Mid-Level Public Safety Supervisors Under The Department Of Labor’s New FLSA Regulations

Even though only weeks have passed since the Department of Labor issued regulations completely rewriting the standards as to when employees are exempt from the Fair Labor Standards Act’s (FLSA) overtime provisions, there has already been quite a debate as to the status of mid-level supervisors under the new regulations. Notably, the regulations themselves, effective in August 2004, are silent on the status of mid-level supervisors. The regulations do, however, speak in general terms about employees providing law enforcement, fire protection, corrections, and EMS services.

The General References To Public Safety Employees In The Regulations

For example, Subsection 541.3(b)(1) of the regulations states that the executive, administrative and professional exemptions under Section 213(a)(1) of the FLSA do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or similar work.

Section 541.3(b)(2) of the regulations continues the theme, indicating that public safety employees do not qualify as exempt Executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof. In the words of the regulation, a police officer or firefighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or firefighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

The DOL’s implications continue unabated in Section 541.3(b)(3) of the regulations, which provides that public safety employees do not qualify as exempt Administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer’s customers.

Lastly, Section 541.3(b)(4) of the regulations provides that public safety employees do not qualify as exempt Learned Professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. The regulation notes that although some police officers, firefighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard...
prerequisite for employment in such occupations.

**Mid-Level Supervisors Such As Police Sergeants And Fire Lieutenants**

Perhaps the real nuggets in the DOL's announcement of the new rules can be found in the Preamble (or comments) to the new rules, and not in the rules themselves. In the Preamble, the DOL took great pains to seemingly indicate that first-line supervisors such as law enforcement sergeants (and perhaps even lieutenants) and fire lieutenants (and perhaps even captains) should not be considered exempt employees under the FLSA.

For example, the substantive discussion of the issue in the Preamble begins with the blunt (if either inaccurate or misleading) statement that most of the courts facing this issue have held that police officers, firefighters, paramedics and EMTs and similar employees are not exempt because they usually cannot meet the requirements for exemption as executive or administrative employees. The Preamble then cites approvingly from the case of *Department of Labor v. City of Sapulpa, Oklahoma*, 30 F.3d 1285, 1288 (10th Cir. 1994), in which a court held that fire department captains were not exempt executives because they were not in charge of most fire scenes; had no authority to call additional personnel to a fire scene; did not set work schedules; participated in all the routine manual station duties such as sweeping and mopping floors, washing dishes and cleaning bathrooms; and did not earn much more than the employees they allegedly supervised. The Preamble also quotes approvingly from a series of cases holding that law enforcement detectives should not be treated as exempt employees.

The Preamble then states that federal courts have held that police officers, paramedics, EMTs, and similar employees are not exempt professionals because they do not perform work in a field of science or learning requiring knowledge customarily acquired by a prolonged course of specialized intellectual instruction as required under the current and final section 541.301 of the regulations. In the body of the paragraph containing this statement, the Preamble cites *Fraternal Order of Police, Lodge 3 v. Baltimore City Police Department*, 1996 WL 1187049 (D.Md. 1996), for the proposition that police sergeants and lieutenants are not exempt professionals, even though some possessed college degrees, because college degrees were not required for the positions.

**Clear Indications That Mid-Level Supervisors Will Not Be Exempt From Overtime Under The FLSA**

In a direct statement, the Preamble posits that the Department has no intention of departing from this established case law. Rather, for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers, firefighters, paramedics, EMTs and other first responders are entitled to overtime pay. Police sergeants, for example, are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations; neither do they work in a field of science or learning where a specialized academic degree is a standard prerequisite for employment. Finally, such police officers, fire fighters, paramedics, EMTs and other public safety employees also cannot qualify as exempt under the highly-compensated test in final section 541.601. As discussed below, final section 541.601(b) provides that the highly-compensated test applies only to employees.
whose primary duty includes performing office or non-manual work. Federal courts have recognized that such public safety employees do not perform office or non-manual work.

The Preamble then contains a lengthy discussion of the status of high-level police and fire officials, noting that federal courts have found high-level police and fire officials to be exempt executive or administrative employees only if, in addition to satisfying the other pertinent requirements, such as directing the work of two or more other full time employees as required for the executive exemption, their primary duty is performing managerial tasks such as evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; ensuring operational readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed.

An important part of the analysis, the Preamble suggests, is whether purportedly exempt police and fire executives generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed. Only in the latter case, the Preamble concludes, should even high-level executives be deemed exempt.

**What Lies Ahead In The Future?**

Though the Preamble does not have the same legal effect of the regulations themselves, it will likely be given considerable weight by the courts. The FLSA itself contains no definition of who executive, administrative, and professional employees are. Rather, the FLSA leaves the matter to the DOL. Since the DOL writes the definitions, its interpretation of the definitions, even in the Preamble, will almost certainly be persuasive with the courts.

The DOL itself gives the clearest indication of what the new rules may mean for mid-level public safety supervisors:

Some police officers, firefighters, paramedics and EMTs treated as exempt executives under the current regulations may be entitled to overtime under the final rule because of the additional requirement in the standard duties test that an exempt executive must have the authority to hire or fire other employees or make recommendations given particular weight on hiring, firing, advancement, promotion or other change of status.

The final regulations can be found at: [http://www.dol.gov/esa/regs/compliance/whd/fairpay/regulations.htm](http://www.dol.gov/esa/regs/compliance/whd/fairpay/regulations.htm)

The DOL's preamble can be found at: [http://www.dol.gov/esa/regs/compliance/whd/fairpay](http://www.dol.gov/esa/regs/compliance/whd/fairpay)