



Salaried Doesn't Always Mean Exempt: How to Break the Bad News to Decisionmakers

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The plethora of Fair Labor Standards Act cases (see March 2010 newsletter, p. 5) reveals, at least anecdotally, that employers may not appreciate the distinction between “salary” and “exempt” with regard to the obligation to pay overtime. Regularly, I find that otherwise sophisticated, educated “professionals” (in the vernacular) and business owners do not recognize that the requirement to pay overtime is the norm, and whether an employee is paid a salary is not determinative of much.

Over the years, I have developed a “spiel” (five-minute summary) that I use to explain the rule of law. Often, it does not go down easy. The particularly well-educated and sophisticated client often resists the concept, because they assume that if it were true that paying someone a salary doesn't necessarily mean they aren't entitled to overtime, they would have heard it before. I in turn assume they are unfamiliar with this distinction simply because they have been exempt from the act's overtime provisions for a long time — maybe since college, when they may have only worked part time, or because their employers got it wrong, too.

First, I explain the purpose of the act: it was enacted in 1938 after the Great Depression to get more people back to work. Rather than have one person work 80 hours a week, the overtime pay requirement made it more cost effective for an employer to hire two people for the same total wages. I explain that overtime is the rule, and exemptions from the requirement to pay overtime are the exception, and “salary” and “exempt” are not the same thing.

Being Exempt From Overtime

Second, I elucidate the general principles of the overtime exemption: first, the person must receive a salary of \$455 per week, which means, for purposes of this introductory discussion, there are no deductions for absences or tardiness (29 C.F.R. §541.602; see ¶220 of the *Handbook*); second, exemptions from the requirement to pay overtime are narrowly construed in light of the purpose of the act; and, third, these are “white-collar” exemptions and job titles are not determinative — rather, one looks at the actual duties performed (29 C.F.R. §541.2). This naturally segues into analysis of the particular exemptions that may be available to the position at issue.

There are three main “white collar” exemptions from the act: professional, executive and administrative (see 29 C.F.R. §541.0, et seq.; see ¶¶231, 241 and 251 of the *Handbook*). (While there are other exemptions, the introduction to Exemption 101 is the short and plain version. The professional exemption is the easiest to explain; the administrative exemption is the hardest to explain. Typically, the computer professional and the outside sales exemptions are not the subject of the spiel, simply because they are fairly unique and fact specific.)

I explain in gross generalities: The professional exemption applies to doctors, lawyers, nurses, teachers, architects and others with advanced degrees (29 C.F.R. §541.300). The executive exemption applies to persons who supervise two or more full-time employees, manage a discrete department, and are involved in hiring and firing decisions (29 C.F.R. §541.100). The administrative exemption applies to persons who help run the employer's general business operations, such as marketing, accounting and risk management (29 C.F.R. §541.200).

I usually have a minute left to elaborate: typically, employers tend to consider anyone performing office tasks as “administrative.” However, in this position, the employee must exercise “independent judgment” and

See *Salaried vs. Exempt*, p. 2

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“discretion” on matters of importance to qualify for the exemption (29 C.F.R. §541.202). Deciding the order to perform routine tasks is not the level of discretion contemplated by the exemption.

Often during the discussion of the administrative exemption, the possibility of misclassification is revealed;

the treatment of employees as “administratively exempt” is the area most likely to lead into a discussion of an audit.

As the Borg said in Star Trek, “resistance is futile,” and as the exempt-versus-salary distinction begins to sink in, the door opens to the introduction to Audits 201. However, that is left for another day. 🏠



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