



SEPTEMBER 2006

EMPLOYER BULLETIN:

ARE YOU PROPERLY CLASSIFYING YOUR EXEMPT AND NON-EXEMPT EMPLOYEES?

The Fair Labor Standards Act (“FLSA”) provides an exemption from both minimum wage and overtime pay for bona fide executive, administrative, professional and outside sales people. In order for an exemption to apply, an employee’s specific job duties and salary must meet all the requirements of the Department of Labor’s regulations.

As a threshold matter, in order for an employee to be “exempt” under one of the specific exempt categories (discussed below), the employee must be compensated on a salary basis of not less than \$455 per week. Being paid on a “salary” basis means an employee regularly receives a predetermined amount of compensation each pay period. This amount cannot be reduced due to variations in the quality or quantity of the work.

THE EXECUTIVE EXEMPTION: To qualify, (a) the employee’s primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise; (b) the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and (c) the employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which he/she is employed, regardless of the type of business organization and who is actively engaged in its management, is considered a bona fide exempt executive.

THE ADMINISTRATIVE EXEMPTION: To qualify, (a) the employee’s primary duty must be 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 (b) the employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

THE LEARNED PROFESSIONAL EXEMPTION: To qualify, (a) the employee’s primary duty must be the performance of work requiring advanced knowledge which is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment; (b) the advanced knowledge must be in a field of science or learning; and (c) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

THE CREATIVE PROFESSIONAL EXEMPTION: To qualify, the employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Recognized fields of artistic or creative endeavor include music, writing, acting and the graphic arts.

THE COMPUTER EMPLOYEE EXEMPTION: To qualify, (a) the employee must be compensated **either** on a salary or fee basis (at a rate not less than \$455 per week **or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour; and (b) the employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below:

The employee's primary duty must consist of:

- i. the application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
- ii. 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 machine operating systems; or
- iii. a combination of the above-mentioned duties, the performance of which requires the same level of skill.

OUTSIDE SALES EXEMPTION: To qualify, (a) the employee's primary duty must be making sales or obtaining orders or contracts for services or the use of facilities which will be paid by the customer; and (b) the employee must be customarily and regularly engaged away from the employer's place of business.

Sales includes any sale, exchange, contract to sell, consignment for sales, shipment for sale, or other disposition and includes the transfer of title to tangible property.

Drivers who deliver products and also sell the products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. Factors considered in this analysis are: a comparison of the driver's duties with those of other employees engaged as drivers and as salespersons, the presence or absence of customary or contractual arrangements concerning amounts of products to be delivered, whether or not the driver has a selling or solicitor's license when required by law, the description of the employee's occupation in collective bargaining agreements and other factors set forth in the regulation.

HIGHLY COMPENSATED EMPLOYEES: Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis which addresses situations where employees received deferred compensation) are exempt from the FLSA if they customarily and regularly perform at least

one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

BLUE COLLAR WORKERS: The exemptions provided by FLSA above apply only to "white collar" employees who meet the salary and duties tests set forth above. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy no matter how highly paid they might be.

OTHER LAWS & COLLECTIVE BARGAINING AGREEMENTS: The FLSA provides minimum standards that may be exceeded but cannot be waived or reduced. Employers must comply with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA relieves employers from their contractual obligations under such bargaining agreements.

WHAT SHOULD EMPLOYERS BE AWARE OF? Employers should have accurate job descriptions to enable them to efficiently determine whether an employee is exempt or non-exempt. Job titles or salary basis alone do not determine exempt status. Therefore, it is essential that you regularly audit what duties your employees are actually performing to ensure their written job descriptions are accurate and they are properly classified under the FLSA.

ANY FURTHER QUESTIONS SHOULD BE DIRECTED TO HEATHER G. PTASZNIK AT (313) 259-8586 OR JOHN T. BELOW AT (313) 259-8597

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