
CMG EMPLOYMENT NOTES

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The FairPay Rules

Introduction

There have been reports recently regarding million dollar plus settlements with the Wage-Hour Division of the US Department of Labor. Our own clients have experienced increased audits and assessments as a result of those audits. Fortunately, our clients have not had to pay amounts in seven figures, but in proportion to their payrolls, they have sustained significant losses. Their problems with the Wage-Hour Division were not due to a desire to deprive employees of their proper wages, but due to good faith misunderstandings of the law. In fact, in most cases, the employers were attempting to provide the employees a better deal than they would receive under a different payroll approach.

As if employers did not need additional reasons to avoid employee complaints, some agencies of the Department of Labor, including the EEOC and the Wage-Hour Division, have recently made a habit of issuing "press releases" when filing complaints or after settlements with employers. These press releases have often overstated the alleged misdeeds of the employers named and the respective agency's success at achieving a recovery for the employees. Employers would be well-advised to exercise caution in all employment related matters. When entering into a settlement with a Federal agency, it may now be in order to negotiate a press release with the agency as part of the overall settlement.

Due to the complexity of the Fair Labor Standards Act, ("FLSA"), which dates back to the Great Depression, few companies can claim total compliance with the FLSA. A key aspect to the FLSA is that it cannot be waived by employees. In other words, even though an employee and employer agree to a particular compensation program, if it is not in technical

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Thoughts from the Editor

This newsletter is being published as the nation gears up for another presidential election. Due to the domestic and international scene, this is a difficult time for our country and the world. It has been our commitment to maintain this newsletter as a non-partisan publication. We do not intend to change that policy.

The new FairPay rules have been the source of political maneuvering for over a year. The prior hot issue in the employment area, the ergonomic rules, have still not been issued by the Department of Labor. This newsletter is published with the disclaimer that there may be a last ditch legislative effort to postpone or amend these rules. If that happens, we will discuss any changes in a future issue of this newsletter.

While preparing this newsletter, your editor made a trip to the Dallas area and met with a number of clients there. During the preparation for the visit, we checked our database for names and phone numbers. Unfortunately, some of our information was incorrect. Our mantra continues: Please tell us when your phone, email or mailing address changes, as we are making a best effort to stay in touch with our readers. If you are reading this newsletter and you are not the person on the label, please contact us so we can correct our information. There is no charge for this newsletter. You may contact us by phone, email or fax. CMG is endeavoring to eliminate all faxes, which is why we no longer list fax numbers in this newsletter. However, if you need to send a fax, call us and we will provide the appropriate number.

Claremont Management Group, Inc. wishes all of our readers a happy and safe summer.

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compliance with FLSA, then the employer would still be responsible for paying the employee damages as a result of a Wage-Hour audit.

The new rules, effective August 23, 2004, have drawn political attacks from multiple sources. The rules, as this newsletter goes to print, are much different than what was originally proposed. As now written, the rules increase the number of employees who will be eligible for overtime and provide some modest clarifications for determining who is an exempt employee.

The crucial issue for employers continues to be who is "exempt" and "non-exempt" under the FLSA. The traditional definitions are in a box on the next page. For many years most employees were required to be paid a salary of \$250 per week in order to be considered exempt. This low amount has persisted through the years, even though virtually no manager in the United States has made less than this modest amount in years. The new rules provide that the exempt standard is now \$455 per week or \$23,500 annually. The new rules also provide that employees making \$100,000 per year and with some exempt responsibilities will be presumed to be exempt.

The next five sections list the exemption categories with information from the new rules on determining whether employees will be able to be classified as executives, administrators, professionals, computer employees or outside salespersons.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests, in addition to the salary test discussed above, must be met:

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- 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.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests, in addition to the salary test discussed above, must be met:

- 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
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

To qualify for the **learned professional employee exemption**, all of the following tests, in addition to the salary test discussed above, must be met:

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The interpretation of the new rules is that the employee will have at least a four-year degree.

To qualify for the **creative professional employee exemption**, all of the following tests, in addition to the salary test discussed above, must be met:

- 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.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The salary test discussed above will apply, or if compensated on an hourly basis, at a rate not less than \$27.63 an hour;

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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:
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 2) 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;
 - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

NOTE: Employees performing computer repair and service are non-exempt.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

NOTE: The requirement that the employee perform no more than 20% non-sales work no longer applies, although more than 50% non-sales work will certainly be a problem.

Other Matters of Note

Blue Collar Workers

The exemptions provided by the FLSA apply only to "white collar" employees who meet the salary and duties tests. 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.

Paramedics & Other First Responders

The exemptions also do not apply to police officers, fire fighters, paramedics, hazardous materials workers and similar employees, regardless of rank or pay.

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.
- 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.

ACTION PLAN

1. Make sure that accurate job descriptions are prepared for each position in your organization.
2. Review not just your job descriptions, but also the titles. Titles are not dispositive on the issue of exemption, but calling an employee a technician or clerk will definitely cause investigators to classify them as non-exempt.
3. You cannot "make a silk purse out of a sow's ear," or something like that. In other words, if a position is really non-exempt, pushing them into the exempt category may produce some short term gains, but it is a poor strategy.
4. When in doubt, either classify the employee as non-exempt, or consult an expert for assistance. Avoiding the creation of a problem will always be the best approach.

EXEMPT OR NONEXEMPT?

Nonexempt Employees: Employees who are required to be paid overtime at the rate of time and one half their regular rate of pay for all hours worked beyond forty hours in a defined workweek, in accordance with applicable Federal Wage-Hour laws.

Exempt Employees: Employees who are not required to be paid overtime, in accordance with applicable Federal Wage-Hour Laws, for work performed beyond forty hours in a workweek. Executives, professional employees, outside sales representatives, and certain employees in administrative positions are typically exempt.

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