Insights, News & Events

# FLSA REGULATIONS: BASIC PRINCIPLES ON EMPLOYEE OVERTIME EXEMPTIONS

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(Part 2 of the Wage-Hour Compliance Series)

This Part 2 in our series addresses the challenge that businesses face in complying with the FLSA rules on treating certain employees as "exempt" from the law's overtime pay requirement. The litigation explosion over exemption disputes is a sign that the rules on exemptions are not simple to interpret and apply.

Employers understandably struggle with the question of whether or not a particular employee qualifies for one of the overtime exemptions under the FLSA. The regulations defining the most familiar exemptions (Executive, Administrative, Professional, Outside Sales, and Computer Employee) often seem ambiguous or worse. **Making things more challenging, the burden of proof in a contested exemption case is on the *employer***.

To protect themselves, employers should ensure that every FLSA exemption they claim is fully justified and properly applied. The following basic principles on employee overtime exemptions should be the starting place for an internal review:

An employee is not exempt simply because he or she is paid a salary rather than at an hourly rate, management thinks of the person as a manager or as being indispensable to the business, or because the employee "wants to be" exempt.

There are specific and often detailed criteria which limit the employees to whom exemptions may be applied. **It is the *employer's* legal burden to show that each exemption requirement is met**; employees are not required to prove that they are eligible for overtime pay.

**Exemption criteria usually apply on an employee-by-employee basis**. There is risk in deciding who is exempt based simply upon things like job descriptions, generalizations about what groups of employees do, or conventional wisdom that "everybody" treats a particular position as being exempt.

The U.S. Labor Department and the courts construe exemptions very narrowly. Doubt is routinely resolved against the employer.

The **exemptions most often at issue are those for so-called "white collar" employees**: executive, administrative, professional, computer and outside sales employees and certain "highly compensated" employees.

The detailed and elaborate regulations actually defining those exemptions are compiled at 29 C.F.R. Part 541. Those regulations were revised extensively in 2004. These are exemptions from the *minimum wage, overtime, and timekeeping* requirements.

- ***Reminder***: In addition to the "duties" tests applicable to those particular exemptions, most of them also impose a "salary basis" requirement which generally prohibits "docking" the weekly salary of such an employee if the employee works any part of a workweek.

For additional protection, employers should also adopt and publish a Salary Basis Policy as described in the white-collar regulations which provide a "safe harbor" defense in the case of improper salary deduction problems.

In addition to those so-called "white collar" jobs which commonly exist in all industries, there are industry-specific exemptions (or even job-specific exemptions) that should be explored, as appropriate. These include:

For certain employers in the retail industry, the FLSA's Section 7(i) provides an exception for (1) any employee of a retail or service establishment, (2) who receives more than 50% of his or her earnings in a "representative period" from commissions, and (3) whose regular rate in overtime workweeks comes to more than 1.5 times the minimum wage.

For purposes of Section 7(i), a "retail or service establishment" is one 75% of whose annual dollar volume of sales is not for resale and is recognized as retail sales in the particular industry. The FLSA provides for this exception at 29 U.S.C. § 207(i), and the provision is further interpreted at 29 C.F.R. §§ 779.410-779.421. This exception relates to *overtime only*.

In a variety of industries, we have made extensive use of the so-called "motor carrier" exemption. It applies to drivers, drivers' helpers, loaders and mechanics for

which the U.S. Transportation Secretary has the power to establish qualifications and maximum hours of service.

The exemption is found at 29 U.S.C. § 213(b)(1), and it is further interpreted at 29 C.F.R. Part 782. This exemption is from *overtime only*, and its application has been narrowed significantly through legislative developments in 2005 and 2008.

An exemption for employers in certain other industries applies to *salesmen, partsmen or mechanics* primarily engaged in selling or servicing automobiles, trucks or farm implements, if they are employed by a non-manufacturing establishment primarily engaged in selling such vehicles or implements to ultimate purchasers.

There is a similar exemption for *salesmen* primarily engaged in selling trailers, boats or aircraft if they are employed by a non-manufacturing establishment primarily engaged in selling trailers, boats or aircraft to ultimate purchasers.

The FLSA provides for these exemptions at 29 U.S.C. § 213(b)(10), and they are further interpreted at 29 C.F.R. § 779.372. These are exemptions from overtime only.

In conducting an internal review of whether certain employees are properly classified as exempt, employers can start with a review of existing job descriptions (which might or might not be accurate or complete).

To supplement such a review, employers should also consider using a confidential (attorney-client privileged) Position Analysis Questionnaire for a knowledgeable manager to complete for legal review regarding positions under that manager's supervision.

Such a questionnaire not only asks about the amounts of time spent by the employee on separate components of the job's duties, but the questionnaire also asks for examples (if applicable) of actual duties that correspond with one of the regulatory examples of the important phrase "exercises discretion and independent judgment in matters of significance." That phrase is a hotly litigated topic in connection with the question of whether the elusive Administrative exemption is applicable to a particular job.

To manage employee overtime exemption-misclassification risks (as with other wage-hour issues), prevention through internal compliance reviews is essential in order to reduce exposure to expensive problems such as lawsuits, USDOL investigations, back-wage payments, double damages, penalties, etc.

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