

Question & Answer Summary

February 18, 2010 Webinar

Wage and Hour Update, Part 2: Who's Exempt from Overtime?

On February 18, 2010, Miller Law Group presented part two of our Wage and Hour Update webinar series. We examined legal requirements and recent developments regarding federal and California "white-collar" exemptions to overtime laws, including the administrative, executive, and professional exemptions, as well as the outside and inside sales exemptions. We also discussed the salary basis test and best practices for classifying employees. The following are answers to frequently asked questions by webinar attendees.

Q. IN DETERMINING WHETHER THE "DUTIES TEST" IS SATISFIED FOR EXEMPTION FOR A PARTICULAR EMPLOYEE, DOES THE EMPLOYER HAVE TO ANALYZE THE INDIVIDUAL EMPLOYEE'S DUTIES, OR IS IT ENOUGH THAT THE GROUP OF EMPLOYEES IN SIMILAR JOBS ARE PERFORMING EXEMPT DUTIES THAT MEET THE TEST?

A. An employee will not qualify as exempt merely because co-workers performing similar duties are properly classified as exempt, or based solely on a job title shared with exempt employees. Rather, exempt classification of a particular employee must be determined based upon an individualized assessment of that employee's work duties and salary.

Q. MUST AN EMPLOYER INFORM AN EMPLOYEE WHO IS CLASSIFIED AS EXEMPT AS TO THE SPECIFIC TYPE OF EXEMPTION THAT APPLIES (E.G. ADMINISTRATIVE, EXECUTIVE, OUTSIDE SALES)?

A. There is no legal requirement to inform an employee about the specific type of exemption the employer is applying. It is a good practice, however, to indicate the applicable exemption in job descriptions, as well as to ensure that the job description reflects duties that are consistent with the exemption and the work the employee actually is performing. Furthermore, note that even if an employer initially classifies an employee under an incorrect classification, but the employee qualifies as exempt under another exemption, the employee can still be considered exempt.

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Q. IF A NONEXEMPT EMPLOYEE TEMPORARILY COVERS AN EXEMPT EMPLOYEE'S DUTIES WHILE THE EXEMPT EMPLOYEE IS ON A LEAVE OF ABSENCE, DOES THE FACT THAT A NONEXEMPT EMPLOYEE WAS ABLE TO PERFORM THAT JOB MEAN THAT THE JOB REALLY DOES NOT QUALIFY AS EXEMPT?

A. No. The determination of exempt status focuses on the duties an employee performs. Thus, if an employee's specific job duties meet the legal standards for exemption, it is irrelevant whether those duties are also sometimes performed by a non-exempt employee, such as during an exempt employee's absence. Of course, if the non-exempt employee who is covering for an exempt employee is not "primarily engaged" in performing exempt duties and/or does not meet the salary basis test, then the non-exempt employee will remain non-exempt even during the time period when covering the exempt job.

Q. WITH RESPECT TO THE CALIFORNIA RULE THAT AN EXEMPT EMPLOYEE MUST SPEND MORE THAN FIFTY PERCENT OF WORK TIME PERFORMING EXEMPT DUTIES, IS THE TIME MEASURED ON A DAILY, WEEKLY, OR MONTHLY BASIS?

A. For the executive, administrative and professional exemptions, the time must be measured on a *workweek* basis. In particular, to qualify for these exemptions, the employee must spend more than 50 percent of his or her work time performing exempt duties. The California Wage Orders specify that "[t]he work actually performed by the employee during the course of **the workweek** must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement."

Q. MY COMPANY HAS A POLICY THAT HOLIDAYS WILL NOT BE PAID DURING AN EMPLOYEE'S INTRODUCTORY PERIOD (FIRST NINETY DAYS OF EMPLOYMENT). MAY WE REDUCE AN EXEMPT EMPLOYEE'S PAY IF A HOLIDAY FALLS WITHIN THE INTRODUCTORY PERIOD?

A. No, an exempt employee's salary should not be reduced if a holiday falls within his or her "introductory period." Generally, to meet the salary basis test to qualify for certain exemptions, an exempt employee must receive his or her full salary for any week in which the employee performs any work, without regard to the number of days or hours worked. There are limited exceptions to this salary basis rule, but a holiday falling within a regular workweek does not qualify as an exception.

Q. WE HAVE AN EXEMPT EMPLOYEE WHO TOOK A HALF DAY OFF DUE TO ILLNESS. CAN WE DEDUCT THIS TIME FROM HIS PAY?

A. No, the general rule is that deducting pay for an exempt employee's partial-day absence will destroy the exemption. Note, however, that even when an employee's salary may not be reduced for a partial-day absence, in some cases an employer may make partial-day deductions from an exempt employee's *accrued paid time off*. Thus, for example, if an exempt employee works one hour and takes seven hours off for illness, and has two hours of available sick leave and two hours of accrued vacation, the employer must pay the full salary but may deduct two hours from the employee's available sick leave and two hours from the accrued vacation (as long as the employer has such policies in place). For more examples, please see the [November 23, 2009 Opinion Letter from the California Division of Labor Standards Enforcement](#).

Q. WHAT ISSUES SHOULD MY COMPANY BE AWARE OF REGARDING PAYING OUT EMPLOYEES FOR ALLEGED WAGE VIOLATIONS IN RETURN FOR A RELEASE AGREEMENT?

A. Securing a release of wage claims in California can be a complex process. Generally, California Labor Code section 206.5 voids waivers of an employee's right to receive all wages due. Courts, however, have clarified that section 206.5 does not prohibit a release of claims for unpaid wages where: 1) there was a *bona fide* dispute over whether wages were owed; 2) the employer has paid all of the undisputed wages without regard to whether the employee signs a release; and 3) the employee receives something of value in exchange for releasing the right to sue for the additional (disputed) wages. Thus, before seeking a release of wage claims from an employee, an employer must pay wages that are clearly owed.

For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

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