

STATE REDUCES THRESHOLDS FOR CALIFORNIA COMPUTER PROFESSIONALS' OVERTIME EXEMPTION: CHANGES TAKE EFFECT IMMEDIATELY

Insights
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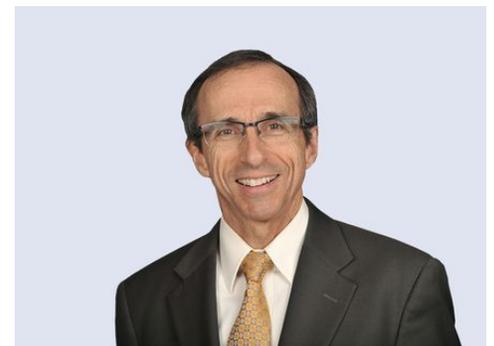
Last week Gov. Arnold Schwarzenegger approved an amendment substantially changing the law concerning overtime pay for certain computer software professionals. The law amends the California Labor Code and restores the overtime exemption for qualifying computer programmers, analysts and engineers who are paid a monthly salary equivalent to at least \$75,000 per year, or who continue to be paid at least \$36 per hour for all hours worked. The bill was passed as urgency legislation and took effect on September 30, 2008.

In recent years, the exemption had been available only to otherwise-qualifying employees who were guaranteed wages beginning at \$41 or above for every hour worked (whether paid on an hourly basis or with a combination of salary and additional compensation). This had the effect of making many computer programmers, analysts and engineers non-exempt under California law when they were exempt under federal law, and as a consequence, imposing additional obligations to provide meal and rest periods required by California law at specified intervals (as with other non-exempt employees) or be subject to statutory premiums and penalties. The new law restores some equilibrium to the field and allows employers to treat their exempt computer professionals as such.

Background

When originally enacted in 2000, Labor Code section 515.5 required employees to be paid a specific hourly rate (indexed to inflation annually) to qualify for the exemption.

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The law was subsequently amended to allow the exemption if employers paid qualifying computer professional employees a salary plus any additional compensation necessary to assure that they still would be paid at least the minimum rate for every hour worked in a workweek – an undesirable situation which required employers to track exempt employees' hours.

The qualifying wage began at \$41 per hour in 2000 and rose to \$49.77 by 2007 as a result of indexed increases, then was reduced to \$36 per hour by legislative amendment in 2007, effective January 1, 2008. The newest amendment retains the current minimum of \$36 per hour, but adds the option of paying an annual salary of at least \$75,000. These minimum rates are tied to the California Consumer Price index and will be adjusted on January 1st each year.

The Reasons for the Change, and its Effect

Like the prior amendment, this most recent change in the Labor Code had been sought by the high tech industry for some time, as a measure to stem a rash of wage-and-hour lawsuits and to keep jobs in California. The changes more closely harmonize California's computer software professionals exemption with federal law, although the exemptions are still not completely identical.

Under the new provisions, you may now pay computer professionals on a strictly hourly basis (which requires tracking of hours), *or in the alternative*, on a salary basis (which does not require tracking hours), and still qualify for the exemption from overtime. The new alternative requirement that employees be paid a salary of at least \$6,250 per month is designed to prevent employers from counting, or retroactively crediting, incentives and bonuses paid on a quarterly or annual basis toward the minimum salary requirement.

Nonetheless, this new alternative may provide significant savings for employers who may require qualified computer professionals to work overtime without having to track or pay for additional hours to meet an hourly-rate threshold, while at the same time guaranteeing a weekly salary to these same employees who work reduced hours during slow periods.

Additional Requirements

Employees working in the computer software field are now exempt from overtime under state law but still must meet

several requirements. In addition to the pay requirement mentioned above, the employee must be:

- primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment;
- primarily engaged in duties that consist of one or more of the following:
 1. 1. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional specifications;
 2. 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; or
 3. The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.
- highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, or software engineering; and
- paid at least \$36 per hour, or must earn a salary of at least \$75,000 per year (paid at least \$6,250, at least once a month)

Another change is that exempt employees may now be engaged in "computer systems analysis, programming, *or* software engineering," rather than "computer systems analysis, programming, *and* software engineering," as in the past.

This exemption is still not available for the following types of employees:

- trainees and entry-level employees;
- employees who are not sufficiently skilled to work independently and without close supervision;
- employees who operate computers or manufacture, repair or maintain computer hardware and related equipment;

- engineers, drafters, machinists and others who use computer design software such as CAD/CAM;
- writers who provide content for the Internet, CD-ROMs and software promotional material, and technical writers who create box labels, product descriptions, installation instructions, and the like; or
- employees working in the motion picture, television or theatrical industries who use computer software to create special-effects imagery.

Our Advice

We recommend that employers conduct self-audits to assure compliance with this amended exemption, if applicable, as well as any other white-collar exemption requirements that may apply. In addition we also recommend employee self-appraisals and duty acknowledgments. If you would like our assistance in developing or implementing these actions, or if you would just like more information generally, contact any attorney in one of our California offices:

Irvine 949.851.2424

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