

Hello. It looks like you're using an ad blocker that may prevent our website from working properly. To receive the best experience possible, please make sure any blockers are switched off and refresh the page.

If you have any questions or need help you can email us

CONTRIBUTORS

Are Your Salaried Employees Truly Exempt?

There are individuals in every workplace in the United States who are paid a salary and considered exempt from pay for overtime after forty hours in a work week. While the issue of whether employees are properly classified as exempt is always an issue

...

Richard D. Alaniz, JD • Jan. 17, 2019



There are individuals in every workplace in the United States who are paid a salary and considered exempt from pay for overtime after forty hours in a work week. While the issue of whether employees are properly classified as exempt is always an issue that could potentially arise, exempt status is more likely to be called into question if and when the Department of Labor (DOL) goes forward with a proposed increase in the salary amount required to qualify as exempt. It has been reported that such a proposed rule could be issued in early 2019. Therefore, now might be a good time to discuss some of the issues likely to arise if the salary amount is changed.

In May 2016, the DOL proposed to more than double the current \$23,660 per year threshold for exempt status. The proposed increase to \$47,476 was effectively blocked by court action. It remained blocked as the Trump administration took office and remains so today. The new Secretary of Labor, Alex Acosta, early in his tenure stated that a revised rule would likely be issued at a later date. He also commented that while he did not support such a drastic increase, some increase was needed to keep pace with business reality. The last change occurred in 2004. According to some reports, any new rule is likely to propose a salary threshold in the range of \$31,000 to \$33,000 or so. This would require that an exempt employee be paid a weekly salary of approximately \$600 versus the current salary threshold of \$455 per week.

It is not clear how many additional employees could become eligible for overtime pay if the salary level is increased. It would certainly be at least several million nationwide. Employers in some Southern states, which tend to have somewhat lower salaries might be more seriously impacted. Challenges to being classified as exempt after the overtime rules are revised can be anticipated from those employees who feel that based upon their duties or lack thereof, they should qualify for overtime pay.

It is virtually certain that lawsuits will be filed since misclassification is one of, if not the most frequently challenged Fair Labor Standards Act (FLSA) issues. In fact, employers have paid over \$3.6 billion since 2007 to settle wage and hour discrimination claims, and wage and hour claims continue to be a thriving area of litigation.

There are many law firms that do nothing more than sue employers over claims of unpaid overtime. It is therefore imperative that those employees that you classify as exempt from overtime pay are truly properly classified. If overtime is common in your business, the back pay liability could be significant. The liability period can go

back three (3) years. In addition, penalties also include liquidated (double) damages and attorney's fees.

How Does an Employee Qualify as Exempt from Overtime?

To be properly classified as exempt, the person must satisfy the two part, "salary" and "duties", tests. The person must be paid at or above the required salary level (currently \$455 per week) and the duties of the employee must fall within one of the so-called "white collar exemptions". They are generally referred to as the "executive", "administrative" and "professional" exemptions.

Executive Exemption

For the "executive" exemption to apply, the person's primary duties must be management of the enterprise or a customarily recognized department or subdivision thereof. The person must also direct the work of two or more other employees, and have authority to hire or fire employees or have particular weight given to his or her recommendations on employee issues. The most common positions falling under the executive exemption are business owners or managers, department managers, and supervisors.

Administrative Exemption

The "administrative" exemption is the one most commonly used by businesses to classify employees as exempt and also the one most frequently litigated. To qualify, it requires the requisite salary and that the person perform office or non-manual work directly related to the management of the business. In addition, the employee must exercise discretion and independent judgment on significant matters. One way of considering the basis for the exemption is to make the distinction between "production" work and "administrative" work. However, not all "administrative" work is considered exempt.

The exemption would not apply to an employee responsible for performing duties that involve clerical or secretarial work, answering phones, filing or performing other repetitive and routine office work. Some of the well-recognized exempt administrative positions include human resources personnel, purchasing agents, insurance claim adjustors, office managers, payroll managers and executive assistants to business owners.

Professional Exemption

In considering who qualifies as an exempt professional employee, the DOL recognizes four separate categories: “learned professionals”, “artistic or creative professionals”, “teachers” and employees engaged in the practice of law or medicine. Most businesses will have few, if any employees who qualify as a professional. If they do, such as engineers, the basis for exempt status is usually clear. They will have a college degree or comparable training qualifying them as a professional in their area of expertise.

Computer Professionals

The DOL also recognizes certain computer professionals as exempt. The FLSA actually has two separate exemptions for these types of employees. In addition to an exemption with the same salary level as that of other categories, \$455 per week, there is also an exemption for computer employees who are paid at least \$27.63 per hour. The types of employees that qualify for these exemptions are computer system analysts, computer programmers, software engineers and other similarly skilled professional employees. The exemption does not apply to persons whose duties are to install, upgrade, or maintain computer station software or to those who install hardware and cable for their employer’s local area network. Unless they have the educational/professional background, the company’s general I.T. employees do not qualify for the exemption.

Outside Sales

The FLSA also provides an exemption for employees engaged in “outside sales” as opposed to inside sales. This exemption must satisfy both a duties and a location test. No specific salary amount is required. However, the primary duty must be making sales while regularly engaged away from the employer’s place of business. Also included within the exemption are employees whose primary duty is obtaining orders or contracts for the performance of services or the use of facilities when payment for the services or facilities will be paid by the customer.

Outside sales employees generally work alone, away from the place of business, have minimal supervision, and normally receive commissions based on their successful sales rather than hours worked. Inside sales personnel are generally not exempt unless they qualify for the “executive” or “administrative” exemptions. These are among the most frequently misclassified employees.

Final Thoughts on the Overtime Exemption

The most common error in misclassification is the assumption that merely paying an employee at least the required salary of \$455 per week results in exempt status. It is quite common for various non-manual office jobs to be paid on a salary basis. However, to be an exempt position under the FLSA requires both the appropriate salary and performance of the specified duties of the relevant exemption. In some work settings there may be numerous employees in a particular job classification that are misclassified. If the misclassified employees do not routinely work more than 40 hours per week, the potential exposure for unpaid overtime would be minimal. However, if the issue ever does arise, the penalties would include any overtime pay due as well as liquidated damages and attorney's fees.

When the administration finally proposes a new salary level for purposes of exemption from overtime, there is also a possibility that the "duties" test may be revised as well. Such a change would require extensive analysis for its justification and that makes it less likely that a change would be proposed. There are obviously more significant issues confronting the Trump administration on all fronts. However as noted, once a rule is proposed but not yet effective, it might be quite beneficial for employers to carefully review the job functions of all their salaried employees.

This review should be more substantial than simply identifying which exempt employees currently make less than \$33,000 per year or whatever the new salary threshold may ultimately be. Considerations that should also be examined include the number of hours potentially affected exempt employees routinely work, possible salary compression issues (comparison with other salaried positions) if the salary is increased, and the potential effect on incentive payments or similar bonus arrangements.

Employers should be equally cognizant of workplace morale. Simply re-designating previously exempt employees as non-exempt to avoid a salary increase can have serious negative workplace effects. First, it is likely that some employees will view this as a demotion. Second, previously exempt employees could lose work schedule flexibility, benefits that are provided only to exempt employees, and perhaps equally important to many, their perceived status in the workplace. By carefully considering all these factors, you may be able to avoid the misclassification challenges that some employers face when an exempt status is questioned, or a new salary threshold is implemented.

=====

Richard D. Alaniz is a partner at Alaniz Law & Associates, a labor and employment firm based in Houston. He has been at the forefront of labor and employment law for over forty years, including stints with the U.S. Department of Labor and the National Labor Relations Board. Rick is a prolific writer on labor and employment law and conducts frequent seminars to client companies and trade associations across the country. Questions about this article, or requests to subscribe to receive Rick's monthly articles, can be addressed to Rick at (281) 833-2200 or ralaniz@alaniz-law.com.

Contributors • Human Resources & Payroll • Payroll • Product & Service Guide •
Richard D. Alaniz • Article

CPAPA is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors.

© 2022 Firmworks, LLC. All rights reserved