

employee's daily and weekly tasks in order to be confident of any claimed exemption. Further, historically, deciding which specific activities were not inherently an "essential part of and necessarily incident to" the exempt work proved to be a subjective and difficult standard to apply for employers, employees, as well as Wage and Hour Division investigators. The discretionary powers test has similarly proved to be a subjective and difficult standard to apply. Moreover, making such finite determinations would be made even more difficult in the aftermath of the decisions in *Donovan v. Burger King, Corp.*, 675 F.2d 516 (2nd Cir. 1982), *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982), and similar judicial rulings which hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks. Accordingly, given these developments in judicial construction of the law, the Department is of the view that the discretionary powers provision and the percentage limitations on particular duties formerly applied under the now dormant long test are not useful criteria that should be reintroduced for defining the executive exemption in today's work place.

The proposed regulations at § 541.101 would recognize as an exempt executive any employee who owns at least a 20 percent equity interest in the enterprise in which the employee is employed. Section 541.102 of the proposed regulations would continue the principle that an employee in "sole charge" of an independent establishment or a physically separated branch establishment may qualify as an exempt executive. "Sole charge" of an establishment is defined to include the senior employee with authority to make decisions regarding day-to-day operations and to direct the work of other employees. These provisions appear in the current regulations as exceptions to the percentage restrictions on non-exempt work under the former long test, in recognition of the due weight to be given the freedom from direct supervision and the high degree of executive responsibility enjoyed by the top person in charge of a separate business location, as well as the special status of a partial equity owner of an enterprise. The Department believes that these continue to be valid concepts for special status as executives under the proposed restructured regulations as well. The Department seeks comments on whether the salary level and/or salary basis requirements should be eliminated as unnecessary for sole

charge executives and business owners. We have proposed to eliminate those requirements only for the 20 percent owner, based upon our belief that such an individual likely will share in the profits of the enterprise and that this is an adequate substitute indicator of exempt status.

The proposed regulations also would reorganize, simplify, streamline and update the regulations in other ways. The proposed regulations utilize objective, plain language in an attempt to make the regulations understandable to employees and employee representatives, small business owners and human resource professionals. We also propose to eliminate outdated and uninformative examples and to update definitions of key terms and phrases. The proposed regulations would move a number of sections pertaining to salary issues (current §§ 541.117, 541.118) to a new subpart G (discussed below), where all such provisions will be consolidated. Other sections relevant to several or all of the exemption categories (such as the definition of primary duty and a section regarding application of the exemptions to trainees) would move to a proposed new subpart H (Definitions and Miscellaneous Provisions) to eliminate unnecessary repetition. The following sections of the current regulations have been edited and moved to proposed new subpart H:

Current Section . . .	Moved to . . .	Proposed section
541.101 General .....		541.702
541.103 Primary duty .....		541.700
541.108 Work directly and closely related .....		541.703
541.109 Emergencies .....		541.705
541.110 Occasional tasks .....		541.706
541.111 Nonexempt work generally .....		541.702
541.116 Trainees .....		541.704

Section 541.102 of the current regulations, entitled "Management," has been modified and moved to proposed section 541.103.

Section 541.115 of the current regulations, entitled "Working foremen," has been moved to proposed § 541.106 and renamed, "Working supervisors," although no substantive changes are intended. A new provision on supervisors in retail establishments has been added as proposed § 541.107. Both 541.106 and 541.107 address the difficult issue of classifying employees who have both exempt supervisory duties and non-exempt duties, and the Department invites comments on whether these sections have appropriately distinguished exempt and non-exempt employees. Section 541.106

provides, as in the current regulation, that an employee with a primary duty of ordinary production work is not exempt even if the employee also has some supervisory responsibilities. This situation often occurs in a factory setting where a collective bargaining unit employee who works on a production line also has some responsibility to direct the work of other bargaining unit employees. Another example is a police officer who directs the work of other police officers on the conduct of an investigation but is also a member of a bargaining unit. Bargaining unit members do not become exempt employees simply because they are given some supervisory responsibilities.

The definition of the term "department or subdivision" remains at § 541.104, and the definition of "two or more employees" remains at § 541.105. The Department invites comments on whether the supervision of "two or more employees" required for exemption should be modified to include "the customary or regular leadership, alone or in combination with others, of two or more other employees."

Section 541.106 of the current regulations, entitled "Authority to hire or fire," is proposed to be deleted. The text in this section does not contribute to any further explanation of the requirement, and no further explanation seems necessary. Section 541.107 of the current regulations, entitled "Discretionary powers," and § 541.112 of the current regulations, "Percentage limitations on nonexempt work," are also deleted from the proposed rule for the reasons discussed above.

#### *Subpart C, Administrative Employees, §§ 541.200–.207*

To qualify as an exempt administrative employee under the current regulations, an employee must be paid on a salary or fee basis at a rate of not less than \$155 per week and meet the "long" duties test, or earn \$250 per week and meet the "short" duties test. The long test requires that an exempt administrative employee have a primary duty of either performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; or performing functions in the administration of a school system, or educational establishment or institution, in work directly related to academic instruction or training. In addition, the current regulations require that an administrative employee: Customarily and regularly exercise discretion and