White Collar Exemptions: Do Employers Need to Pay Overtime Compensation to H-1B Workers?[i] [Part I[ii]]

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The H-1B visa program allows U.S. employers to temporarily hire non-immigrants to fill specialized jobs in the United States. Specialized occupations are those occupations that require a "theoretical and practical application of a body of highly specialized knowledge, and …attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Employers who seek to hire an H-1B nonimmigrant in a specialty occupation must first submit a Labor Condition Application ("LCA") to the Department of Labor (DOL) with the goal of obtaining DOL approval. DOL approval ensures that the employment of H-1B visa holder does not adversely affect wages or work conditions of U.S. workers, as required by the Immigration and Nationality Act.

The employer, on the LCA, must attest that it is offering, and will offer during the period of employment, the *greater* of: (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or (2) the prevailing wage level for the occupational classification in the area of employment. In addition, the LCA, among other things, must specify the occupational classification in which the worker will be employed, the wage rate and conditions under which they will be employed. Once DOL certifies the LCA, the employer submits paperwork on behalf of the employee to the United States Citizenship and Immigration Services ("USCIS") and requests an approval of H-1B (I-129) petition.

Although the LCA requires the employer to specify the wage rate, it is silent on the issue of overtime compensation. To understand why the LCA is silent on overtime compensation, OR, in the alternative, whether employers employing H-1B workers are required to pay overtime compensation, it is pertinent to go beyond the regulations governing the LCA and to closely examine the provisions of the Fair Labor Standards Act (FLSA) and its related regulations.

The FLSA, a federal law, requires that employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half of the regular rate of pay for all hours actually worked in excess of 40 hours in a workweek[iii]. The FLSA applies to: (1) employees who are engaged in interstate commerce or in the production of goods for commerce (commonly referred as "Individual Coverage" Test); or (2) employees who are employed by an enterprise[iv] engaged in commerce or in the production of goods for commerce, unless the employer can claim an exemption from coverage (commonly referred as "Enterprise Coverage" Test).

Several exemptions exist that relieve an employer from having to meet the statutory minimum wage, overtime, and concomitant record-keeping requirements. Exemptions are narrowly construed against the employer asserting them. Consequently, employers and employees should always closely check the exact terms and conditions of an exemption in light of an employee's actual duties before assuming that exempt status might apply to the employee. The ultimate burden of supporting the actual application of an exemption rests on the employer. Note that nothing in the FLSA or DOL regulations prevents an employer from paying a worker at or above the minimum wage or to provide overtime pay even if the worker is not, by law, subject to the minimum wage or overtime pay requirements.

Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as a *bona fide* executive, administrative, professional and/or outside sales employee. Among others, Section 13(a)(17) also exempts certain computer professionals paid at least $27.63 per hour from the overtime provisions of the FLSA. It is important to highlight that job titles do *not* determine "exempt status" under the law. A job title can be indicative of potentially exempt status but it is not wholly determinative of the issue. In order for an exemption to apply, an employee's specific job duties and salary must meet the parameters set forth in the FLSA and its concomitant regulations.

To qualify for the executive employee exemption, in addition to being compensated on a salary basis at a rate not less than $455 per week ($23,660.00 annually), the employee's primary duties must involve managing the enterprise, or managing a customarily recognized department or subdivision[v] of the enterprise. Moreover, the exempt employee must: customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and have the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Similar to executive employees, administrative employees qualifying for exempt status must be compensated on a salary or fee basis at a rate not less than $455 per week ($23,660.00 annually). Also, to claim an exemption, the administrative employee must satisfy the following two requirements: (1) The employee's primary duty 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; and (2) The employee's primary duty must involve the exercise of discretion and independent judgment with respect to matters of significant importance to the business.

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[i] This article does not cover rights and benefits of public agency employees under FLSA.

[ii] This is the first part of the three part article. This part begins with the discussion about "why LCA is silent on overtime compensation, OR, in the alternative, whether employers employing H-1B workers are required to pay overtime compensation" by providing a basic background about the H-1B visas and the Fair Labor Standards Act (FLSA) and its related regulations. Part II of the article explores the question of "why H-1B employees are *usually* treated as an "exempt employee" under the FLSA". Finally, Part III will build on the Part II discussion and will also

examine the situations involving H-1B employees working in occupation(s) that usually do not require an advanced specialized academic degree.

[iii] A workweek is a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods. The workweek does not have to coincide with the calendar week, but instead it may begin on any day of the week and at any hour of the day.

[iv] An enterprise is defined as an individual, corporation, school, university, government agency or healthcare institution engaged in interstate commerce that directly or indirectly employs workers and that has an annual gross volume of sales made or business done of not less than $500,000. (The dollar volume test, however, does not apply to health care institutions, schools, universities and government agencies, which are covered by the Act if engaged in interstate commerce regardless of their volume of business.)

[v] The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function