



ADVISORY

Understanding the New White-Collar Overtime Pay Requirements

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One of the most troubling and expensive business problems today is complaints of unpaid wages. The **Wage and Hour Division of the U.S. Department of Labor** receives at least 30,000 complaints each year. This is more than all other discrimination complaints **combined** and that number has grown 400% over a five-year period. Added to the number of federal complaints are thousands of complaints filed with each of the 50 U.S. state Labor Departments. Complaints are filed under **The Fair Labor Standards Act** at the federal level, which was old (1938) and cumbersome. The first real overhaul came in 2004, but it was recently revisited and the "white collar exemption" pay requirements were changed. The final ruling was announced in May and will be effective December 1, 2016.

How Serious is the Problem?

Although these may be startling statistics to digest, it's even more troubling to learn the Department of Labor estimates 70% of employers are out of compliance. Upon receiving a complaint with DOL, a wage and hour investigator arrives at the business. When the employer is found to have failed to pay wages due, the back pay award can go back three years. If it's found to be willful, the employer can be assessed damages equal to the amount of the back pay (called liquidated damages). To make matters even more complicated, these complaints spread into a class action lawsuit quickly. Unlike most discrimination

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complaints, a wage and hour complaint is like a stone thrown into a lake. It ripples. The investigation spreads throughout the company and the result can be an economic disaster.

Most Frequent Complaints

Most wage and hour complaints are for failure to pay overtime because the employee was wrongly classified as exempt from overtime. Other frequent complaints are:

- Working an employee "off the clock"
- Changing an employee "time record" to avoid paying overtime
- Failure to give required breaks and lunch periods (as required by state or federal law)
- Failure to pay accurately at termination

Most Frequent Errors

The Department of Labor has created a list of the most common employer errors:

1. Assuming all employees paid a salary are not due overtime
2. Improperly applying an exemption
3. Failing to pay for all hours an employee is "suffered or permitted" to work
4. Limiting the number of hours employees are allowed to record
5. Failing to include all pay required to be included in calculating the regular rate for overtime
6. Failing to add all hours worked in separate establishments for the same employer when calculating overtime due
7. Making improper deductions from wages that cut into the required minimum wage or overtime. Examples: shortages, drive-offs, damage, tools, and uniforms
8. Treating an employee as an independent contractor
9. Confusing federal law and state law
10. Using Compensatory Time as pay for overtime

We will look at numbers one and two in this *Advisory* because they are the focus of the new rulings from the Department of Labor and will take effect soon.

1. Assuming all employees paid a salary are not entitled to overtime

When an employer says an employee gets no overtime "because he is salaried," there is an automatic red flag. The Department of Labor does not talk about "salaried" or "hourly" employees. They talk "exempt" and "non-exempt." They are interested in who is entitled to be paid overtime and who is not. Being salaried and being exempt from overtime are not synonymous. In fact, the Department of Labor has very detailed descriptions of which jobs (not people) are exempt from overtime.

- Employees in "white-collar" management, executive, professional, and administrative jobs must be paid a minimum salary of \$913.00 a week (effective December 1, 2016), **AND**
- Employees must be consistently paid the salary of at least \$913.00 each week without being docked for less than a full day, **AND**

- Employees must perform work that is called “exempt level” work, which is why it’s commonly referred to as a “white collar” exemption. (Blue collar, manual labor jobs, such as electricians, mechanics, welders, plumbers, etc. are not exempt from overtime no matter how much money they earn.)

All three conditions above must be met. Some employers pay \$913.00 a week, but they dock the employee by the hour for absence - **NO**. Some pay the minimum of \$913.00 every week but the employee performs work that does not qualify to be exempt - **NO**. Never be deceived by title. The job title is never enough to convince the Department of Labor. Every position is examined separately based on the exemption criteria.

The new ruling allows a company to use up to 10% of non-discretionary bonuses to make up the annual \$47,476 salary requirement. A non-discretionary bonus is paid as a result of a pre-established criteria that has been satisfied. Discretionary bonuses (given because the owner decided to give a bonus) do not count toward the total to reach \$47,476.

2. Improperly applying an exemption

Understanding the exemptions, based on “scope of work” is confusing. First, it’s important to understand you will always examine the job content and give no consideration to the person occupying the position. When a position is examined, there’s an assumption the job is vacant. Certain white-collar jobs are exempt if the scope of the work meets the exemption qualifications. There are five “white collar” categories:

- Executive (including Highly Compensated Executives)
- Administrative
- Professional
- Sales
- Computer

Each of these categories has detailed criteria at the Department of Labor’s website. The process is difficult and confusing, but it’s mandatory. Any employer giving the criteria a cursory review and making a cavalier decision will regret it. Those of us who do this every day agree on the errors we see employers make that will never stand the test by DOL.

Here’s how we actually do this work:

The **EXECUTIVE EXEMPTION** isn’t too difficult. We quickly identify all the white-collar executives and managers who are paid more than \$134,000 in annual cash compensation. They are automatically exempt. Those less than \$134,000 must meet the criteria. The employee’s primary duty must relate to managing the business or one of its recognized departments or subdivisions. The employee must customarily and regularly direct the work of at least two full-time employees (or their equivalent in part-time employees). The employee must have the authority to hire or fire employees, or the employee’s recommendations as to hiring, firing, promotion, or demotion must carry particular weight. Hiring managers in customer service, distribution, shipping, purchasing, or inventory control would be in this group.

The **PROFESSIONAL EXEMPTION** is next and it's reasonable. There are two kinds – creative and learned. Creative professionals include musicians, artists, writers, and sculptors. Learned professionals are those jobs requiring an advanced degree (or equivalent learning). It includes engineers, architects, doctors, lawyers, certified accountants, chemists, and others who need to be what we would call “academically learned” beyond high school or vocational school. **NOTE:** Just because an employee may be called an “engineer” is not sufficient. Professionals must have the academic credentials needed for exemption status.

The **ADMINISTRATIVE EXEMPTION** is a constant source of problems. It's also a place you can expect the Wage and Hour investigator to pounce on when there's an audit (random or complaint). Administrative Assistant is a target job for audits and so are any positions with the title Coordinator. One of the reasons is the use of the nebulous requirement for “judgment and discretion.” Those in administrative positions must use significant judgment and discretion. The Department of Labor lists many examples, which call for the use of judgment and discretion, but it's up to the employer to decide if the job matches the description. When the DOL disagrees with the employer's decision, they can issue a citation.

There are many positions that can be examined under the Administrative Exemption, but each must be considered carefully. Don't fall into the trap that the employee prefers to be “salaried,” or assign exemption status to a super clerk. The Administrative employee must perform office or other non-manual work, which directly relates to the management or general business operations of the employer or its customers. The employee's primary duty must include the exercise of discretion and independent judgment with respect to significant matters that could affect the profit or loss of the business.

The **SALES EXEMPTION** applies to Outside Sales. Clearly, the exemption applies to those who work away from the offices/building of the employer. The employee cannot be called an Outside Sales employee and exempt from overtime if the employee actually does not go outside the building and spend the day selling. Telephone sales: **NOT** a chance!

The primary duty of the Outside Sales employee is making sales or obtaining orders or contracts for services, or for the use of facilities, for which clients or customers pay compensation. The employee is customarily or regularly engaged in these activities away from the employer's place of business. An outside sales employee typically makes sales at the customer's place of business or home, if selling door-to-door. They are not in the white-collar exempt category that requires the \$913 per week, if they are commissioned sales employees. Outside sales employees are exempt from overtime, but not from being paid minimum wage.

The **OUTSIDE SALES EXEMPTION** does not apply to Inside Sales. Inside Sales positions are non-exempt. In fact, I have rarely ever seen an Inside Sales job that can qualify to be called exempt. Frequently, employers argue they believe the job is exempt. If so, it will need to be exempt under the criteria for the Administrative Exemption, not Outside Sales.

Remember, the employer can exempt the position if they choose. However, there are consequences

when they are wrong. If the Inside Sales employee is paid hourly, plus commission, that commission must be added in to the gross wages for overtime purposes. It's a frequent and very expensive problem. (This is called "Grossing up your payroll.")

The **COMPUTER EXEMPTION** is not especially difficult for experienced evaluators. A computer exemption can be met if the position requires high-level computer work (programmers and network administrators, etc.) or it can be met by paying the employee \$27.63 an hour. Helpdesk and Computer Operators do not meet the exemption criteria based on job content.

That content must include:

- Applying systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional applications.
- Designing, developing, documenting, analyzing, testing, creating, or modifying computer systems or programs (including prototypes), based on and related to user or system design specifications.
- Designing, documenting, testing, creating, or modifying computer programs related to machine operating systems.
- A combination of the above duties, requiring the same level of skill.

The penalty for failure to pay overtime to employees wrongly classified can be back pay for up to three years and a punitive damage award (liquidated damages) equal to the back pay award. Time spent defending the claim and legal fees are costly. If the Department of Labor cites you, get competent legal counsel who understands Wage and Hour Law. Preventing these costs is our motivation to get it right in the first place. The exemption criteria based on scope of work is difficult. Although some jobs are easy to make a decision about, many are not. But, you can be sure it is not a responsibility to take lightly.