

OVERTIME EXEMPTIONS, DOCKING SALARY AND TIME WORKED

THE EXEMPTIONS

The Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, and its regulations, 29 C.F.R., Part 778, require that all employees be paid at least a set minimum wage and that they be paid at least time and one-half their “regular rate” for all hours over 40 worked in a single week. The FLSA sets forth numerous exemptions to these requirements. The major exemptions from the FLSA overtime requirements apply to salaried “executive”, “administrative” and “professional employees” which are based on an individual’s salary and job duties. Job title is not controlling. There are also numerous small exemptions based on specific industries and occupations. The determination of exemption

Executive Employee Exemption

An employee must meet the following criteria to qualify as an exempt executive:

1. the employee must be compensated on a salary basis at a rate of not less than \$684 per week (\$35,568 annually), exclusive of board, lodging or other facilities;
2. the employee’s primary duty must be management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
3. the employee must customarily and regularly direct the work of two or more other employees; and
4. The employee must have the authority to hire or fire other employees or have “particular weight” given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees.

Administrative Employee Exemption

An employee must meet the following criteria to qualify for the administrative exemption:

1. The employee is compensated on a salary or fee basis at a rate of not less than \$684 per week (\$35,568 annually), exclusive of board, lodging or other facilities;
2. The employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Employee Exemption

A learned or creative professional employee will qualify for the professional exemption if the employee satisfies the following criteria:

1. The employee is compensated on a salary or fee basis at a rate of not less than \$684 per week (\$35,568 annually), exclusive of board, lodging, or other facilities; and
2. The employee's primary duty is the performance of work:
 - a. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
 - b. Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

“Work requiring advanced knowledge” is defined as work that is “predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment a distinguished from the performance of routine mental, manual, mechanical or physical work.”

“Advanced knowledge” cannot be obtained at the high school level. The Department of Labor generally requires that the knowledge be obtained through a 4-year undergraduate degree. Under the new regulations, however, the knowledge must “customarily” be acquired through long academic study, so there are situations in which home study or experience is sufficient.

Exemptions For Teachers

- A. A teacher is generally considered to be an exempt professional employee provided the following the following requirements are met:
1. The teacher’s primary duty must be teaching, imparting knowledge or some other type of work which is intellectual and not manual; and
 2. The job requires advanced knowledge in the field of science or learning which is acquired by a course of specialized instructions and requires a four-year degree through an accredited college or institution in education or a related field.
 3. There is no salary requirement

Bona fide teachers in preschools and daycares may qualify for exemptions from the minimum wage and overtime pay requirement as “learned professionals” under the same conditions as a teacher in an elementary or secondary school. Preschool or daycare employees whose primary duty is to care for the physical needs of the facility’s children would ordinarily not meet the requirements for the exemption.

- B. There is also a specific Teacher Exemption which requires:
1. The employee's primary duty to be teaching, tutoring, instructing, or lecturing to impart knowledge at an **“educational establishment.”**
 2. To be an educational establishment, the program must be licensed by a state agency responsible for the state's educational system or accredited by a nationally accrediting organization for career schools. There is no distinction between public or private school.
 3. There is NO minimum salary requirement for this special exemption

DOCKING SALARY

Generally, to be exempt as an executive, administrative or professional employee, pay must be based on a “salary.” Generally, if an employee is ready, willing and able to work or actually works any part of a day, no matter how small, deductions from salary may not be made or the employee may lose the exempt status. The new DOL regulations offer only 7 exceptions from the “no docking” of salary rule:

- Absence from work for one or more full days for personal reasons, other than sickness or disability;
- Absence from work for one or more full days due to sickness or disability, provided the employer has a bona fide plan, policy or practice of providing sickness or disability benefits;
- To offset amounts received as payment for jury duty, witness fees, or military pay;
- Penalties imposed for major safety violations;
- Disciplinary suspensions of 1 or more full days for rules violations;
- Amounts prorated in the first and last weeks of employment; and
- Unpaid leave under the Family and Medical Leave Act (“FMLA”), including intermittent leave or reduced work days.

The new regulations also provide a “safe harbor” for improper deductions from salary.

An overtime exemption will not be lost because of improper salary docking if the employer:

- Has a clearly communicated policy prohibiting improper salary deductions that includes a complaint mechanism;
- Reimburses employees for any improper deductions; and
- Makes a good faith commitment to comply in the future.

TIME WORKED

Under the FLSA, a non-exempt employee must be compensated for all time the employee is “suffer[ed] or permitt[ed] to work” whether or not required to do so. An employee must also be paid for “all time during which the employee is required to be on duty or to be on the employer’s premises or to be at prescribed workplace.”

1. If an employee continues to work voluntarily at the end of his shift, as long as the employer knows of or has reason to believe that the employee is continuing to work, this time is considered to be working time.
2. This rule is applicable to work performed away from the premises, at a job site, or at home.
3. The employer cannot refuse to pay the employee for the time worked, even as discipline for working an unauthorized period of time.
4. For employees who travel to a job site other than their employer’s place of business, working time begins when the employee reaches the first place he/she does any work-related activity. If an employee has to report to the employer’s place of business for any reason prior to traveling to the first assignment, the workday begins when he/she reports to the employer’s place of business.

5. Similar rules apply to the end of the workday, generally the time the employee leaves the last place he/she is required to perform any duties for the employer.
6. There are also special rules regarding on-call and travel, especially overnight travel.
7. Rest periods of short duration (less than 20 minutes) are considered to be time worked.
8. Any bona fide meal period of more than 20 minutes need not be compensated as work time.
9. Attendance at meetings, lectures and training programs are not considered to be time worked if: 1) it is outside of normal work hours; 2) it is voluntary; 3) it is not job related; and 4) no other work is concurrently performed.
10. Mandatory training and training during an employee's regular work hours are considered to be time worked.

These materials were prepared by Jennifer Chalal who is a member of the Employment and Labor Group at Spector Gadon Rosen Vinci P.C. These materials are intended as a summary and are not intended to provide legal advice on any specific matter.