California Employers Must Take Care With Overtime Exemptions

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For those of us who work with employees in highly specialized fields, it is important to never lose track of the recurring issue of whether exempt classification of employees for overtime purposes is appropriate. While all employers should make it a practice to evaluate the classification of employment positions, employers in the professional and technical industries, such as engineers, architects and contractors, should pay close attention to whether the professional exemption correctly applies to certain skilled employees.

California employers have the burden to prove that an exemption applies, which is not always an easy one to prove. This has become particularly important when authorities, such as the U.S. Department of Labor and California Division of Labor Standards Enforcement, have been auditing firms that frequently work on prevailing wage jobs. A mistake in this area can be costly and jeopardize the firm's ability to obtain government contracts.

By way of background, there are three primary exemptions that an employer will consider in classifying its employees: (1) executive, (2) administrative and (3) professional exceptions. While there are common requirements among all exemptions, this article addresses some key issues regarding the professional exemption, which professional and technical firms often apply to a large portion of their employees.

The professional-exempt employee will usually be among the "enumerated" professions, such as law, medicine, dentistry, optometry, architecture, engineering, accounting and teaching. (See, Wage Order 4 of the Industrial Welfare Commission [IWC].) For example, in prior guidelines of the IWC, "engineering" in the list of enumerated professions was intended to exempt licensed civil, mechanical and electrical engineers from the overtime rules, but not apply to junior engineers or drafters. In the architecture and engineering fields, employers are confronted with the question of how to classify an unlicensed architect or engineer who is otherwise performing exempt functions but lacks the license to do so. Some fairly recent court decisions have suggested that the exemption might apply to such individuals if certain conditions are met.

Certainly, if an employer proves that the employee is licensed in California and practices one of the enumerated professions, the matter is usually resolved and the exemption is established. However, where the individual is unlicensed but still falls within one of the enumerated professions, the

inquiry becomes far more detailed. To obtain exempt status, the employer must instead prove that the employee is exempt under the learned or artistic category of the professional exemption. Two court decisions specifically examined whether unlicensed individuals who worked in any of the enumerated professions would be completely ineligible to qualify as professional-exempt employees because they lacked the requisite licenses.

The 2011 decisions of Campbell v. Price Waterhouse Coopers LLC and Zelasko-Barrett v. Brayton-Purcell LLP addressed the issue among unlicensed lawyers and accountants. Both courts determined they may still qualify as exempt following a detailed evaluation of the whether their actual job duties and educational backgrounds met the criteria of a learned or artistic professional. This was the case even though the applicable IWC wage orders seemingly required licenses for members of the enumerated professions.

More specifically, for the unlicensed employee to be exempt, the work must either require knowledge of an “advanced” type in a field of science or learning customarily acquired by a “prolonged course” of specialized intellectual instruction and study, or is original and creative in character in a recognized field of artistic endeavor where the results depend primarily on the invention, imagination or talent of the employee.

The "prolonged education" requirement involves a field of science or learning that is "customarily" acquired by a prolonged course of intellectual instruction or study that cannot be obtained at the high school level. Thus, the exemption is restricted to employees with specialized academic training. The employee must usually have at least a baccalaureate degree or its equivalent, which includes a longer intellectual discipline in a particular course of study as opposed to a general academic course otherwise required for a baccalaureate degree. The exemption necessarily involves not only an assessment of the educational background of the employee and whether the employee is actually applying the prolonged course of intellectual instruction to the job, but also involves a careful analysis about whether the employee is exercising independent judgment and discretion and working under limited supervision, among other criteria to satisfy the exemption.

In the case of a seasoned engineer or architect who has practiced for several years, there is a decent chance the exemption will apply notwithstanding the absence of a license. However, firms often face challenges is proving the exemption for the unlicensed junior engineers or architects who do not have the requisite skill and experience to exercise the independent judgment and discretion under limited supervision. These individuals often work under close supervision of a principal and do not have the experience to make final critical decisions or even recommendations on which the principal relies. Given the enhanced burden of establishing the exemption where the employee is not licensed, it can be difficult to satisfy the learned or artistic professional exemption for the junior employee. Several firms elect to mitigate the risk of a wage-and-hour lawsuit by classifying such employees as hourly nonexempt, with the express understanding that the employee will grow into the position and begin to work independently such that the position would be reclassified as exempt in the future.

Similarly, often architects, and more particularly engineers, will be performing various inspection duties on prevailing wage or other jobs. The DOL and California Division of Labor Standards Enforcement have been auditing engineering firms with the focus to some extent on whether the engineer on a job site is performing engineering functions or on the other hand, whether the work is predominantly manual, nonexempt work that would not satisfy any exemption. Where the engineer is not licensed and is performing inspection functions, as noted above, the firm will have the enhanced burden of proving that the employee is engaged in the activities of a learned or artistic professional. Remember, under California wage-and-hour laws, the employer has the burden to prove exempt status, which will be driven mainly by the actual job duties performed and the amount of time on a daily basis that the employee performs such duties.

In the engineering context, for example, inspection duties by an unlicensed engineer can involve manual work, such as traveling a job site and testing to ensure compliance with construction plans. The question arises whether these individuals are actually performing engineering duties. There are occasions where a firm will engage several inspectors who perform essentially the same duties on a job site. Whether an employee is treated as exempt will hinge only on whether he or she has an engineering degree. If the duties are the same, a court may conclude that the position does not require the advanced degree and the exemption could be lost depending on the circumstances. It therefore becomes critical that the employer conduct a fact intensive evaluation of the actual duties performed to show exempt status.

Moreover, another requirement to prove exempt status is that the employee be paid on a salary basis. The employee must be paid a minimum salary of at least two times the minimum wage for full-time employment, which currently amounts to a salary of $37,440. Often audits by the Division of Labor Standards Enforcement or DOL reveal payroll records that reflect the employee is not paid on a salary basis, but rather has his or her pay deducted depending on the quality or the quantity of work performed. In the case of professional services firms that are required to account for hours worked on the timesheet, there can be a compulsion to deduct from the salary where the timesheets submitted to the client reflect fewer than, for example, eight hours of billable work on a given day. Remember, the essence of the exemption is that the employee receives the same salary for every pay period, regardless of the quality of work or the quantity of hours worked. Thus, there may be times when an employee's timesheet is light but that should not result in a deduction in pay. If that is the case, then the pay is driven by the number of hours actually worked, which is inconsistent with exempt status. Only nonexempt employees are paid for the actual hours worked. Instead, the employer may address lack of productivity through counseling and discipline as opposed to deductions from compensation.

On the other hand, often professional services firms choose to pay exempt employees for extra hours worked in a given workweek, such as when a project is heavy and many of the professionals are working longer hours. Provided the policy is well-documented and consistently administered to mitigate risk of disputes over whether extra time should be paid, the employee will not lose exempt status by virtue of receiving the extra time pay. Similarly, the salary basis requirement does not

statds by virtue of receiving the extra time pay. Similarly, the salary basis requirement does not prevent the employer from breaking down an employee's salary into an hourly rate for purposes of computerizing payroll, bidding work or otherwise. It is critical that he or she receives the predetermined amount of salary during each pay period. These rules also do not prevent an employer from requiring exempt employees to punch a time clock or record the amount of hours worked, such as for billing purposes, so long as the compensation is not actually calculated based on the number of hours listed in the time sheets.

These fairly recent developments are staunch reminders to firms practicing in the professional services field to evaluate whether their employees meet an applicable exemption. This is particularly important given the increase in prevailing wage projects that have been accompanied by more government scrutiny over the wage-and-hour practices of employers. Professional services firms should be updating their classifications as necessary and consulting with their human resources professionals or employment lawyers to ensure compliance.

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