

What is the Fair Labor Standards Act?

The Department of Labor, in the background section of 29 CFR Part 541, states that, "the FLSA generally requires covered employers to pay their employees at least the federal minimum wage (which is currently \$5.15 an hour), and overtime premium pay for all hours worked over 40 in a work week. However, the FLSA includes a number of exemptions from the minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime pay 'any employee employed in a bona fide executive, administrative, or professional capacity * * * or in a capacity as outside salesman.'" These exemptions are often referred to as the FLSA's "white collar" exemptions. *See* 29 CFR Part 541 at 15560.

What are the proposed new rules and why did the Department of Labor propose new rules regarding the "white collar" exemptions to the Fair Labor Standards Act?

According to the DOL, the "white collar" exemptions have "engendered considerable confusion over the years regarding who is, and who is not, exempt." The regulations generally require three tests to be met for the exemption to apply: (1) The employee must be paid a predetermined and fixed salary, not an hourly wage that is subject to reductions because of variations in the quality or quantity of the work performed (the "salary basis test"); (2) the amount of salary paid must meet minimum specified amounts (the "salary level test"); and (3) the employee's job duties must primarily involve managerial, administrative or professional skills as defined by the regulations (the "duties test"). *See* 29 CFR Part 541 at 15560.

The Department of Labor proposed to update and revise the FLSA "white collar" exemptions because "suggested changes to the part 541 regulations have been the subject of public commentary for years, including a review of the regulations by the U.S. General Accounting Office (GAO) in 1999. GAO recommended that the Secretary of Labor comprehensively review and make necessary changes to the part 541 regulations to better meet the needs of both employers and employees in the modern work place, and to anticipate future work place trends." *See* 29 CFR Part 541 at 15560.

You may read the DOL's "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer

Employees," contained at 29 CFR 541 at:
<http://www.paralegals.org/associations/2270/files/29-CFR-Part541.pdf>

Did NFPA respond to the DOL's request for public comment, and if so, did it take a position on the exempt/non-exempt status of paralegals?

On June 27, 2003, NFPA submitted its response to the DOL's proposed new rules, and while it could not take a position on whether paralegals should be exempt or non-exempt because its members were almost evenly divided on the issue, NFPA provided the following information for the DOL's consideration:

1. the background of NFPA;
2. a history of the paralegal profession;
3. information regarding paralegal roles and responsibilities;
4. NFPA's definition of a paralegal and the preferred terminology and use of the term "paralegal";
5. educational and continuing education information;
6. PACE exam; and
7. discussion of ethics and professional responsibility for the paralegal.

Additionally, NFPA set out specific comments to the proposed language such as increasing the proposed change of the salary test from \$425 per workweek to \$650 per workweek, and a recommendation that the DOL not eliminate the duties test in determining employees who may be exempt from overtime.

You may read NFPA's response at:
<http://www.paralegals.org/associations/2270/files/DOL-response.pdf>.

What became of the proposed new rules and what is the current status?

Although there was a great deal of legislation proposed to block the implementation of the new rules, the Department of Labor's changes to the Fair Labor Standards Act regarding white collar exemptions did pass and went into effect on August 23, 2004. In addressing public concern, the Secretary of Labor issued many press releases and comments in support of the new rules. You may read those press releases at the DOL's website at:
<http://www.dol.gov/esa/media/press/whd/whdprss.htm>.

Despite the implementation of the new "white collar" exemptions, there is legislation pending to rescind portions of the DOL's regulations. Some states, such as Maine, Michigan and Ohio are considering legislation that would preserve the status quo of the prior regulations. NFPA will continue to monitor these legislative efforts and keep our members apprised of any new developments.

Did the DOL specifically address the paralegal profession in its discussion of the new rules?

The DOL specifically included language regarding the paralegal profession and continued its position that "paralegal" will specifically remain non-exempt pursuant to 541.301(e)(7), unless they hold advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties." The following is the language taken from the new regulations

(<http://www.dol.gov/esa/regs/compliance/whd/fairpay/regulations.htm>).

Paralegals. The Department received a number of comments from paralegals and legal assistants expressing concern that they would be classified as exempt under the proposed regulations. Other commenters urge the Department to declare that paralegals are exempt learned professionals. However, none of these commenters provided any information to demonstrate that the educational requirement for paralegals is greater than a two-year associate degree from a community college or equivalent institution. Although many paralegals possess a Bachelor's degree, there is no evidence in the record that a four-year specialized paralegal degree is a standard prerequisite for entry into the occupation. Because comments revealed some confusion regarding paralegals, the final rule contains new language in section 541.301(e)(7) providing that paralegals generally do not qualify as exempt learned professionals. The final rule, however, also states that the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

What does NFPA believe with regard to paralegals' non-exempt status and compensation?

While some law firms have previously classified their paralegals as exempt employees, the DOL has issued opinions in the past consistently stating that in most cases, paralegals are non-exempt employees.

NFPA firmly believes that the exempt/non-exempt issue, that is – how paralegals are compensated – in no way changes or decreases our profession or our value to the legal team. In other words, being classified as a non-exempt employee does not equate to a paralegal being considered "unprofessional."

The issue of exempt/non-exempt status of paralegals continues to be a very "hot" topic, and one that has been debated and discussed for many years. NFPA believes it will continue to be discussed until the issue of minimum educational requirements for entry into the profession, as specifically mentioned by the DOL, is addressed.