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U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington

"EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN"
RE-DEFINED

New Ruling Affects Almost All Establishments
in Interstate Commerce

Classifications of white collar employees who need not be paid overtime after 40 hours a week were re-defined today in amended regulations affecting almost all interstate commerce establishments by Colonel Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor. The regulations go into effect October 24, 1940, the same day on which the standard workweek under the Fair Labor Standards Act (Federal Wage and Hour Law) becomes 40 hours.

Principal change in these regulations under the Act is a separate definition for "administrative" employee, heretofore defined together with "executive." An executive as defined remains one whose primary duty consists in management and who, among other qualifications, gets \$30 a week or more. Administrative employees are more broadly defined in the new regulations to include those whose duties, while important and associated with management, are functional rather than supervisory, and who are paid "a salary commensurate with the importance supposedly accorded the duties in question." The regulations require that such a salary be not less than \$200 a month.

"Protection for the typical white collar worker from inconsiderate exploitation as to his or her working hours will continue," said Colonel Fleming in issuing the new regulations. "Those workers will also continue to have the protection of Section 6 requiring that they be paid at least \$12 for a 40 hour week, and in certain industries operating under wage orders establishing various higher minima, at least \$13, \$14, or \$16 a week. With few exceptions, the employer representatives who testified at our 'white collar' hearings agreed that most clerical workers should have this protection. They asked that some

impractical situations be solved. We feel that these new regulations solve them. They called to our attention instances of salaried employees with important functions whose work was difficult to measure in hours. Yet they did not come under our definition of 'executive (and) administrative' usually because they did not supervise other employees. The solution is this: If these employees work at non-manual assignments which require the exercise of discretion and independent judgment and if they receive \$200 a month or more they need not record their hours or be paid overtime under the law.

"These amendments are not retroactive. The Division's original definition of 'executive (and) administrative' which was worked out at a conference attended among others by A. D. Whiteside, president of Dun & Bradstreet, Inc.; Newbold Noyes, publisher of The Washington Star; Robert Watt of the A.F. of L.; and John Abt of the Amalgamated Clothing Workers (C.I.O.), was a legal definition.

"During the first month of this Division's operation, my predecessor, Elmer F. Andrews, publicly invited persons aggrieved by this definition to petition for its revision. No formal petitions were received. One of the first things I did upon becoming Administrator was to announce my readiness to conduct a hearing into the inequities caused by this definition. Petitions were filed by the Council of National Wholesale Associations, The American Retail Federation, and The Southern States Industrial Council. A great many persons signified their intention to testify. We held four hearings for groups of industries. We also included our definitions of 'professional' and 'outside salesman' in the agenda. The revisions going into effect October 24, the second birthday of the Act, are the result of these hearings at which more than 200 persons testified, either orally or through submission of briefs. The record grew to more than 2,000 pages, and included extensive studies made by trade associations and unions of the functions paid and hours worked by executives and white collar workers generally in American industry.

"Enforcement of the Wage and Hour Law as regards white collar workers will continue to expand as more and more clerical workers in covered establishments

become aware of their rights under this law and have the courage to bring violations to our attention. It is not safe to work such employees long hours without overtime payment to make up for managerial inefficiency or to keep down payroll. Every day Wage and Hour inspectors are arranging payment of considerable sums in restitution to stenographers, bookkeepers, etc. Again we warn employers to put their houses in order by coming into compliance with this Act before the amounts owed to stenographers and bookkeepers grow to financially embarrassing proportions."

In issuing the new regulations, Colonel Fleming made public the report and recommendations of Harold Stein, Assistant Director of the Hearings Branch of the Division, who presided at the four hearings held during the summer on proposed revisions. "These recommendations," said Colonel Fleming, "will be the Division's construction of the regulations until and unless they have to be amended in part because of experience or because of authoritative decisions of the courts."

The provision in the original definition for executive which caused more questions than any other was the requirement that an executive do no substantial amount of the work done by his subordinates. The new regulations answer the question, "What is substantial?" "Substantial" means more than 20 percent on an hourly basis. Thus, a foreman listed on the payroll records as exempt from overtime because he comes under the "executive" definition, whose subordinates work 40 hours a week may work eight hours at the same kind of work. More than eight hours of such work would make him a working foreman and legally necessitate payment of at least time and a half his regular rate for his work in excess of 40 hours a week. Most representatives of industry at the four hearings were in agreement that the working foreman should be paid overtime.

How extensively any definition of an "executive" affects American industry is remarked on in Mr. Stein's report. "It should be noted," the report says, "that executive employees are an essential feature of all industry. Many employers employ no administrative employees, as the term is used herein; thousands have no occasion to employ professional employees, in any sense of the term. . . ."

Executives--high and low--exist and must exist everywhere." As railroads are exempt from hours regulation, the Division's definition of "executive" and "administrative" will not affect this industry. Employees of retail or service establishments, the greater part of whose selling or servicing is in intra-state commerce, are not covered by the wage nor the hour provisions of the Act.

The definition for an employee employed in a "professional" capacity and thereby exempt from overtime requirements has been broadened by including the artistic professions and narrowed by the requirement that the "professional" employee exempt from overtime requirements must be paid \$200 a month or more. The \$200 salary requirement does not apply to licensed members of the legal and medical professions. Under the regulations, there is no legal obligation to pay graduate chemists, engineers, etc., \$200 a month. But if they are not paid \$200 a month, they must be paid time and a half for all work over 40 hours a week.

The definition of "outside salesman" is broadened to exempt from minimum wage and overtime pay requirements "driver-salesmen." It is further amended to assure the exemption of advertising solicitors selling publication and radio advertising contracts and freight solicitors.

While the hearings did not deal with the exemption of "employees employed in a local retailing capacity," as the original definition had raised few questions, the amended regulations make one change in this definition. The phrase, "who does no substantial amount of work of the same nature as that performed by non-exempt employees," occurs in the original definition. The amended definition substitutes for "no substantial amount of work" the words "whose hours of work . . . do not exceed 20 percent of the number of hours worked in the workweek-by . . . non-exempt employees."

The Administrator has broad powers, not only to define but to delimit the extent of these exemptions under Section 13(a)(1) of the Act which reads, "The provisions of sections 6 (minimum wages) and 7 (maximum hours) shall not apply with respect to (1) any employee employed in a bona fide executive, administrative

professional or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)."

Under the new definition an "executive" employee, to be carried on the payroll records as exempt from overtime, must meet six tests:

- (1) His primary duty consists of the management of the establishment in which he is employed, or a customarily recognized department or subdivision thereof.
- (2) He customarily and regularly directs the work of other employees therein.
- (3) He has the authority to hire or fire other employees, or his suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees are given particular weight.
- (4) He customarily and regularly exercises discretionary powers.
- (5) He is compensated for his services on a salary basis at not less than \$30 per week (exclusive of board, lodging or other facilities).
- (6) His hours of work of the same nature as that performed by non-exempt employees do not exceed 20 percent of the number of hours worked in the workweek by the non-exempt employees under his direction. But this sixth requirement does not apply in the case of an employee who is in sole charge of an independent establishment or a physically-separated branch establishment.

This definition is the original definition for "executive (and) administrative" with minor revisions. It now defines "executive" alone. The report, based on the record of the hearings, notes that the words "or subdivision" in the first requirement have been added to the original definition at the suggestion of the Edison Electric Institute.

The report notes that there were requests to term group supervisors as "executives" along with those whose primary duty is the management of a customarily recognized department or subdepartment. As to this, the report reads, "It would require a strange interpretation of 'bona fide' executive to include

such groups of supervisors within the term. It would seem improper to give as imposing a title as 'executive' to a person who supervises a collection of men performing a job, or a series of jobs, but whose responsibilities do not include the kind of permanent status that is properly associated with the management of a recognized department."

In the third requirement, the wording is changed to read "hire or fire" instead of "hire and fire." In the fifth requirement the words "on a salary basis" are in addition to the original definition. The last requirement substitutes "no more than 20 percent of the hours worked" for the phrase, "no substantial amount of work" in the original definition. It is the hours worked by the subordinates, not the total worked by the executive, to which the 20 percent applies. The exception in the case of the employee in sole charge of an independent establishment takes care of problems such as presented by the Pittsburgh Plate Glass Company with reference to its branch managers.

In discussing the term "administrative," the report of the presiding officer at the hearings says, "A considerable number of the proposed re-definitions submitted to the Administrator conceive of 'administrative' as merely a lower form 'executive.' While such a distinction might be appropriate for some other purposes, it would be clearly inappropriate in establishing definitions for two terms which must not overlap if effect is to be given to each of the words of an Act of Congress."

The report points out that although the terms "executive" and "administrative" "are in a large degree overlapping in common usage, it is both urgent and appropriate to limit the term 'executive' to persons whose duties include some form of managerial authority--to persons who actually direct the work of other persons. The term 'administrative' can thus be reserved for persons performing a variety of miscellaneous but important functions in business. This latter group is large in modern industrial practices and includes typically such persons as bank tellers, personnel managers, credit managers, buyers, supervisors of

machine tools, safety directors, claim agents, auditors, wage rate analysts, tax experts and many others."

The Southern States Industrial Council proposed a definition for "administrative" which would remove wage and hour protection from all white collar employees given annual vacations and sick leave. The Indiana Manufacturers Association proposed exempting all those paid \$18. a week and more, and their assistants without salary qualifications.

Three types of "administrative" employees are exempted by the new definition for that term. All must be paid \$200 a month or more (exclusive of board, lodging or other facilities); all must be engaged in non-manual work which requires the exercise of discretion and independent judgment. The first type exempted is one who regularly and directly assists an executive or another exempt administrative employee. The second is one who performs under only general supervision office or field work directly related to management policy or general business operations along specialized or technical lines requiring special training, experience, or knowledge. And the third is one whose work involves the execution under only general supervision of special assignments or tasks directly related to management policies or general business operations.

As to the salary requirement, the report states, "The employee for whom exemption is sought under the term 'administrative' have extremely diverse functions. It is further evident that in many instances their function is difficult to identify, although it may well be important. In such a situation, the final and most effective check on the validity of the claim for exemption is the payment of a salary commensurate with the importance supposedly accorded the duties in question. Furthermore, a title alone is of little or no assistance in determining the true importance of an employee to the employer. Titles can be had cheaply and are of no determinative value. Thus, while there are some superintendents of maintenance who qualify for exemption under Section 13(a)(1) (normally under the term "executive"), it is not hard to call a janitor a 'superintendent'

or a 'superintendent of maintenance' if some result desirable to the employer will flow therefrom."

Overtime may be disregarded for a professional employee only when his pay is \$200 a month or more (exclusive of board, lodging, or other facilities) and who is customarily and regularly

(A) engaged in work

- (1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and
- (2) requiring the consistent exercise of discretion and judgment in its performance, and
- (3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and
- (4) whose hours of work of the same nature as that performed by non-exempt employees do not exceed twenty percent of the hours worked in the workweek by the non-exempt employees; provided that where such non-professional work is an essential part of and necessarily incident to work of a professional nature, such essential and incidental work shall not be counted as non-exempt work; and
- (5) (a) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or
(b) predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which

depends primarily on the invention, imagination or talent of the employee, and

- (B) compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities); provided that this subsection (B) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.

The original definition did not apply a salary requirement to "professional" employees. Originally, a "professional" employee had to be one who exercises discretion and judgment "both as to manner and time of performance as opposed to work subject to active direction and supervision." Subsection (A)(2) is a revision of this requirement. As in the case of "executive," the phrase "no substantial amount of work of the same nature as that performed by non-exempt employees" has been changed to "20 percent of hours worked". Subsection (5)(b) has been added to allow the exemption of employees in the artistic professions in the broad sense of the word. The report and recommendation showed that this is meant to include certain employees who are writers, photographers, motion picture actors, musicians, painters, etc.

"Outside salesman" is defined as an employee

- (A) who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in
- (1) making sales within the meaning of Section 3 (k) of the Act; or
 - (2) obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer, and
- (B) whose hours of work of the same nature as that performed by non-exempt employees do not exceed twenty percent of the number of hours worked in the workweek by such non-exempt employees; provided that work performed incidental to and in conjunction with the employee's own outside

sales or solicitations, including incidental deliveries and collections, shall not be regarded as non-exempt work.

The original definition for "outside salesman" included this sentence, "For the purpose of this definition, recurrent, routine deliveries, whether or not prior orders are placed by the purchasers, and collections, shall not be considered sales." The elimination of this sentence, the recommendation showed, is intended to allow salesmen who drive a truck and make deliveries to be considered exempt.

"Sales" is defined in the Act--Section 3(k). This definition, the report notes, does not cover certain transactions such as the sale of radio time and of advertising space in newspapers and periodicals. In order to exempt this work from overtime requirements, Section (A)(2) has been added to the original definition.

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