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**Richard D. Alaniz** • 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

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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

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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 adjusters, 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

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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 maybe numerous employees in a particular job classification that

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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.

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