

## FARALLON LAW GROUP NEWSLETTER (SEPTEMBER, 2010)

### Exempt Employees vs. Non-Exempt Employees

This month's newsletter topic relates to exempt employees versus non-exempt employees for purposes of overtime compensation. This is an area where there is a lot of misunderstanding by employers. For example, some erroneously believe that because a person is salaried, rather than paid on an hourly basis, the employee is exempt from the requirement to pay for overtime. Whether a person is salaried or hourly is not the determining factor.

➤ **What are exempt employees?**

There are three main categories of exempt employees: professional, administrative, and executive. The exact boundaries of these categories are unclear, but the burden is on the employer to show the employee is properly classified as exempt from receiving overtime.

Under California law, the definition of a professional, administrative or executive employee is one who:

- Is "engaged in work which is primarily intellectual, managerial, or creative," and "which requires exercise of discretion and independent judgment," and
- Is paid a monthly salary equivalent to at least twice the state minimum wage for full time employees.

Additional exemptions may apply to highly compensated employees who are paid at least \$100,000 a year and certain employees in computer-related areas.

Whether an employee is properly classified as exempt is determined on a case-by-case basis.

➤ **Commissions Based Employees**

Employees who are paid commissions are not automatically exempt. Although there is an exemption for sales people who "customarily and regularly work more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts

for products, services or use of facilities," there is no automatic exemption for inside sales people.

➤ **What is the law regarding overtime for non-exempt employees?**

The Federal Labor Standards Act (FLSA) requires that non-exempt employees be paid overtime for more than 40 hours worked in a week. California law requires that non-exempt employees be paid overtime for more than 40 hours worked in a week **and for more than 8 hours worked in a day.**

So how does an employer reconcile these differences? Where California law provides greater protection to an employee than the FLSA, employers must comply with the California labor laws. Similarly, since laws relating to overtime pay are different from one state to another, employers with employees in more than one state must take special care to make sure they are complying with the laws of all states in which they have employees. But no matter where your company is located, an employer can generally follow California wage standards and be safe, because California has historically had the strictest labor code in the country!

Employers should also keep in mind that, in California, if the employer fails to compensate an employee for proper overtime pay, the employer is subject not only to the unpaid wages, but to significant penalties, including an amount equal to the overtime wages, interest, and costs.

The process of determining whether an employee is exempt or non-exempt can be confusing and unclear. But employers need to determine their employees' classifications in order to pay them in compliance with applicable laws.

***Please feel free to contact Michelle Reed at 415-255-2450 if you have questions about the distinction between exempt and non-exempt employees.***

*This Newsletter is intended as a general guide to law issues and developments. It does not contain a general legal analysis or constitute a legal opinion of Farallon Law Group LLP or any member of the firm on the legal issues described. It is recommended that readers not rely on this general guide in structuring individual transactions but that professional advice be sought in connection with individual transactions.*