

Pole Position

Amendment to Regulation 13 Governing
Exempt Employees

February 2006

FEBRUARY 2006 – AMENDMENT TO REGULATION 13 GOVERNING EXEMPT EMPLOYEES

On February 17, 2006, the new regulations on eligibility for "white-collar" workers came into effect through the Puerto Rico Department of Labor and Human Resources ("DLHR") Regulation 13 (5th Revision) ("Regulation 13"). Its express purpose is to define the terms administrator, executive, professional, as well as computer employees and outside salesmen, who are thereby exempt from the provisions of various wage and hour laws, including Act 180 of July 27, 1998 (the Minimum Wage, Vacations and Sick Leave Act), Act 379 of May 15, 1948 (the Days and Hours Worked Act), Act 17 of April 17, 1931 (the Commercial Establishments Operations' Act), Act 428 of May 15, 1950 (the Chauffeurs' Social Security Act), Act 289 of April 9, 1946 (the Seventh Day Rest Act).

The new DLHR Regulation 13 has simplified the tests used to determine exempt status compared to Regulation 13's Fourth Revision, provides descriptive examples of how certain occupations may be covered or not by the defined exemptions, and parallels many of the provisions of the Fair Labor Standards Act's ("FLSA") white collar exemptions, which came into effect on August 23, 2004.¹ Under the Fourth Revision of Regulation

13, an employee was considered a professional, an executive or an administrator if he or she met the requirements of either one of two (2) tests, commonly known as the "long test" and the "short test", the applicability of which depended on both the employee's weekly salary and the duties performed.

However, under Regulation 13, the employee must satisfy the new and higher minimum salary threshold of \$455 per week, (equivalent to \$23,660 per year, exclusive of housing, food, and other services) as well as the primary duties and requirements of each exempted category. As to the duties test, the regulations have been modified as follows:

Employees, Outside Salesmen, and Highly Compensated Employees as exempt employees. For **Computer Employees**, the salary basis test has the thresholds, either of which applies: earnings of \$455.00 per week or \$27.63 or more an hour. The duties test, exempt a **Computer Employee** if the primary duties consist 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 operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills. An employee employed as a computer systems analyst, computer programmer, software engineer, or other similar skilled worker in the computer field will also be exempt under the regulations.

¹ In fact, the new regulation expressly establishes the DLHR's intent that the same be interpreted in a manner consistent with the exceptions, examples and interpretations provided in the FLSA. Another key change is the inclusion of **Computer**

Executive - (1) Primary duty of the management of the enterprise or a recognized department or subdivision; (2) customarily and regularly directs the work of two (2) or more full-time employees (or their equivalent, e.g. one full-time employee and two part-time employees); and, (3) 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). A person will also be deemed an executive if he/she owns at least a twenty percent (20%) equity interest in the enterprise in which the employee is employed.

Administrator - (1) 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; (2) and exercise of discretion and independent judgment with respect to matters of significance.

Learned Professional - (1) Primary duty of performing work requiring knowledge of an advanced type, predominantly intellectual, and who constantly exercises discretion and independent judgment, 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. This exemption also includes **Creative Professionals**, and defines them as employees whose primary duty consists of performing work of an original and creative character in a recognized field of artistic effort (as opposed to routine, mechanical or manual work which may be performed by a person who possesses a general ability and training of a manual or intellectual nature), the results of which primordially depend on the employees' inventiveness, imagination or talent in a recognized field of artistic or creative nature.

As to **Outside Salesmen**, no salary basis test is required. Thus, an employer must focus on the

primary duties of the employee to determine whether he or she is an outside salesman. Accordingly, an employee is an **Outside Salesman** if he or she: (1) has the primary duty of making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (2) customarily and regularly engaged away from the employer's place or places of business.

A **Highly Compensated** employee is one who has an annual revenue of at least \$100,000.00 and usually and regularly performs one or more of the duties or responsibilities of an executive, administrator, or professional.

Regulation 13 also contains provisions regarding salary deductions from pay. Accordingly, it allows a deduction for a full day for disciplinary suspensions (e.g., suspensions for violating a generally applicable written policy prohibiting workplace violence or sexual harassment), deductions from pay if the employee is absent for personal reasons other than sickness or disability, and deductions if the employee is absent for sickness or disability and the deduction is conducted pursuant to Company policies to compensate lost wages as a result thereof, and for the time he or she is receiving benefits under Worker's Compensation Act, SINOT, and other similar statutes. Even though Regulation 13 does not contain an express safe-harbor provision for "impermissible" or inadvertent deductions, it contains language to the effect that an employer may not lose the deduction if it has developed and clearly communicated a policy that prohibits the improper pay deductions. The same could include a complaint mechanism and provisions for reimbursements to employees for any improper deductions.

In light of the foregoing, the most significant consequence of Regulation 13 concerns the modifications to the salary test. From now on, before classifying an employee as an exempt employee, he or she must earn, at least, \$455 per

week. Only then will the duties of the employee be assessed to determine whether they are consistent with an exempt employee's duties, as defined.

And always remember the phrase created long ago by Roman jurists : “the thing is not created by its name”.

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