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A Broadcaster's Guide to the Fair Labor Standards Act

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The Fair Labor Standards Act (the "FLSA") is the federal law governing wage and hour requirements for employees. The FLSA requires that employees with nonexempt positions be paid at least the federal minimum wage and be compensated for overtime at 1.5 times their regular rate of pay for any time exceeding 40 hours that they work in any given workweek. Although the FLSA applies to all employers, the Act also contains provisions applicable only to certain broadcasters. This Advisory only addresses federal law. State law may impose stricter standards than federal law as to which employees are exempt from overtime, and employers must ensure that they meet both federal and applicable state law standards.

The FLSA exempts from the Act's overtime and minimum wage requirements certain classifications of employees who are both salaried and meet specified "white collar" duties tests. (The salary-basis test does not apply to outside sales employees or to computer professionals paid at an hourly rate not less than $27.63 an hour.) In addition, the amount of employees' salaries can make the difference between their jobs being classified as exempt or nonexempt. The minimum salary for exempt status is $455 per week ($23,660 annually). The regulations also include an exemption for "highly compensated" employees whose total annual compensation is at least $100,000, if the employee customarily and regularly performs one or more exempt duties of the executive, administrative, or professional classifications.

Exempt classifications applicable to all employers include professional employees; executive employees; administrative employees; skilled computer employees; outside sales employees; and highly compensated employees performing executive, administrative, or professional tasks. The regulations also include a combination exemption for individuals who do not fall neatly into any of those six categories yet perform duties sufficient to qualify for exempt status. In addition, the FLSA includes a special exemption from overtime pay requirements for certain employees of small-market radio and television stations.

Properly classifying employees under the FLSA is critical to avoiding legal liability. Employers who misclassify employees risk liability for back overtime pay, attorneys' fees, and liquidated damages. Employees can be held to be wrongly classified as exempt if their positions do not meet the duties test or if the employer makes improper deductions from their salaries. The basic principle of the salary-basis requirement is that exempt employees must receive their full salary for any workweek in which any work is performed, regardless of the number of days or hours worked or the quality of the work product. Thus, docking an exempt employee's pay for a partial-day absence would violate the salary-basis test and destroy the employee's exempt status—and the employer could face substantial liability for payments for overtime worked by that employee. Moreover, an employer that has an actual practice of improper salary deductions can destroy the exempt status not only of the employee from whom the improper deduction was made but also of any similarly situated employees that are subject to the same policy.

This Advisory gives a brief overview of each of the exempt classifications and highlights the special exemption applicable to small-market broadcasters.

Professional Employees

- The employee must be compensated on a salary basis at a rate of not less than $23,660 annually, exclusive of board, lodging, or other facilities; and
- The employee's primary duty must be the performance of work either requiring:
    - knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (for employees classified as "learned professionals") or
    - requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor (for employees classified as "creative professionals"). This includes such fields as music, writing, acting, and the graphic arts.

      Pointer: Because the duties of creative employees vary widely, the determination of exempt creative professional status must be made on a case by case basis, depending on the extent of the invention, imagination, originality, or talent exercised by the employee.

      Pointer: Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television, and other media are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

Executive Employees

- Compensation must be on a salary basis at a rate of not less than $23,660 annually, exclusive of board, lodging, or other facilities;

- The employee's primary duty must be the management of the enterprise in which the employee is employed or of a customarily recognized department of subdivision thereof;

- The employee must customarily and regularly direct the work of two or more other employees; and

- The employee must have the authority to hire or fire other employees. Alternatively, if the employee's authority is not exclusive, the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight by the employer.

  Pointer: In deciding whether a particular employee is exempt, a common mistake is for employers to focus uniquely on the requirement that the employee customarily and regularly direct the work of two or more other employees. Note that this responsibility alone will not merit the classification of an employee as an executive. The balance of the previously listed factors must also be fulfilled.

Administrative Employees

- The employee must be compensated on a salary basis at a rate of not less than $23,660 annually, exclusive of board, lodging, or other facilities; and

- The employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; and

- The employee's primary duty must include the exercise of discretion and independent judgment on matters of significance.

  Pointer: The regulations provide illustrations of duties that involve the exercise of discretion with respect to matters of significance. For example, administrative employees who have the discretion to commit the employer in matters of financial significance (such as through purchasing or budgeting) are generally classified as exempt.

Computer Employees

- The employee must be compensated either (a) on a salary or fee basis at a rate of not less than $23,660 annually, exclusive of board, lodging, or other facilities, or (b) at an hourly rate not less than $27.63 an hour; and

- Te employee's primary duties must consist of the following: (a) the application of systems-analysis techniques and procedures, including consulting with users to determine hardware, software, or functional specifications; (b) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (c) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (d) a combination of these duties, the performance of which requires the same level of skills.

Pointer: The regulations specifically provide that "job titles are not determinative of the applicability of this exemption," due to the fact that "job titles vary widely and change quickly in the computer industry." Hence, neither a job title that references computers nor the mere fact that an employee works with computers suffices by itself to qualify an employee for the "computer employee" exemption.

Outside Sales Employees

- Salary requirements applicable to other exempt employees do not apply to outside sales employees; and
- The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which consideration must be paid by the member, client, or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business (i.e., headquarters or other office) in performing the primary duty.

Pointer: Work that is in support of an employee's own sales, such as designing promotional materials, will not disqualify an employee from the outside sales exemption, even if the employee devotes significant time to those duties. On the other hand, work that is performed in support of others' sales, such as that performed by customer service employees, does not qualify for the outside sales exemption.

Highly Compensated Employees

- An employee whose primary duty includes performing office or nonmanual work and who receives a total annual compensation of at least $100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

Pointer: Employers may make one catch-up payment during the last pay period, within one month after the end of the year, or within one month after the employee's termination, to bring an employee's total compensation for the year up to the $100,000 mark to classify the employee as exempt.

Combination Exemption

- Employees who perform a combination of exempt duties as described in the other five exempt-employee classifications may qualify for exemption under this category.

Pointer: The regulations provide limited guidance on what sort of positions qualify for the combination exemption, so there is somewhat more risk for association employers who rely on this exemption to avoid paying overtime. It is advisable to seek legal counsel before classifying an employee as exempt under the combination exemption.

Special Overtime Exemption for Small-Market Radio and Television Station Employees

Unlike the "white collar" exemptions available to all employers, this special exemption applies only to the overtime requirements of the FLSA, but not to the minimum wage requirements.

Each of the following three requirements must be met in order that an employee may be exempt from overtime requirements:

- The employee must be employed as an announcer, or a news editor, or a chief engineer;

  - An announcer is an employee who appears before the microphone or camera to introduce programs, read news announcements, present commercial messages, give station identification and time signals, and present other similar routine on-the-air material. In small stations, an announcer may, in

    addition to these duties, operate the studio control board, give cues to the control room for switching programs, make recordings, make the necessary preparations for the day's programs, play records, or write advertising, promotional or similar type copy.

  - A news editor is an employee who gathers, edits and rewrites the news. A news editor may also select and prepare news items for broadcast and present the news on the air.

  - A chief engineer is an employee who primarily supervises the operation, maintenance, and repair of all electronic equipment in the studio and at the transmitter and is licensed by the Federal Communications Commission as a Radio Telephone Operator First Class. In small stations, only one such engineer may be employed, and in some cases he may be assisted by part-time workers from other departments. Where two or more engineers are employed by a station, only one may qualify as chief engineer—the one who, on the basis of the factual situation, is in charge of the engineering work.

    Pointer: This exemption applies only to an employee who is employed "primarily" as an announcer, news editor, or chief engineer. While no bright-line rule exists, generally speaking, where an employee spends more than half of the hours he works in a workweek in a named occupation, he will be considered to be primarily employed in that occupation during that workweek.

- The employee must be employed by a radio or television station;

  Pointer: Employees of independent contractors and of others who work for a radio or television station but who are not "employed by" such station are not exempt under this exemption even if they engage in the named occupation.

- The major studio of such radio or television station must be located in a city or town which:

  - has a population of 100,000 or less, provided that the city or town is not within a larger metropolitan area that has a population greater than 100,000; or

  - has a population of 25,000 or less, even if the city or town is within a larger metropolitan area that has a population greater than 100,000, provided that the smaller city or town is at least 40 airline miles from the principal city in the larger metropolitan area.

    Pointer: A "major" studio for purposes of the exemption is the FCC required "main studio" of the radio or television station

To avoid misclassification of employees as exempt—and the significant penalties that may result—practice the following safeguards:

- Maintain specific, current, and accurate information on individuals' job duties to identify positions that are explicitly designated as exempt or nonexempt under the regulations. (Attorneys, for example, are expressly included in the "learned professional" exemption, if they meet the salary-basis test. Emergency medical technicians, on the other hand, are, by regulation, nonexempt.)

- Review borderline positions for compliance with the regulations.

- Include in your employee handbook a policy explaining the salary basis test for exempt positions and barring improper deductions from the salary of exempt employees. Under the regulations, if an employer has an actual practice of making improper deductions from the salary of exempt employees, then all employees in the same job classification working for the same managers responsible for the improper deductions will lose their exempt status, which can create significant back overtime liability, However, the regulations create a "safe harbor" for employers that (1) have a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburse employees for any improper deductions, and (3) make a good faith commitment to comply in the future. In such cases, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints. The Department of Labor has published a model policy on salary deductions.[1]

- Add language to workplace conduct policies regarding the possibility of unpaid suspension for violations of those rules. Unless unpaid suspensions are expressly designated as possible penalties for violations of workplace conduct rules, the regulations prohibit unpaid partial-week suspensions for exempt employees who violate such rules.

- Be mindful that state and local laws may impose heightened wage and hour requirements and even increased standards for classifying positions as exempt. For example, many localities mandate a higher minimum wage than the federal minimum wage rate, and California law requires employers to calculate overtime for nonexempt employees on a daily basis for any hours worked over eight in one day, among other more stringent wage and hour requirements. You must comply with both the federal standards and any heightened state or local standards for employees in those jurisdictions.

Live Link

U.S. Department of Labor, Model Salary Basis Policy, Overtime Security for the 21st Century Workforce

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[1] http://www.dol.gov/esa/regs/compliance/whd/fairpay/modelpolicy_pf.htm