sponsoring a bill that would rollback the changes before they go into effect. Whether or not Congress rescinds the rules is likely to have little effect on public safety personnel.

While several competing law enforcement labor groups claimed credit for saving police officer overtime rights, the Fraternal Order of Police (FOP) released a letter from Secretary of Labor Elaine Chao in which she thanked the FOP for its “constructive engagement” in the rulemaking process and said DOL “could not have crafted a final rule that does so much to strengthen overtime protections for the men and women of law enforcement without the FOP’s input.”

The government’s “FairPay” website, which contains video and text explanations of the new rules along with a complete draft of the regulations, may be accessed through [www.dol.gov](http://www.dol.gov).

