

Classification of Law Firm Employees under the Fair Labor Standards Act

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Employees of law firms fall into numerous wage and hour classifications, some generally exempt from overtime pay requirements, some generally not, and some performing jobs less easy to categorize. This article will analyze some of the common jobs in law firms and discuss wage and hour issues related to those jobs. The Fair Labor Standards Act (“FLSA”) requires that any employee be paid overtime pay after working 40 hours in a workweek unless the employee’s job duties meet a specific exemption from overtime pay requirements. The following analysis focuses on broad categories of law firm employees and on general rules for determining wage and hour exemptions. The application of an exemption to a particular employee or employee classification should be based upon an analysis of the employee’s specific job duties, compensation, and other relevant factors.

A. Attorneys

Most full-time attorneys employed by a law firm will be exempt employees. As a highly compensated employee (earning at least \$100,000.00 annually), an attorney can be exempt from overtime pay requirements with very little analysis of job duties as long as the attorney has executive, administrative, or professional duties¹. Although a number of other exemption tests may also be applied to attorneys, the easiest exemption to apply to an attorney, after the “highly compensated employee” exemption, is the “learned professional” exemption, which should cover partners and associates. To qualify for the

¹ 29 C.F.R. § 541.601(c).

learned professional exemption, the attorney must primarily perform work that requires advanced knowledge², including the use of discretion and judgment, in a field of learning that is customarily acquired by a prolonged course of specialized intellectual instruction³, such as law school⁴. In addition, the attorney must be paid at least \$455 per week⁵. A part-time attorney may also qualify for the learned professional exemption provided that she earns at least \$455 per week, which is “an absolute requirement, no matter whether the worker is full-time or part-time⁶.”

Contract attorneys may be paid on a fee basis rather than on a salary basis and be exempt⁷. “Fee basis” means payment of “an agreed sum for a single job regardless of the time required for its completion.” For example, an attorney could be hired on a fee basis to review and catalog discovery documents and be paid a lump sum for the work regardless of the amount of time the attorney takes to complete the task. This contract attorney would be exempt from overtime requirements. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis⁸. The contract attorney must nonetheless earn the equivalent of \$455 per week. Department of Labor regulations state:

To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and

² 29 C.F.R. § 541.301(b).

³ Law is specifically included in the regulations defining specialized fields of science and learning. 29 C.F.R. § 541.301(c).

⁴ The specialized instruction must be a prerequisite to the application of the learned professional exemption. 29 C.F.R. § 541.301(d).

⁵ 29 C.F.R. §541.300(a)(1).

⁶ Employer’s Guide to the Fair Labor Standards Act § 321, p. 79.

⁷ 29 C.F.R. § 541.605.

⁸ 29 C.F.R. § 541.605(a).

whether the fee payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours⁹.

B. Paralegals

Paralegals work roles that are sometimes closely analogous to those of attorneys, although paralegals are generally not exempt employees and must, therefore, be paid overtime pay. Unlike attorneys, paralegals are not “learned professionals” and are more correctly viewed, in the wage and hour context, as production workers. As to paralegals, Department of Labor regulations provide that:

Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. **However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties.** For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption¹⁰.

Paralegals do not qualify under the administrative exemption either because they are “production workers and also do not exercise discretion and independent judgment¹¹.” However, in one case, a jury did find that paralegals qualified for the administrative exemption¹².

Paralegals will continue to be difficult to classify under wage and hour laws. This is particularly true because of the wide range of job functions that law firms assign to

⁹ 29 C.F.R. § 541.605(b).

¹⁰ 29 C.F.R. § 541.301(e)(7) (emphasis added).

¹¹ Wage and Hour Opinion Letter dated April 13, 1995.

¹² *Reich v. Page & Addison P.C.*, No. 3:91-CV-2655-P (March 10, 1994, N.D. Tex.)(decided before Wage and Hour Opinion Letter in footnote 11).

paralegals and due to the increasing education and professional qualifications that usher paralegals into the workforce. Until paralegals can be clearly classified as exempt or non-exempt without question, employers whose paralegals are performing legitimate executive or administrative duties should give those employees titles other than “paralegal.” If a law firm wants to claim that its paralegals are exempt, then it should analyze the exemption separately for each employee based on specific descriptions of the job responsibilities of each paralegal, not based on a general description that applies to all the paralegals.

C. Executive and Administrative Assistants

Job titles mean little if anything in determining whether an employee is exempt from overtime pay requirements. Positions in law firms described as executive or administrative assistants are a good example of this. To satisfy the requirements for the “administrative” exemption, the employee “has been delegated authority regarding matters of significance” that can be exercised without specific instructions or prescribed procedures¹³. The “matters of significance” test distinguishes the employee who is entitled to the administrative exemption from other employees, like secretaries, who have significant responsibility but who do not meet the exemption criteria. The exempt administrative assistant must do office work that relates to management or general business operation and must be paid a salary of at least \$455 per week. Most secretaries will be non-exempt employees.

Matters that relate to management or general business operation include accounting, personnel management, human relations, employee benefits, and computer

¹³ 29 C.F.R. § 541.203(d).

network and database administration¹⁴. Whether an administrative assistant uses discretion and independent judgment must be determined in light of all of the facts but does include such things as the authority to formulate and implement policies and the authority to commit the employer in matters that have a substantial financial impact on the company¹⁵. “Matters of significance” is not a defined term in the regulations¹⁶. Something is not a matter of significance just because the employer will suffer a financial loss if the employee fails to perform the job properly¹⁷. An office manager could meet the administrative exemption if the duties and responsibilities meet the necessary tests and the salary is at least \$455 per week. Again, the application of the administrative exemption should be applied on a case-by-case basis to the specific duties and responsibilities of the employee and not on the basis of titles assigned and general job descriptions.

D. Support Staff – IT Department

Employees with “computer-related occupations” may be exempt even though the employee is paid on an hourly basis. The hourly rate of pay, however, must be at least \$27.63 per hour for every hour worked, including overtime¹⁸. Alternatively, a computer professional can qualify for exemption using the “salary basis” test provided the salary is at least \$455 per week¹⁹. Department of Labor regulations specifically list “computer

¹⁴ 29 C.F.R. 541.201(b).

¹⁵ 29 C.F.R. § 541.202(b).

¹⁶ 29 C.F.R. § 541.202(a).

¹⁷ 29 C.F.R. § 541.202(f). The regulation give examples of what are not matters of significance even though the employer would suffer great loss if the employee failed to perform – a messenger, for example, who loses a check or an equipment operator who causes damage or injury with the equipment.

¹⁸ Small Business Job Protection Act of 1996; P.L. 104-188.

¹⁹ 29 C.F.R. § 541.400(b).

systems analysts, computer programmers, software engineers [and] other similarly skilled workers in the computer field” as examples of employees covered by this exemption²⁰.

While many employees are dependent upon the use of computers to perform most, if not all of their job duties, this alone does not create the computer professional exemption²¹.

For the exemption to apply, the employee must have a primary duty that consists of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- 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;
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- A combination of the aforementioned duties, the performance of which requires the same level of skills²².

E. Law Clerks

None of the exemptions discussed above clearly applies to law clerks. They are not yet learned professionals because they have not graduated from law school. They will not qualify for the administrative exemption because they will rarely exercise the level of discretion required or participate in management or operation of the business.

F. Conclusion

The application of the FLSA to law firms is no different than the application of that law to any other business. Some employee classifications within a law firm will be obviously exempt, some will obviously not be exempt, and some classifications will require close study to determine if an employee meets the requirements for exemption from overtime pay.

²⁰ 29 C.F.R. § 541.400(a).

²¹ 29 C.F.R. § 541.401.

²² 29 C.F.R. § 541.400(b).