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Don't Gamble with a “Head-in-the-Sand” Approach to Overtime Claims

BY ROBERT A. KAISER, J.D.



To get a sense of public consciousness about an issue, Google is a good place to start. A Google search of “overtime” will reveal that the top “hits” are law firms that promise the prospect of a large recovery. It may be that the prospect of a large recovery for any one employee is small, but the prospect of a sizable recovery of attorneys’ fees, regardless of the size of the recovery for the employee, is quite a motivator for some law firms.

Perhaps the most significant development in this area of the law has been the recent increase in collective actions by groups of workers seeking seven-figure awards. In the last several years, employers have been hit with huge damages awards, or have agreed to pay equally sobering amounts to settle overtime claims. In such cases, each individual’s claim for unpaid overtime may be quite small—a few thousand or even a few hundred dollars—but when people join together in collective actions, the resulting damages (and attorneys’ fees) can be enormous.

Many employers adopt a “head-in-the-sand” approach to overtime claims, gambling that questionable pay practices won’t be discovered. Such employers mistakenly assume that if employees seem satisfied (or should be satisfied) with their compensation, they have nothing to worry about. However, all it takes is one disgruntled employee or former employee to visit a competent attorney, and it’s off to the races. When that happens, all pay practices are open to dissection in court. And this is true even if all other employees are agreeable to a particular arrangement.

The federal Fair Labor Standards Act, as well as the Missouri Minimum Wage Statute, are intended to regulate minimum wages, overtime pay, equal pay and child labor. As a general rule, any employee who works more than 40 hours in a week must be paid premium pay of 1 ½ times their regular hourly rate for all hours worked over 40. These laws apply only to actual employees, and thus a preliminary inquiry may require an analysis of an individual’s employment status. And even if a person is an employee, the laws do include exceptions—those positions that are “exempt” from this general rule—and thus the designation of “exempt” status.

Only Employees are Covered by these Laws

Not everyone who performs services for an employer will be considered an "employee." If an individual is not an "employee," he or she is not covered by these laws. However, some employers seek to avoid the obligations and potential liability presented by the overtime and other employment laws by classifying workers as "independent contractors," and paying them by means of the 1099 process, rather than through payroll. Sometimes these classifications are appropriate. However, how an employer chooses to label a worker is not controlling. Rather, to determine whether an individual is an employee under most employment laws, courts focus on the economic reality of the relationship. Courts look to whether the individual is economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself. If this test sounds familiar to many CPAs, there is a good reason: the tests borrow from traditional IRS analysis applied by accountants on a routine basis.

Who is Exempt?

Deciding how to classify an employee is a crucial decision, as mistaken classification can lead to enormous potential exposure. Yet, many employers put surprisingly little thought into these decisions. And, unfortunately, exemptions are commonly misunderstood and misapplied even by employers who are attempting to comply with the law. Here are some common mistakes and fallacies regarding exemptions:

- If I put an employee on salary, she becomes exempt.
- If an employee has a manager, supervisor, or administrator title, he is exempt.
- If an employee is highly compensated, she is exempt.
- If an employee is college-educated and performs office work, he is exempt.
- If an employee has an advanced degree, she is exempt.
- I have an employee who wants to be paid on salary, rather than hourly, and does not want to record his time. Based on his wishes, it's OK for me to treat him as exempt.
- If an employee agrees to work some overtime at straight time pay, that should be fine.
- Everyone else in my industry classifies this position as exempt.
- The employee doesn't work overtime, so it doesn't really matter.

All of these assumptions are simply incorrect, and if an employer has classified employees as exempt on any of these bases, they need to look again. By way of example, under the law, employees cannot "agree" to a pay scheme other than what the law requires, can't "agree" to forgo overtime, and can't "agree" to be exempt if they are not.

Instead, employers should familiarize themselves with the exemptions and apply them as the law, and not common sense, dictates.

So, here is a quick look at some of the most commonly used exemptions:

Executive Exemption

An employee qualifies for the executive exemption if she:

1. Is compensated on a salary basis at a rate of not less than \$455 per week; and
2. Has a primary duty of management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and
3. Customarily and regularly directs the work of two or more other employees; and
4. Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

This is a relatively straightforward exemption, and is generally met by any real supervisor who truly supervises, with all that entails, at least two other employees.

(Continued...)

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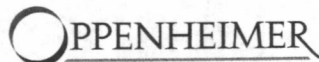
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Administrative Exemption

The administrative exemption is the most frequently misunderstood and misapplied. An employee qualifies for the administrative exemption if she:

1. Is compensated on a salary or fee basis at a rate of not less than \$455 per week;
2. Has a primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
3. Has a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance.

Employers should resist the urge to treat this as a "catch-all" exemption for employees performing any white-collar work. A key phrase is performing "work directly related to the management or general business operations of the employer;" and it generally refers to work that is linked with the running or servicing of the business.

This work must not be of a routine or clerical nature and must be of substantial importance to the management or operation of a business. As a general rule, bookkeepers, secretaries, and clerks are not exempt, while tax experts, credit managers, account executives, brokers, sales

research experts and personnel/human resources directors typically stand a better chance of qualifying as exempt.

Professional Exemption

An exempt professional employee is one who:

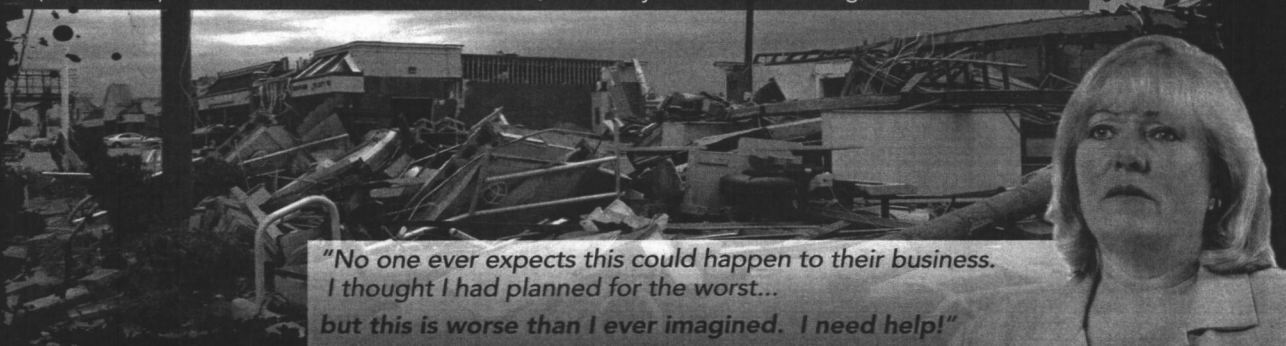
1. Is compensated on a salary or fee basis at a rate of not less than \$455 per week (except for certain licensed professionals in the fields of law and health care); and
2. Has a primary duty of the performance of work:
 - i. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (the "learned professions"); or
 - ii. Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (the "creative professions").

An actor (good or bad) is an example of a creative professional. A CPA, performing as such, is a good example of a recognized learned professional. This may even be true for non-CPA accountants—if in doing their jobs they consistently exercise discretion and independent judgment. On the other hand, an accountant that merely inputs data into a tax preparation software program,

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May 22, 2011

An EF-5 tornado ripped through the heart of Joplin, MO leaving 161 dead, 7000 housing units destroyed and 523 businesses affected (5000 employees). A majority of the businesses affected plan to reopen in their current or new location, but many are still wondering, "How?"

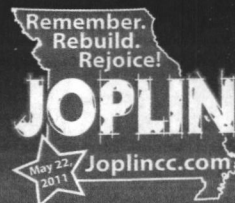


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or prepares an initial tax return for supervisory review by another is generally not performing at an exempt level.

Computer Professionals

An exempt computer professional is one who:

1. Is compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities, or on an hourly basis at a rate not less than \$27.63 an hour; and
2. Has primary duties consisting of:
 - i. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; or
 - ii. 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; or
 - iii. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - iv. A combination of the aforementioned duties, the performance of which requires the same level of skills.

The exemption specifically excludes employees involved in the operation of computers or in the manufacture, repair or maintenance of computers (like "help desk" employees), as well as employees whose tasks involve computer use, such as engineers, drafters and even users of CAD/CAM systems. As a general rule, those who design software and write code are exempt while those who install software or engage in routine troubleshooting are not.

Conclusion

These descriptions offer a glimpse of some common exemptions. Other exemptions exist for outside salespeople, drivers and driver helpers engaged in interstate transport, certain highly compensated employees, and a host of lesser utilized positions. It should be clear that ascertaining a proper classification can be as much art as science, requiring the application of specific facts to the principles outlined above, and often reasoning by analogy to positions already litigated or mentioned in the federal regulations. As is the case with most legal problems, however, recognition that there is an issue is half of the solution.

Robert Kaiser is a partner in the employment and labor practice group at Armstrong Teasdale, LLP. As counsel to both public and private sector employers, he represents emerging and mature businesses in labor and personnel-related disputes and litigation, wage and hour matters, executive employment agreements, compensation plans, confidentiality and non-compete agreements. He can be reached at rkaiser@armstrongteasdale.com.



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