

## **(6) Exempt Status of Specific Jobs**

### **Am I Exempt from the overtime provisions of the FLSA?**

The FLSA provides for certain categories of employees that are not entitled to receive overtime compensation regardless of the amount of hours the employee works in a workweek.

Therefore, the first step in determining whether an employee is entitled to overtime is to examine his or her exempt status. Simply put, if the employee is exempt, his/her employer is not obligated to pay him/her overtime compensation. The good news is, however, that the courts typically construe exemptions to the FLSA's overtime provisions against the employer. The most common exemptions applied by the courts are called the "white collar" exemptions. These exemptions include the "executive," "administrative," and "professional" exemptions.

### **First Things First**

The most common mistake made by employers and employees alike is that simply paying an employee a salary makes the employee exempt. THIS IS NOT TRUE. Being paid a salary is not the same as being an exempt employee. Rather, to be "exempt," each of the following criteria must be met: A. The employee must be paid a fixed salary or fee basis not subject to improper deductions; AND B. The employee must perform the duties identified by the Department of Labor and the courts of an exempt employee. Remember, that if an employee is paid on an hourly, not salaried basis, he/she cannot be exempt and is entitled to overtime regardless of the type of duties or work they perform. The only exception to this rule is for teachers, lawyers, and doctors. Another thing to remember is that these exemptions are called the "white collar" exemptions. Therefore, they do not apply to "blue collar" workers such as laborers, police officers, firefighters, construction workers, woodworkers, or other types of employees that do not work in an office or "white collar" environment.

### **Salary Basis**

As of August 23, 2004, to meet the salary basis test, an employee must be paid a predetermined salary of at least \$455 per week. For work performed prior to August 23, 2004, the employee had to be paid a predetermined salary of \$250 per week. If an employer makes certain improper deductions to this predetermined salary, the employee is not paid on a salary basis and is entitled to overtime compensation. For example, if the employer deducts from the employee's salary because there is no work to perform, the employee is not paid on a salary basis and is entitled to overtime compensation. Additionally, if the employer forces the employee to take time off from work, the employee still is entitled to receive all of his/her predetermined salary for the week. The general rule is that, if a salaried employee works any portion of the workweek (even a few hours on one day of the week), the employee must be paid his/her full salary to meet the salary basis test. Employers are, however, permitted to deduct from an employee's salary without forfeiting the employee's exempt status as follows:

### **Permissible Deductions**

if the employee is absent from work for one or more full days for personal reasons, other than sickness or disability;

if the employee is absent from work for one or more full days due to sickness or disability if the deductions are made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences (such as short term disability or other leave plan);

as an offset or to reduce any amounts received by the employee as payment for jury fees, witness fees, or military pay if the employee is absent from work for these reasons;

if the employer imposes a penalty for violating safety rules of "major significance" (such as smoking in an explosives plant);

if the employer imposes an unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules. An example of such an instance would be a violation of the employer's sexual harassment or workplace violence policies;

to pay a proportionate part of an employee's salary for partial time actually worked in the first and last weeks of employment; and

unpaid leave taken pursuant to the Family and Medical Leave Act ("FMLA");

### **Common Improper Deductions**

The following deductions are examples of improper deductions made by an employer which likely will defeat the claim that an employee is paid on a salary basis. The result of these improper deductions means that the otherwise exempt employee may be entitled to overtime compensation for the weeks in which such improper deductions were made:

deductions for a partial-day absence to attend a parent-teacher conference;

deduction of a day of pay because the employer was closed due to inclement weather or a company holiday;

deduction of three days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty;

deduction for a two day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences (under a disability or other leave plan)

### **Duties Tests**

Assuming an employee is truly paid on a "salary basis," he/she must still perform certain duties to be considered exempt and thus, not entitled to overtime. So, even if an employee is paid on

a "salary basis," but does not perform the duties described below, he/she is entitled to receive overtime compensation for hours worked over forty (40) in a workweek. The most common exemptions employers try and apply are the executive, administrative, and professional exemptions. The duties required to be performed to meet each of these exemptions is described below.

### **Executive**

An employee who falls within the executive exemption must regularly:

supervise two or more other employees;

manage an organization, department, or subdivision of the company; and

have the authority to hire and fire employees or make recommendations regarding these tasks that are given significant consideration in the ultimate decision making process.

Importantly, an employee's fancy job title means nothing if the employee does not actually perform the above duties. Therefore, a job title that suggests that an employee is in charge when, in reality, the employee has no supervisory authority is not performing executive job duties. Accordingly, a "manager," for example, who does nothing more than the employees he "supervises" is not performing executive job duties.

### **Administrative**

The most frequently litigated, and most difficult exemption to interpret is the administrative exemption. Generally speaking, an employee performs administratively exempt duties if he/she:

performs "office" or non-manual work that is related to management of the company or the general business operations of the company;

regularly exercises "independent discretion and judgment" with regard to matters of significance.

Generally, employees who fall within the administrative exemption perform work that is of a relatively high-level of importance to the company, and involves the use of significant judgment and discretion (such as comparing two alternatives and having the ability to choose one or the other). Tasks such as filing, filling out forms, preparing routine reports, answering telephones, making travel arrangements, working on customer "help desks," and similar duties are not likely considered administratively exempt. While again, job titles alone mean little, the Department of Labor has identified the following types of jobs that may fall within the administrative exemption if the above criteria are met: insurance claims adjusters, human resource managers, computer/network administrators, financial services providers, and management consultants.

On the other jobs such as clerks, examiners, graders, financial product salespersons, and processors. Again, while the foregoing constitutes general guidelines for interpreting the administrative exemption, it is important to remember that each position must be evaluated on a case by case basis.

### **Professional**

Typically, the professional exemption includes persons such as doctors, lawyers, accountants, teachers, computer programmers and network administrators. Employees are considered to perform exempt professional duties if their work involves the application of advanced, usually specialized, learning or credentials of the type commonly associated with the "traditional learned professions" such as medicine, law, accounting or engineering. In most instances, a professionally exempt employee will possess a specialized academic degree in their respective field, and exercise significant independent judgment and discretion in performance of their duties. Recently, the Department of Labor identified the following categories of employees (in addition those identified above): (a) registered or certified medical technologists; (b) registered nurses (RN); (c) dental hygienists; (d) physician assistants; (e) chefs; and (f) athletic trainers. To the contrary, the Department of Labor identified the following categories of employees as NOT falling within the professional exemption: (a) cooks; (b) licensed practical nurses (LPN); (c) bookkeepers; (d) paralegals or legal assistants; and (e) trainees. Other exemptions as well

The bottom line is this - exemptions need to be examined on a case by case basis. There are other exemptions that apply to employees in particular industries (such as employees who work at auto dealerships, in agriculture, as taxi drivers, as commissioned sales employees, as computer professionals, outside sales representatives, etc.) Each exemption has particular requirements that need to be examined prior to determining whether an employee is exempt. The good news for employees, however, is that exemptions are typically construed in favor of the employee. Therefore, if you are unsure whether your job duties or pay structure make you exempt, contact a qualified FLSA lawyer to discuss whether you may be entitled to overtime compensation.