



# The Fair Labor Standards Act

## The New Federal Overtime Rules

**F**OR the first time in decades, the U.S. Department of Labor has significantly changed the rules regarding overtime pay for millions of workers throughout almost every industry in the United States, including the employees of equipment dealers. The new rules, however, only affect the minimum wage and overtime pay requirements for certain “white collar” employees at dealerships. They do not affect the overtime exemptions that may apply to certain salesmen, technicians or partsmen at farm implement dealerships, as further discussed herein.

This information is designed to bring you up-to-date with certain wage and hour requirements of the federal **Fair Labor Standards Act (FLSA)**, including the 2004 changes to the overtime rules for the “white collar” employees and the new minimum wage rules, which became effective July 24, 2007. The FLSA applies to all dealerships with an annual sales volume of at least \$500,000, and may apply to the employees of even smaller dealerships that perform duties affecting interstate commerce.

Because the FLSA rules may be changed from time to time, and may be subject to different interpretations by the U.S. Department of Labor and the federal courts, it is important to seek current information on the applicable laws in your area. The local office of the U.S. Department of Labor, Wage & Hour Division, or your legal counsel can best answer detailed questions. Certain state laws and regulations may also apply and, in some instances, may be more demanding than federal law.

### ■ Basic Wage and Hour Requirements of the FLSA

#### Minimum Wage

The current federal **minimum wage is \$5.85** per hour. Also, the federal minimum wage will increase to \$6.55 on July 24, 2008 and to \$7.25 on July 24, 2009. Please note, however, that certain states require a higher minimum wage.

#### Subminimum Wage

A subminimum wage of \$4.25 an hour may apply to **employees under the age of 20 during their first 90 days of employment.** The law prohibits employers from displacing current employees in order to hire youths at the subminimum wage, and from reducing the work

schedule, wages or benefits of current employees in order to hire youths at the subminimum wage.

#### Overtime

Unless a specific exemption applies, you must pay an employee **one and one-half (1 1/2) times** the employee’s regular rate of pay for all hours the employee actually works **in excess of 40 hours in any workweek.**

Paid time off (such as vacations, sick days and holidays) does not count as hours worked for purposes of calculating overtime.

Travel to and from work does not equal work time, but travel “that’s all in a day’s work,” such as travel between work sites, does count as hours worked for purposes of calculating overtime.

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**Overtime eligibility is based on the number of hours worked in each seven-day workweek.** Therefore, dealers cannot calculate overtime eligibility based on the number of hours worked during a two-week pay period. Likewise, overtime eligibility under the FLSA is not based on the number of hours worked during a day. Please note, however, that some states do require overtime pay based on the number of hours worked each day.

If an employee is not paid an hourly wage, or if an employee is paid at more than one rate, the employee's "regular rate of pay" is calculated by dividing the employee's total pay earned for that workweek by the total number of hours the employee actually worked that workweek.

There is no limit on the hours of work for any employees over the age of 16.

## ■ Exemptions from Overtime Requirements for Certain Equipment Dealership Employees

There are industry-specific and job-specific exemptions from the overtime requirements. If an exemption applies, then the exempt employee need not be paid overtime. It is permissible, however, for dealers to voluntarily pay overtime to employees who would be considered exempt.

### Salesmen, Partsmen and Mechanics in Farm Equipment Dealerships

One important exemption applies to certain employees of farm equipment dealerships. Specifically, the overtime requirements do not apply to:

"any salesman, partsmen, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, *farm implements* or aircraft if employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers."

"Primarily engaged" means at least 50 percent for purposes of this exemption. In other words, in order to meet the requirements of this exemption, both of the following conditions must be satisfied:

- 1) Over 50 percent of the establishment's annual dollar volume of sales must come from the sale of farm equipment; and
- 2) Over 50 percent of the employee's time must be spent in selling or servicing the farm equipment.

Note that this exemption does not apply to any dealerships that primarily sell lawn and garden, consumer, industrial, utility, construction and/or outdoor power equipment, as opposed to farm equipment. Further, it only applies to these three types of employees, not to any other employees of the dealership.

Accordingly, if a dealership sells 51 percent lawn and garden equipment and 49 percent farm equipment, then no employees would qualify for this exemption. Further, any salesmen, partsmen or mechanics in the dealership who spend more than half of their work time selling or servicing anything other than farm equipment would not qualify for the exemption, even if more than half of the dealership's sales come from the sale of farm equipment.

It is extremely important to remember that *job titles are irrelevant* for purposes of analyzing whether a particular employee is exempt. It is what the employees do, such as their particular job duties, that matters – not what the employees are called.

For purposes of this exemption, a "*salesman*" means an employee whose primary duty is to make sales or obtain orders for sale of farm equipment.

A "*partsmen*" means an employee whose primary duty is to requisition, stock and dispense parts for farm equipment.

There is some confusion concerning the meaning of "*mechanic*" for purposes of this exemption, as it specifically relates to equipment dealers. "Technicians" at

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dealerships may qualify as mechanics for purposes of this exemption only if their primary duty is performing mechanical work on farm equipment in order to get the equipment in proper operating condition. Included in this category are “get ready” mechanics, body and fender mechanics, wrecker mechanics or persons performing general maintenance and repair.

The regulations make it clear that the following kinds of work are not considered to be “mechanical work” for purposes of this definition: washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating or “other non-mechanical work.”

Further, although this is not mentioned in the statute or the regulations and is not considered binding legal authority, the Department of Labor has taken the position that “set-up persons” or “knockdown machinery assemblers” should not be considered “mechanics” for purposes of this exemption. The Department of Labor’s position is that the mere assembly of plows and other farm equipment, which have been cut to measurements and for which all the parts have been manufactured to fit together, should not be deemed “mechanical work” in determining whether an employee qualifies for this exemption. **Accordingly, in order to avoid the risk of liability, equipment dealers should pay overtime to any employees who work primarily as “set-up persons,” as opposed to technicians who primarily perform mechanical work.**

According to the Department of Labor, other employees not covered by this exemption include service writers, service advisors, service salespersons and service managers who are not primarily engaged in mechanical work. Service managers, however, may be exempt if they meet the conditions of the “executive” or “administrative” exemptions described below. There may also be other overtime exemptions available for certain other dealership employees, including, but not limited to, commissioned salespeople, interstate drivers or loaders, outside salespeople, department managers, human resources directors, accountants, and other salaried executives, administrative and professional personnel, as discussed in the following two sections.

### **Commissioned Employees**

The FLSA provides an exemption from its overtime requirements for certain employees paid on a commission basis. **This exemption could apply to all retail equipment dealerships, not just farm implement dealerships.** The following conditions must be met for this exemption to apply:

- 1) The establishment must be a “retail” establishment, where at least 75 percent of the annual volume of sales is not for resale and is recognized as retail sales in the industry;
- 2) The employee’s regular rate of pay must exceed 1 1/2 times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked; and
- 3) More than 50 percent of the employee’s compensation for a representative period (not less than one month and not more than one year) must consist of commissions.

### **The Motor Carrier Exemption**

Certain employees of dealerships who work as drivers, drivers’ helpers, loaders or mechanics may also be exempt from the overtime requirements for each week during which their duties affect the safety of an *interstate* motor vehicle shipment. This means a shipment must cross state lines, or the trip must connect with an intrastate terminal (rail, air, water or land) to continue an interstate journey of goods that has not come to rest at a final destination.

### **■ The White Collar Exemptions**

As previously explained, the overtime rules for “white collar” employees were modified in 2004 and became effective August 23, 2004. These exemptions apply to *outside salesmen* and to salaried employees employed in a bona fide *executive, administrative or professional* capacity – terms that are specifically defined by the federal

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regulations. Employees in these categories are exempt from both the minimum wage and overtime provisions of the FLSA, provided they meet the basic requirements. **These exemptions apply to employees throughout almost every industry in the United States, including the employees of all types of equipment dealers – not just farm implement dealers.**

**Please note that (contrary to popular belief) just because an employee is paid on a salary basis does not mean that the employee is not entitled to overtime pay.** In order for “white collar” executive, administrative or professional employees to be exempt from the minimum wage and overtime requirements of the FLSA, the employees must be paid a minimum salary AND perform duties that meet the specific requirements of one of the exempt categories described in the regulations.

### New Rules

The following is a summary of some of the most significant aspects of the new rules regarding the executive, administrative, professional and outside sales exemptions:

- Raises the current minimum salary for the executive, administrative and professional exemptions to **\$455 per week** – increased from \$155 per week for executive and administrative exempt employees, and \$170 per week for exempt professionals. **Accordingly, no employees paid a salary of less than \$455 per week, or \$23,660 per year, will qualify for these white collar exemptions.**
- Creates a new exemption for all employees who are: (a) paid on a salary or fee basis of at least \$455 per week; (b) receive total annual compensation of **\$100,000** or more; and (c) perform non-manual work that includes some executive, administrative or professional function.
- Revises the duties test for all of the white collar exemptions, and defines “**primary duty**” for purposes of these exemptions as “the principal, main, major or most important duty that the employee performs” – based on all the facts in a particular case – not just time. Accordingly, an employee’s “primary duty”

could conceivably take even less than 50 percent of the employee’s time.

- Clarifies that these exemptions do not apply to any “blue collar” workers – i.e., employees who perform work involving repetitive operations with their hands, physical skill and energy – regardless of their compensation.
- Clarifies that deductions can be made from an exempt employee’s salary only under very limited circumstances – otherwise the exemption may be lost for that employee and all similarly situated employees. The new rules expressly permit deductions from an exempt employee’s weekly pay under the following circumstances:
  - 1) When an employee is absent for one or more full days for personal reasons other than sickness or accident, deductions may be made in full-day increments only;
  - 2) When an employee is absent for one or more full days due to sickness or disability, and has exhausted all of his or her accrued paid leave pursuant to the employer’s policy, deductions may be made in full-day increments only;
  - 3) Deductions may be made to offset any amounts received by the employee for jury duty, witness duty or military duty fees during the employee’s absence;
  - 4) Deductions may be made for penalties imposed in good faith for infractions of major safety rules;
  - 5) Deductions may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for violations of workplace conduct rules;
  - 6) Deductions may be made for unpaid leave under the federal Family and Medical Leave Act (FMLA), which applies to dealers with at least 50 employees within a 75-mile radius; and

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- 7) The employer may pay a proportionate amount of an employee's full weekly salary when the employee works less than a full week during the first and/or last weeks of work.
- Limits the circumstances in which exemptions will be lost for improper deductions, and creates a "safe harbor" for good faith compliance efforts.

The following is a summary of the new requirements for the most relevant white collar exemptions:

### **Executive Exemption**

- The employee must be paid a salary of at least \$455 per week (\$23,660 per year).
- The employee's primary duty must be management of the enterprise or a customarily recognized department or subdivision – e.g., service department or parts department.
- The employee must customarily and regularly *direct the work of at least two full-time employees*.
- The employee must have the *authority to hire and fire* other employees (or the employee's hiring/firing recommendations are given particular weight because it is a part of his/her job).
- Owners of at least a 20 percent equity interest in the dealership would be exempt if actively engaged in management.
- There is no longer a specific limitation on non-exempt work.

### **Administrative Exemption**

- The employee must be paid a salary or fee basis of at least \$455 per week (\$23,660 per year).
- The employee's primary duty must be performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

- The employee's primary duty must include the exercise of discretion and independent judgment with respect to "matters of significance." Examples of the ability to exercise such discretion and independent judgment are given in the regulations.
- There is no longer a requirement for the employee to "customarily and regularly" exercise discretion and independent judgment.
- Use of certain technical reference manuals by employees with advanced or specialized knowledge or skills would not affect an employee's exempt status.
- Examples of dealership employees who may be exempt administrative employees include human resources directors, computer network administrators, comptrollers, and parts managers whose primary job is to make major purchasing decisions and/or negotiate major contracts.

### **Exemption for "Learned" Professionals**

- The employee must be paid a salary or fee basis of at least \$455 per week (\$23,660 per year), with exceptions for specific professions.
- The employee's primary duty must be performing work requiring knowledge of an advanced type – i.e., primarily intellectual and varied in character, and which includes work requiring the consistent exercise of discretion and independent judgment – in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.
- Examples include in-house attorneys and CPAs, which are not common positions in equipment dealerships.
- "Bookkeeper" is the most commonly misclassified position in equipment dealerships. **The new regulations make it clear that accounting clerks and bookkeepers generally will not qualify as exempt professionals.**

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### **Exemption for Outside Salesmen**

- The employee's primary duty must be making sales or obtaining orders or contracts.
- The employee must be customarily and regularly engaged away from the employer's place of business. There is no longer a 20 percent limitation on unrelated work.
- There is no salary requirement for this exemption.

### **■ The Risk of Not Following the Rules**

Noncompliance with the FLSA can be extremely expensive for a dealership. Nonexempt employees who are not paid overtime can recover **the back pay they are owed for the last two years (or three years in the case of a willful violation)**. Additionally, the employees are usually entitled to recover **liquidated damages in an amount equal to back wages due** – i.e., double damages – or they may be awarded prejudgment interest. Finally, and often most significantly, the employees may recover their **attorneys' fees**, which could easily total tens of thousands of dollars.

Fines of up to \$1,000 per violation may be assessed against employers who willfully or repeatedly violate the minimum wage or overtime pay provisions. Willful violations of the law may also be prosecuted criminally and the violator fined and/or imprisoned.

Authorized representatives of the U.S. Department of Labor, Wage & Hour Division, may investigate dealerships and gather data regarding wages, hours, and other conditions and practices of employment. The Wage & Hour Division has targeted equipment dealers for wage and hour audits in the past based on complaints by current and former employees, and it sometimes randomly targets dealerships.

FLSA enforcement and Wage & Hour Division investigations are becoming more common and more expensive. The Wage & Hour Division is recovering hundreds of millions of dollars in back wages from employers each year.

### **■ What Should Dealers Do to Avoid Liability?**

- Review the current classifications of all employees who are not being paid overtime, and reclassify them as necessary.
- Review current personnel policies and payroll practices, and ensure they are modified as appropriate.
- Create detailed job descriptions.
- Create a "safe harbor" policy for improper deductions.
- Consider a "preemptive" wage and hour audit by legal counsel.

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