

THE LEARNED PROFESSIONAL OVERTIME EXEMPTION: WHAT YOU NEED TO KNOW – Chapter Four

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The professional exemption to the federal overtime requirements (“Professional Exemption”) is frequently relied upon to categorize employees as exempt from overtime when an employee is functioning in what appears to be a highly skilled capacity. Employers relying on this exception to the Fair Labor Standards Act (“FLSA”) must follow specific practices and procedures to be sure employees labeled as “professionals” meet the specific requirements of this exemption. See 29 C.F.R. §541.300. The Professional Exemption is actually composed of two exemptions, the “Learned Professional Exemption” and the “Creative Professional Exemption.” If an exemption to the overtime rules does not apply, federal law generally mandates that non-exempt employees be paid overtime at time and one half for all hours actually worked over 40 in any workweek.

As a reminder, beginning on December 1, 2016, the minimum salary required for the FLSA while collar exemptions, which includes the Professional Exemption, will increase from \$455 to \$913 per week (from (\$23,660 to \$47,476 calculated yearly). Any employee designated as overtime exempt as a professional employee, but who is currently earning less than \$913 per week, must be given an increase on December 1, 2016 to meet the new salary requirement. The Professional Exemption further requires that the employee meet a specific “duties test.” If you missed the previous articles that explained each exemption and the new salary requirements, see Chapters One through three of the series of articles located at www.saklaw.net.

I. THE LEARNED PROFESSIONAL EXEMPTION:

The Learned Professional Exemption requires specialized academic training in a professional field or specialty in which a certain level of education or license is required. The FLSA regulations require that employees have some advanced degree or license that enables the employee to perform the specialized functions of his or her job. See 29 C.F.R. §541.301. Employers are often unaware of the limitations of the Learned Professional Exemption. It certainly seems reasonable for an employer to assume that this exemption is proper when a high degree of skill and years of experience in an industry are required to perform particular tasks essential to the position. But beware, what appears at first blush to be an employee who is obviously a professional in his or her field, turns out to not be so obvious.

In addition to the salary requirements discussed above, this exemption requires that an employee’s primary duty 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. 29 C.F.R. §541.301.

The professional employee must perform work requiring advanced knowledge in the field of science or learning, and that the knowledge be the type “customarily acquired by a prolonged

course of specialized intellectual instruction.” 29 C.F.R. §541.301. Work requiring “advanced knowledge” means work that is mostly intellectual, such as that which is involved in a field of science or the type of learning customarily obtained through a prolonged course of specialized instruction that results in a degree. This is distinguished from an apprenticeship or career that develops skills and experience in routine mental, manual or mechanical work, which do not qualify for this overtime exemption.

II. THE CREATIVE PROFESSIONAL EXEMPTION:

A related overtime exemption under the FLSA is for creative professionals, and is based on talent, originality, imagination and creativity. In addition to the salary basis requirements described above, the Creative Professional Exemption requires that the employee’s primary duty be “the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” 29 C.F.R. §541.302. As opposed to the Learned Professional Exemption, which requires intelligence, diligence and accuracy in a trained discipline, the Creative Professional Exemption depends on work that requires imagination, invention, originality or talent. This includes individuals such as actors, musicians, painters and artists and composers. It does not include employees who merely collect, organize or record artistic information, unless they actually contribute to its creation or unique interpretation.

III. THE COMMON LINE:

It is difficult for an employee without an advanced academic degree or license to qualify for the Learned Professional Exemption to FLSA. For example, a certified public accountant or accountant with a college degree who exercises independent judgment likely qualifies for the exemption, whereas a junior accountant or accountant clerk performing mostly routine tasks are likely nonexempt. Professionals such as licensed teachers, nurses and attorneys are generally exempt. For the Creative Professional Exemption, the use of actual artistic skill, originality, talent or creativity is required, which means that many employees who put together or organize a final product that is created by others will not qualify for this overtime exemption.

When an employer wishes to rely on the Learned Professional Exemption or the Creative Professional Exemption despite some uncertainty as to its application, such employees should complete timesheets for the hours worked each week. In the event it is determined that an employee has been misclassified, there will be records to show what overtime, if any, is due. Moreover, it is the employer’s obligation to have all nonexempt employees complete time records to show the hours worked each week. The failure to maintain such records is not only a violation of FLSA, but can result in the employee using his or her own personal records to argue that he or she is entitled to overtime hours that were not paid. An employer must keep such records for a minimum of three (3) years under FLSA.

Please note that the information contained in this article is not designed to address specific situations, and does not include rules or regulations that apply to all states. If you have questions concerning this topic, you should consult with legal counsel of your choice to obtain advice on various fact specific matters.

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