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**INFORMATIONAL**  
**MEMORANDUM**

**DATE:** September 2, 2004

**TO:** Eastern Perishable Products Association, Inc.

**FROM:** Kane Kessler, P.C.  
Labor and Employment Law Department

**RE:** New Fair Labor Standards Overtime Regulations

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On August 23, 2004, revised regulations regarding overtime pay under the Fair Labor Standards Act (FLSA) went into effect. These regulations may affect the determination as to whether or not certain of your employees are exempt<sup>1</sup> from overtime pay.

This memorandum will provide an outline of the key provisions of the revised regulations. We have also attached a Model Exempt Employee Deductions Policy. This policy will allow your Company to fully take advantage of the New Safe Harbor and permissible deductions created by the revised regulations. **Due to the complex nature of the FLSA, we**

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<sup>1</sup> An employee who is not "exempt" is required by the FLSA to be paid time and one half his/her regular rate of pay for every hour worked in excess of 40 in a workweek. An "exempt" employee is not required to be paid overtime for hours worked in excess of 40 in a workweek. Note that certain unionized employees may be covered by collective bargaining agreements which require overtime payments. These regulations do not affect the entitlement to overtime pay as provided in such agreements.

**strongly recommend that you consult with legal counsel before you recategorize a formerly non-exempt position as an exempt position.**

1. **Salary Level Requirement:** The new regulations raise the minimum weekly salary threshold from \$115 per week to \$455 per week (\$23,660 annually) for all “exempt” employees. This means that an employee who is not paid at least \$455 per week or \$23,660 per year cannot be exempt from the FLSA’s overtime requirements, regardless of their duties. However, employees who are paid \$455 per week or more are exempt only if they also meet one of the new standard “Duties” tests. If you have employees who were categorized as exempt under the old regulations who do not earn \$23,660 per year, you must recategorize them as non-exempt.

2. **New Standard Duties Test:** Under the previous regulations, in order to be exempt, an employee could meet either the “short” duties test or the “long” duties test which varied depending on the employee’s salary level. The new regulations eliminate the “short” and “long” test and imposed a single “standard” duties test for all employees earning over \$455 per week.

Under the new regulations, there are generally six (6) types of exempt categories: *executive, administrative, learned professional, creative professional, computer and outside sales*. A highly compensated employee – that is, an employee who earns over \$100,000 per year – is exempt if he/she meets any one or more of the duties of an executive, administrative or professional employee.

**Executive Employee:** An employee is an exempt *executive* if (1) his/her primary duty is the management of the enterprise or a department of the enterprise; (2) he/she customarily and regularly directs the work of two or more other employees; and (3) has the authority to hire or

fire, or his/her recommendations on personnel decisions are given great weight. Examples of *executive* employees include division heads, department managers and assistant managers.

**Administrative Employee:** An employee is considered an exempt *administrative* employee if (1) his/her primary duty is performing office or non-manual work directly related to management policies or general business operations of the employer; and (2) his/her primary duty includes customarily exercising discretion and independent judgment with respect to matters of significance. Examples of *administrative* employees include sales agents, executive assistants, accountants and human resource employees (other than clerical employees). Administrative assistants may be exempt if they truly exercise discretion and independent judgment with respect to matters of significance. Administrative employees do not need to supervise other employees in order to be exempt.

**Learned Professional:** An exempt *learned professional* employee is considered such if his/her primary duty requires knowledge of an advanced type in a field of science or learning generally requiring an advanced course of study (although it is not necessary for the employee to have actually earned an advanced degree). Examples of *learned professional* employees include doctors, lawyers, nurses, and teachers.

**Creative Professional:** An employee is an exempt *creative professional* employee if his/her primary duty requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Examples of *creative professional* employees include designers, journalists, musicians, actors, writers, and decorators.

**Computer:** An employee is an exempt *computer* employee if his/her primary duty consists of the (1) application of systems analysis techniques or procedures; or (2) design, development, documentation, analysis, creation, testing or modification of computer systems; or (3) design,

documentation, testing, creation or modification of computer programs related to machine operating systems.

**Outside Sales Person:** Finally, an employee is considered an exempt *outside sales* employee if his/her primary duty is “making sales” or obtaining orders and the employee is customarily and regularly engaged away from the employer’s place of business.

3. **Salary Basis and Permissible Deductions:** Even if an employee earns more than \$455 per week and meets the test for one of the above exemptions, he/she will not be considered exempt unless he/she is paid on a “salary basis.” Employees are paid on a salary basis if they regularly receive a predetermined salary each pay period which is not subject to deductions for any variations in the quantity or quality of work performed. Thus, to satisfy the “salary basis” test, an employer may not deduct any amounts from this predetermined salary during any work week in which any work is performed.

Under the previous rules, the salary basis was lost if an employee was suspended without pay for any reason other than the violation of health and safety rules. The new regulations have added an exception which permits “unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of work place conduct rules.” This exception enables employers to hold exempt employees to the same standard of conduct as that required of their non-exempt employees for violations of written work place rules, such as sexual harassment, work place violence, or other similar misconduct. Please note that the DOL specifies that “work place conduct” refers to serious misconduct, not performance or attendance issues, and should not be construed expansively.

The new regulations also clarify that if an improper deduction has been made as a result of a clerical or time keeping error, a “window of correction” exists by which an employer may

reimburse that employee for the salary lost without jeopardizing that worker's "exempt" status. The regulation also creates a new "safe harbor" provision to be utilized in the event of an improper deduction NOT due to an administrative oversight. Under this provision, an exemption is not lost if (1) the employer has a clearly communicated written policy that prohibits the improper pay deductions and includes a complaint mechanism; (2) reimburses employees for any improper deductions; and (3) makes a good faith commitment to comply in the future. If an employer fails to reimburse an employee for an improper deduction, or continues to make improper deductions after receiving the employee's complaint, the "safe harbor" is lost. Because of the important protections offered by this new "safe harbor" provision, the enclosed model Exempt Employee Deduction Policy has been prepared for your guidance.

4. **Conclusion:** All Employers should promptly review the salaries of exempt employees and make sure that none are paid less than \$23,660 per year. The Exempt Employee Deduction Policy should be reviewed and such a policy should be implemented and distributed to exempt employees as soon as possible.

The application of the revised standard duties test is, in our opinion, as complex as the duties test under the old regulations. If you have any questions about the points raised in this memorandum, please contact Kane Kessler's Labor and Employment Law Department by e-mailing [rsacks@kanekessler.com](mailto:rsacks@kanekessler.com).

**This memorandum is intended as a general explanation for informational purposes and not as legal advice. Because each factual situation may present unique legal issues, the recipient is advised to consult with legal counsel concerning specific situations.**

**SPECIMEN**  
**EXEMPT EMPLOYEE DEDUCTION POLICY**

**Policy**

Pursuant to the Fair Labor Standards Act, an employer may not deduct from the salary of an exempt employee for variations in the employee's time and quality of work, except under certain specific circumstances. Improper deductions from an exempt employee's salary is a violation of the policy of the Employer. If improper deductions are taken from your salary in any workweek, you must report this deduction to Human Resources immediately.

**Permitted Deductions**

In addition to the usual statutory deductions for withholding taxes, FICA and Medicare, and any other deductions agreed to by the employee, including but not limited to health insurance co-payments, 401(k) contributions, life insurance premiums, transit checks, etc., the Employer may deduct from an exempt employee's salary for the following reasons:

1. Absence from work for one or more full days for personal reasons other than illness or injury;
2. Absence from work for one or more full days due to illness or injury if the deductions are made pursuant to the Employer's sick leave policy;
3. Unpaid disciplinary suspensions of one or more days imposed in good faith for violating the Employer's safety rules of major significance or for engaging in serious misconduct, such as theft, fighting, gross insubordination, harassment, violations of drug and/or alcohol rules, violations of any federal, state or city law;
4. Unpaid leave taken pursuant to the Family & Medical Leave Act;
5. Offset for any amounts received as payments for jury duty, witness fees or military pay;
6. Proportionate rate of full salary for time actually worked in the first and last weeks of employment.

**Complaint Procedure**

If you believe that there has been an improper deduction from your salary, you must notify Human Resources in writing. The written notification must contain the following information:

- the dates of the pay period in question;
- the date of the check in question; and
- a detailed description of the alleged discrepancy.

Human Resources will investigate the complaint and will endeavor to resolve the matter within 3 business days of receipt of the complaint. In some cases, a longer time period will be required for resolution. If a correction is warranted, it will be made immediately. If the deduction is considered permissible, Human Resources will contact the employee and explain the reason for its decision in writing as soon as possible.

Any employee who is dissatisfied with the decision of Human Resources may appeal the decision within 10 business days directly to the Executive Vice-President.