



*A Union of Professionals*

## **Impact of the Bush Overtime Rules on Paraprofessionals and School Related Personnel (PSRP) June 2004**

In late April, the Bush administration published final rules (29 CFR Part 541) revising federal guidelines under the Fair Labor Standards Act (FLSA). These required guidelines, originally crafted to define executive, administrative management and professional employees who are exempt from FLSA rights, will make it easier for employers to deny overtime compensation to millions of workers. The new overtime rules take effect **Aug. 23, 2004**.

Following is information on the new regulations governing overtime payment for workers in various categories of employment. As a general rule, we do not believe that very many of the jobs within the PSRP ranks will be affected by the revised rules. But, as with any federal regulation, these rules will be open for interpretation at the district and college level, and we strongly encourage AFT affiliates to review job descriptions and determine which workers may be at risk. The language in the regulations can be confusing. Keep in mind these two important definitions:

- Non exempt employees *are* eligible for overtime compensation
- Exempt employees *are not* eligible for overtime compensation

Under the new rules, a worker may be exempted from overtime protections as an executive, administrative manager or professional employee if he or she meets a two-pronged test: The worker's qualifications and/or job duties must meet the standards outlined in the regulations, and the worker must be paid on a salaried (instead of hourly) basis at a rate not less than \$455 per week. AFT affiliates are cautioned that in some instances employees paid on an hourly basis may be exempted (see sections 541.303 and 541.604 below).

To determine qualifications or job duties, a job title is insufficient. The regulations categorize five areas of employment and describe the type of work and duties that would make an employee exempt from overtime compensation. These areas are listed below and, if applicable, we have outlined the possible effect on PSRP members. We also provide summaries of the language in each section but are urging locals to visit the Department of Labor Web site (<http://www.dol.gov/esa/regs/fedreg/final/2004009016.pdf>) for the full text. You should be aware that in describing the regulations, the Labor Department has provided misleading information that understates their true impact.

### **Subpart A—General Regulations 541.3—Scope of section 13(a)(1) exemptions**

This section states that the regulations do not apply to manual laborers or “other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy.” The rationale is that such workers gain their skills and knowledge through on-the-job training and not through a prolonged course of specialized study. Non management employees in maintenance and construction such as carpenters, electricians, mechanics, plumbers, iron workers, operating engineers, etc., are non-exempt. However, if the employee performs a mix of blue collar and executive,

administrative or professional work, as determined by the employer, the overtime status is questionable. “Blue collar” protections are not a blanket guarantee of overtime.

**AREA OF CONCERN:** PSRPs in **skilled trades and crafts in colleges and K-12 districts** fall into this category. We do not anticipate a problem with maintaining their non exempt status at the district or college level. Although some PSRPs have job titles such as custodial supervisor or maintenance shop manager, their duties generally do not fit the categories of executive, administrative or professional work. Nevertheless, the union should review job descriptions and monitor employer’ actions.

### **Subpart B—Executive Employees**

#### **541.100—General rule for executive employees**

An executive employee is defined as an employee whose primary duty is management of the enterprise, who regularly directs the work of two or more other employees and has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given “particular weight.”

“Particular weight” includes, but is not limited to, whether part of the employee’s job duties involves making suggestions and recommendations, “.even if the employee does not have the authority to make the ultimate decision as to the employee’s change of status.”

Employers determine on a case-by-case basis if the employee performs this work as a primary duty and primary duty can be whatever duty the employer considers to be most important.

Generally, “management” includes but is not limited to interviewing, selecting and training employees; setting and adjusting rates of pay and hours of work; evaluating employees; disciplining employees; planning and controlling the budget, monitoring legal compliance; or controlling the flow of materials and work, etc.

**AREA OF CONCERN:** In some school districts and colleges, **food service managers** are part of bargaining units. The nature of their work does not generally fit into the description of the work of executives. Because the new rule requires that the exemptions be determined on a case-by-case basis, no clear cut rule on eligibility can be developed. As a result, we anticipate substantial litigation around this new standard. The union needs to carefully monitor the application of this rule on workers in this category.

### **Subpart C—Administrative Employees**

#### **541.200—General rule for administrative employees**

This definition includes employees whose primary duty is the performance of office or non-manual work related to the management or general business operations of the employer, and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Work “directly related to the management or general business” includes, but is not limited to, functional areas such as accounting, budgeting, finance, auditing, insurance, purchasing, human resources, labor relations, etc.

“Discretion and independent judgment with respect to matters of significance” is defined generally as comparing and evaluating possible courses of action and then making a considered decision. Examples given include; having authority to formulate, affect, interpret or implement management policies; carrying out major assignments; having the authority to negotiate and bind the organization; and planning objectives. The definition is intended to imply that the employee has the authority to make an independent choice, free from immediate direction or supervision, even if the employee’s judgment is reviewed at a higher level. Finally, it also does not include clerical or secretarial work, recording or tabulating data or performing other mechanical, repetitive, recurrent or routine work.

**AREA OF CONCERN:** With few exceptions, **clerical and technical workers** in K-12 districts and colleges will maintain their non exempt status under the new regulations. Some employers may try to apply exempt status to high-level accounting, purchasing, or financial personnel. The union needs to monitor this.

### **541.204—Educational Establishments**

The regulations specifically address academic administrative employees in educational establishments. This section specifically states that employees in this category perform work related to the academic operations and functions in a school not in general business operations. This includes superintendents, principals, department heads, academic counselors, etc.

**AREA OF CONCERN:** This section specifically *excludes* positions such as social workers, psychologists, lunch room managers or dieticians but states that these employees may qualify for exemption under other areas. (See sections 541.100&.541.200).

### **Subpart D—Professional Employees**

#### **541.300—General rule for professional employees**

This category includes employees whose work requires advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This category may now include “work experience,” which is undefined in the regulations, but will be subject to interpretation by employers and the courts. One area under Professional Employees is of possible concern and that is the section defining teachers.

#### **Section 541.303—Teachers**

This employee is defined as one who has the primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment. The rule also states that the possession of an elementary or secondary teaching certificate qualifies for the exemption regardless of the terminology used by the state for that certificate. Unlike most other provisions, this rule does not require that employee be paid a salary or earn any particular amount.

**AREAS OF CONCERN:** This rule change is of slight concern because a **paraprofessional’s** role generally is defined as supporting instruction, not providing direct instruction. Further, it is our belief that the requirements for NCLB could provide some protections if this is challenged because the NCLB regulations clearly delineate the specific roles of teachers and paraprofessionals.

In **colleges**, many classified/PSRP employees work as part-time faculty members in the same college or in other institutions. The union must monitor these employees so that their status as part-time faculty doesn't infringe on their non exempt status as a classified employee.

### **Subpart E—Computer Employees**

#### **541.100—General rule for computer employees**

This category includes employees whose primary duty consists of the application of systems analysis techniques and procedures, such as including consulting with users to determine hardware, software or system functional specifications; design/development of computer systems or programs; design of computer programs related to machine operating systems, or any combination of these duties.

**AREA OF CONCERN:** This section of the regulations is very thin. It is of major concern for **computer employees** in large school systems and colleges who are responsible for the duties outlined above. In many instances, these employees are directed by an executive or administrative employee, but the nature of their work may result in exempt status.

### **Subpart F—Outside Sales Employees**

We do not believe any PSRP jobs fall within this category.

### **Subpart G—Salary Requirements**

#### **541.604—Minimum Guarantee Plus Extras**

This section defines when compensation that is paid on an hourly basis can be considered a “salary” under the two pronged test for exempting a worker from overtime rights (see above). If an employee is guaranteed a minimum weekly compensation of at least \$455 in any week in which he performs any work at all, his total pay may be calculated on an hourly basis. Such an employee may be denied overtime rights if he meets the duties tests. A “reasonable relationship” must exist between the employees actual pay the guaranteed minimum. The rule does not limit how much of a gap between these two amounts satisfies this test.

**AREA OF CONCERN:** This section is of concern mainly to those individuals with a higher hourly rate of pay *and* executive, administrative or professional duties, such as registered nurses. For example, a worker earning \$16 per hour who typically works a 40-hour week would earn \$640, but under other employment provisions may also be guaranteed a minimum of \$455 (or more) a week. In this instance, the worker could be denied overtime. We believe that this section would affect very few PSRP members. Those most likely affected would be employees such as facilities managers and building engineers.

For additional information, please contact the AFT PSRP Department at [psrp@aft.org](mailto:psrp@aft.org) or 202-879-4400.