

LAWORLD

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New Federal Labor Standard Act (FLSA)

Overtime regulations

The United States Department of Labor's final regulations to the Fair Labor Standards Act (FLSA) went into effect August 23, 2004. The new regulations clarify the FLSA's "white-collar" exemptions to determine whether an executive, administrative, professional, computer or outside sales employee is "exempt" (and must receive an overtime premium) or "non-exempt" (and is not entitled to an overtime premium) from the FLSA's overtime provisions.

Following is a summary of the highlights of the new regulations:

1. The regulations impose a significantly higher minimum salary level for an employee to qualify as exempt. To qualify as exempt, an employee must earn at least \$455 per week (\$23,660 per year), a substantial increase from \$155 per week (\$8,060 per year) under the former regulations. Any

employee earning less than \$455 per week cannot be classified as exempt and is automatically entitled to an overtime premium.

2. The regulations replace the old "short" and "long" duties test with a "standard" test for each category. An employee who meets the minimum salary test will qualify as exempt only if the employee satisfies the criteria for one of the following categories, which will be based upon the employee's job duties, irrespective of his or her title:





Executive Employee: (a) The employee's primary duty is "management of the enterprise" or of a "customarily recognized department thereof;" (b) the employee "customarily and regularly" directs the work of two or more employees; and (c) the employee has the authority to hire and fire employees or has influence (e.g., the power to effectively recommend) "as to hiring, firing, advancement, promotion or other change of status."

Administrative Employee: (a) The employee's primary duty is "performance of office or non-manual work directly related to the management or general business operation of the employer or the employer's customers;" and (b) the employee's primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance."

Professional Employee: (a) A "Learned Professional" employee is one whose

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primary duty requires advanced knowledge in a field of science or learning, where such knowledge is customarily acquired by a prolonged course of specialized instruction. (b) A "Creative Professional" employee is one whose primary duty requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee: The employee's primary duty consists of (a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (b) design development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes,



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- based on and related to user or system design specifications; (c) design, documentation, testing, creation or modification of existing computer programs related to machine operating systems; or (d) a combination of these duties, the performance of which requires the same level of skills.
3. The regulations exempt “highly compensated” employees. To qualify, an employee’s “total annual compensation” (including commissions and non-discretionary compensation) is at least \$100,000, and the employee must customarily and regularly perform one or more of the exempt duties of an executive, administrative or professional employee.
 4. The regulations exempt outside salespeople “customarily and regularly” engaged away from the employer’s place of business.
 5. The regulations classify manual laborers and other “blue-collar” workers as non-exempt, irrespective of how much they are paid.
 6. The regulations permit full-day deductions from pay (docking) of an exempt employee without jeopardizing such employee’s exempt

status. They specifically permit such deductions for, among other reasons, disciplinary suspensions, violations of safety rules and absences for personal reasons.

7. The regulations incorporate a “safe harbor” provision to prevent an automatic loss of an employee’s exempt status (as well as the exempt status of similarly situated employees) due to an improper deduction. An employer must communicate clear policies concerning how its employees are paid, and institute a complaint procedure for employees to address alleged violations of such policies and to remedy any improper action. An employer’s failure to cure an improper deduction will jeopardize an employee’s exempt status.
8. The regulations do not affect an employer’s obligation to pay overtime pursuant to the terms of a collective bargaining agreement.

WHAT SHOULD EMPLOYERS DO?

The United States Department of Labor has indicated that it will vigorously enforce the regulations. Employers are well advised to immediately:

- ➔ Evaluate existing jobs (and job descriptions) under the new regulations to determine whether

employees are properly classified as exempt. In evaluating each employee’s status, pay particular attention to the employee’s “primary duty,” and be sure to remember that any employee who earns less than \$23,660 annually is automatically entitled to an overtime premium for all hours worked in excess of 40 in a workweek. Any changes should be clearly communicated to employees.

- ➔ Revisit existing policies and incorporate FLSA-specific policies and complaint procedures to receive the full benefit of the new “safe harbor” provision. Employers may also wish to review disciplinary policies to provide for full-day deductions from pay for suspensions and other permitted bases. Again, any changes should be clearly communicated to employees.

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New Spanish bankruptcy law

Since 1 September Spain has a new bankruptcy law, which updates the former regulation. The event is relevant, as this new corpus will supersede a regulation that dated back to the first third of the XIX century.

The former system was made up of parts of the 1829 and 1885 Commercial Codes, the 1881 Civil Procedure Law, the 1992 Payment Suspension Act, plus several dozen Supreme Court rulings which were generally extremely relevant, but often open for interpretation, with some obsolete. Furthermore, the bankruptcy legal scenario took place in the courts, but government departments, plus the State Tax Authority, had interests.

Thus the need for a new regulation was a regular topic in the legal profession. This need became even more relevant with the increasing internationalisation of the Spanish economy, and some recent bankruptcy cases which resulted in thousands of small creditors being defrauded. The new regulation has been welcomed by the specialists, as, in addition to modernising the rules it will simplify bankruptcy proceedings, making them far more expeditious and aligning them with recent international standards (e.g. EC Regulation 1346/2000 of 29 May, on insolvency procedures).

The key modifications of the new regulations are:

- Bankruptcy proceedings shall be heard, governed and ruled by a specialised court, the Commercial Court, with a single Magistrate; no other court, agency or administration shall have jurisdiction on matters related to the debtor, its creditors and labour force. This will avoid delays previously caused by interference of other jurisdictions.
- The debtor is appointed a counsel by the Court, to advise it in any legal related issue. In the former system, the counsel had to be appointed, and paid, by the debtor.
- In transient insolvency cases, the debtor is also appointed an administrator, who will conduct the business (formerly the debtor could run it, even by himself).
- The members of the board of the debtor have an extended liability if the filing of the bankruptcy proceeding is delayed more than two months after the company defaulted or was not able to meet its current obligations.
- The shareholders, who up to now did not have any liability whatsoever, except that of the capital represented by each share, may have a secondary liability in certain regulated events.
- The court action has been reduced to a single proceeding, which is common for all types of debtors

(moral and natural persons) and insolvencies (transient or definitive), and will result in proceedings that may be finished within months, while previously they could take several years.

- The creditors will also be affected, as the bankruptcy declaration freezes all the foreclosure and repossession proceedings; in addition the creditor who files the bankruptcy shall be granted a reward of at least 25% of the amount of its claim.
- The debtor has to file the bankruptcy proceeding in the maximum term of two months after becoming insolvent; otherwise it will have to demonstrate that the insolvency was not fraudulent.

The general consensus amongst the legal profession is that the new law will shorten proceedings and increase substantially the results, for good or bad. But in any case, the parties will be still required to act skilfully.

Article prepared by José Suárez de Suárez de la Dehesa Abogados, LAWorld member firm in Madrid, Spain.

From his workshop in calle Santa Ana in Madrid, Felix Manzanero handcrafts guitars for leading musicians around the world



LAWorld members attend world's most prominent legal conference

David Jacoby, Laura Christa and Reinhard Toegl report on the IBA Conference:

LAWorld member firms were well represented among the 1,800 attorneys from around the globe attending the annual International Bar Association (IBA) conference in Auckland, New Zealand from 24–29 October. Representatives from SCP Champetier de Ribes — Spitzer (France); Christa & Jackson (USA), Elkind, Lipton & Jacobs (Canada), Lungerich & Lenz (Germany); Phillips Nizer LLP (USA); and Dr. Reinhard Toegl Rechtsanwaltsgesellschaft mbH (Austria) were present.



The conference was a significant one for the IBA, marking the introduction of a new structure for the committees and sections which do the substantive work of the Association. LAWorld counts two committee officers of the new Legal Practice Division among its ranks: Laura Christa, chair of the Committee on Travel, Tourism and Hospitality Law, and David Jacoby, vice-chair, Committee on Litigation.

The conference opened with a traditional Maori haka (welcome) for the assembled delegates and included a "Lord of the Rings" themed evening reception hosted by New Zealand law firms which took over the central rail station.

In some general meetings delegates emphasised the importance of the rule of law and the relation of the rule of law to human rights and democracy. Some committee sessions linked up with hearings in New Zealand courts and

similar institutions. There were informative sessions on law firm management, with lawyers from all continents sharing experiences.

Laura K. Christa reports that she co-chaired a panel on Film Tourism that featured Lord of the Rings as one example of the ability of a municipality to increase foreign revenue by marketing itself through film. A number of visual examples of similar venues were presented, as well as legal aspects of securing location rights, protecting intellectual property rights and exploiting those rights in other markets. The CEO of director Peter Jackson's production company was on the panel. Laura also reports that the South Island is the adventure capital it is heralded to be and that she and other conference attendees barely made it back in one piece.

David Jacoby participated as a stand-in for a U.S. judge in a program on contingent fees run as part of the involvement of the U.K.'s Civil Justice Review in the IBA conference. The panel included Lord Phillips, Master of the Rolls of England and Wales and head of the Civil Justice Review, the Attorney General of Australia, appellate and trial court judges from Australia, Scotland and the United States and distinguished practitioners from around the world. He also reports he attended a fascinating discussion on the legal and economic impact of New Zealand's banning of parallel film imports, an area which bears on trademark litigation handled by his firm, Phillips Nizer.

Next year's IBA conference is in Prague. Count on LAWorld to be there!



Thai lawyer broadens experience

Down Under

Kitiya Ditpare, a lawyer with LAWorld member firm Rene Philippe & Partners in Bangkok, Thailand, has concluded a three month stint gaining experience in the offices of Makinson & d'Apice, LAWorld member firm in Sydney, Australia. Such short-term transfers are increasing within the LAWorld network as member firms develop closer relationships. The LAWorld Newsletter editor put some questions to Kitiya just before she returned to Bangkok at the end of her stay.

LAWorld: What legal experience did you have before you came to Sydney?

Kitiya: I graduated in 2003 from Chulalongkorn University in Bangkok. During my last year of study, and since graduation, I have been working for Rene Philippe & Partners, a Thai firm which is owned by a Swiss lawyer. Most of my experience has been in commercial cases involving property transactions and foreign companies seeking to start businesses in Thailand.

Was there any specific reason why you chose to gain experience out of your country at this stage in your career?

I had already lived for a year in California with relatives, but I wanted to gain more professional exposure to legal issues outside my home country. At this stage in my career it is very beneficial for me to gain hands-on experience. Australian law is quite different to Thai law in key areas. It is one thing to read about different systems in a text book, another to experience them first hand.

How was the transfer arranged?

I talked to the senior partner, Rene-Philippe Dubout, in Bangkok, and explored some other training options outside

the LAWorld network. In the end, Mr Dubout encouraged me to contact LAWorld member firms as he felt that closer ties with other member firms would be beneficial in the longer term. Bill d'Apice responded quickly to my enquiry and after that I arranged for a three month internship.

Did the visa pose any problems?

Australia only permits training visas for up to 90 days so I had to base my program on this period. I also had to show many documents as part of the application process to prove that I would be returning to Thailand. I love my country, so I found it a bit unsettling that the Embassy staff assumed that a young female Thai would be tempted to overstay in Australia. However, I was patient and thoroughly prepared to deal with this.

What were the transfer arrangements?

Given that the transfer was short term I paid for my travel and arranged my accommodation with relatives in Sydney.

Have you been able to work productively for Makinson & d'Apice while you have been in their office?

At first, I found the Australian accent a bit hard to follow! The experience has been tremendous and I am extremely pleased with the warm support that was provided to me during my stay. Not only have I participated in some very interesting professional cases including sales and purchases of residential and commercial real estate, leasing transactions, sales and purchase of businesses, commercial agreements, company law matters, personal injury matters and miscellaneous other matters, I've also made some great friends. I hope I can keep in touch and host my colleagues when they visit Bangkok.

Comparing Bangkok and Sydney, what are the major differences you have noticed in the legal office environments?

In terms of work styles I would say that Bangkok is more relaxed, but less efficient. The nature of our work in Bangkok involves a more personal approach than would be the case in Sydney. In Thailand, it seems that there is flexibility for interpretation and application of the law. I would also have to admit that Thailand is not a culture that resolves most of its conflicts via the legal profession, whereas perhaps the legal system is more comprehensive in an Anglo-Saxon country, and less forgiving.

Have you picked up any ideas which you will be able to put into practice when you return to Bangkok?

I've picked up many ideas which I think will help me in my future career. The legal profession in Thailand is developing as part of ongoing globalization. I hope that my experience in Sydney can help me to play a valuable role in this process.



Kitiya Ditpare

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