

## **DETERMINING WHETHER AN EMPLOYEE IS EXEMPT FROM OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT**

Recently, there was a movement by the U.S. Department of Labor towards revising the Fair Labor Standards Act (FLSA) regulations. In part, the FLSA establishes overtime at time-and-a-half pay for work that exceeds 40 hours per week. Section 13(a)(1) of the FLSA exempts from the wage and hour provisions of the Act “any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools).” The proposed changes to the FLSA would have modified the tests for determining who is exempt from overtime. However, the changes hit a roadblock when the Senate voted to prevent the Department of Labor from finalizing the regulations. The current regulations are, therefore, still applicable and this article is intended to be a general guide to the current exemptions for “white collar” employees.

Most employees are “nonexempt,” meaning they are entitled to overtime under the FLSA. However, there are general exemptions for “white-collar” employees. To be exempt and, therefore, not entitled to overtime under the FLSA, the employee must be (1) paid on a “salary basis” and (2) his/her job duties genuinely must be high-level “executive,” “administrative,” or “professional.” In addition, there are several overtime exemptions which are specific to particular industries or jobs; however, they are not the subject of this article.

It would be incorrect to assume that just because an employee is paid a “salary” rather than an hourly wage, the employee passes the salary basis test. Under the salary basis test, an employee is exempted if they are (1) paid the same amount every week regardless of the actual hours spent on the job and (2) not subjected to a reduction in compensation based on the quantity or quality of work. In essence this means that even if the employee works only one hour during a work period, he/she would still receive the full amount of the weekly salary.

The second part of the test to determine FLSA exemption is the duties test. In order to be exempt, the employee must perform high level “executive,” “administrative,” or “professional” duties. For the purposes of exemptions, job titles are relatively unimportant. Hence, even if a secretary is called an “administrative or executive assistant,” he/she still would be a secretary. The most important consideration is what the employee actually does on a daily basis.

The “executive” exemption applies to employees who are involved in the management of his/her department and regularly supervise two or more employees. Also, the employee’s management activities must be his/her primary duty (over 50% of the employee’s time). Further, an exempt executive employee must have the authority to hire, fire or promote other employees or at a minimum, be able to recommend such actions to those who are in charge.

The “administrative” exemption applies to relatively high level support or staff personnel who perform office or nonmanual work. An exempt administrative employee’s work is directly and primarily related to management policies or general business operations. The employee’s work also requires the exercise of judgment and discretion. Determining whether an employee is covered by the administrative exemption requires a detailed analysis on a case-by-case basis. Once again, it is important to not focus on job titles. Further, it is important to distinguish

between the use of judgment and discretion from the use of high level skills which may not be exempt.

The FLSA regulations specifically speak to the exemption of employees engaged in the overall academic administration of an elementary or secondary school system. These employees include the superintendent and those of his/her assistants whose duties primarily are concerned with administration of such matters as curriculum, quality and methods of instruction, measuring and testing the learning potential and achievement of students, and establishing and maintaining academic and grading standards. Principals, vice principals and department heads are all exempt. However, secretaries and support staff would, in most cases, not be exempt from overtime pay.

The final exemption is the “professional” exemption. This exemption includes physicians, lawyers, teachers and accountants; thus, teachers are not entitled to overtime under the FLSA.

It must be stressed that there are no “bright-line” tests to determine whether an employee is exempt from overtime. The FLSA regulations merely provide guidance and generalizations to use in determining if the “white collar” exemption applies. As noted above, it is necessary to review each case on an individual basis.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.