

Overtime Exceptions? Exemptions!

November 15, 2010

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The Fair Labor Standards Act ("FLSA") requires that an employer pay employees overtime -- at least one and a half times the employee's base pay -- for all hours worked in excess of forty (40) hours in one workweek. However, certain employees are "exempt" from the FLSA's overtime mandate if the employee meets certain federally-mandated requirements. For an employee to be considered exempt, there are three tests that the employee must meet:

1. the salary level test;
2. the salary basis test and;
3. the job duties test

Because FLSA regulations regarding exemptions can be complex, this article briefly outlines these three tests and the FLSA requirements for properly exempting an employee.

Salary Level

First, for an employee to even be considered exempt, the minimum salary level an employer must pay is \$455 per week. The employer may pay the \$455 in equivalent amounts longer than one week (i.e., \$910 biweekly; \$985.83 semi-monthly; or \$1971.66 monthly), however, the shortest amount of payment required to meet this test is weekly.

Salary Basis

If an employee meets the minimum salary level requirements, then the employer must determine whether the employee qualifies for the salary basis test. To satisfy this requirement, an employer must pay an employee his or her full salary for any week in which the employee performs any work, no matter how much work the employee performs or how well the employee performs. It is important to remember that if an employer makes improper deductions from an employee's salary, it could result in the loss of the exemption for all employees of the same job classification who are working for the same managers that are responsible for the actual improper deductions.

Job Duties

Once an employer determines that it pays its employee the requisite amount at the required time, the final test that an employee must surmount is the job duties test. The three main job duty exemptions are executive, administrative, and professional, which are also known as the "white collar exemptions." The employee must perform a certain "primary" duty, which means that the duty is the principal, main, major, or most important duty that the employee performs. Whether a duty is the employee's "primary" duty will vary on a case by case basis, but the factors considered are relative importance of the exempt duties,

amount of time spent performing exempt work, freedom from direct supervision, and relationship between the employee's salary and the wages paid to other employees for the same kind of work.

To qualify for the executive duties exemption, the employee's primary duty must be managing the business or a customarily recognized department or subdivision. Acceptable management duties generally include interviewing, selecting and training employees, setting and adjusting pay or work hours, disciplining employees, and maintaining production or sales records. Additionally, the exempt employee must normally and regularly direct the work of two or more full-time employees. Finally, the exempt employee must have the authority to hire and fire or their suggestions and recommendations about hiring, firing, advancement, promotion, or other change of status must be given particular weight.

To qualify for the administrative duties exemption, the employee's primary duties must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. Examples of management or general business operations include tax, finance, human resources, employee benefits, purchasing, advertisement, and quality control. The employee must also exercise discretion and independent judgment with respect to significant or important matters concerning the business. An employee is considered to exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.

Under the regulations, there are two potential professional duties exemptions: the learned professionals and the creative professionals. To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science and learning that is customarily acquired by a prolonged course of specialized intellectual instruction. Such advanced knowledge cannot be obtained at the high school level and these employees are typically analyzing, interpreting, or deducing various facts and circumstances. Some examples of potential exempt learned professionals are accountants, engineers, chefs, pharmacists, and licensed funeral directors or embalmers. Accounting clerks, bookkeepers, paralegals, legal assistants, and engineering technicians typically do not qualify for this exemption.

To qualify for the creative professionals duties exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Some examples of recognized fields of artistic or creative endeavor include music, writing, acting, or graphic arts. A creative professional's exempt status will be determined on a case by case basis depending on the extent of invention, imagination, originality, or talent used.

In this cost-savings environment, employers may want to consider reassessing their employee's exemption status, which could reveal that they are paying costly overtime to an employee who, in fact, qualifies for an exemption. Or that an employee may be exempt but only performing nominal duties that could be performed more fiscally by an hourly employee. However, as always, there are certain exceptions to these exemptions. Employees who are improperly labeled as "exempt" may be entitled to unpaid overtime and the employer may be liable for further penalties, including monetary damages for willful violations. Thus, it is imperative that employers contact labor and employment counsel to ensure that all three overtime exemption requirements are met.