

Employers Have Flexibility in Applying the Professional Exemption

Working Together

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The basic premise of the Fair Labor Standards Act with regard to overtime pay is that all employees are to be paid overtime unless they qualify for an exemption. Among the exemptions are the three categories known as “white collar workers:” employees whose primary duty is executive, administrative, or professional, as defined in U. S. Department of Labor [“DOL”] regulations.

The professional exemption applies when an employee’s primary duty is the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of instruction. For most professions, this means a college degree (if not more). It is important to note that for the exemption to apply, the employee must not only have the special knowledge that derives from the advanced course of study, the employee must also perform duties that require this knowledge. A law school graduate who works as a barista in a coffee bar is not an exempt employee.

A registered nurse qualifies as an exempt professional when he or she is using nursing skills; for example, a staff nurse in a hospital or nursing home. However, there are types of work other than bedside nursing that qualify for the exemption. For example, Genex Services LLC provides managed care services for employers and workers compensation insurers, to help injured employees return to work safely and effectively. Genex utilizes field medical case managers to review medical records, interview workers and develop care plans. Genex was sued by one of its case managers, Nancy Williams, an R.N. who was paid a salary, but who claimed that she was owed unpaid overtime pay because the professional exemption should not apply to her. Williams argued that her work was mostly clerical and routine, and that she did not often use her advanced knowledge.

In affirming a grant of summary judgment by the trial court in favor of the employer, the U. S. Court of Appeals for the Fourth Circuit held that Williams regularly used the skills, training and knowledge acquired in nursing school to perform her duties. Moreover, she used those skills in exercising independent judgment. It did not matter that she was not performing traditional nursing in a medical facility, she was still acting as a “learned professional.”

DOL regulations also require that for a white collar exemption such as the professional exemption to apply, a qualified employee must be paid on a salary basis; that is, must receive the same salary amount each pay period (unless some limited exceptions apply). In other words, an employer who pays a professional by the

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hour instead of a salary loses the benefit of the exemption, and must pay overtime if the employee exceeds 40 hours of work in a pay week. So an employee paid on an hourly basis who is regularly scheduled for 40 hours per week may get a smaller paycheck if he works fewer hours, and a larger paycheck if he works extra hours, whereas the salary-basis employee gets the same paycheck each week, regardless of hours worked.

But although the salary basis requirement might be lost if the employer reduces pay when fewer hours are worked, it is not lost if the employer increases pay for increased work. DOL regulations allow an employer to provide an exempt employee with additional compensation (such as to reward special performance) without violating the salary basis requirement. The regulations specify that the additional compensation may be paid on any basis, not just a flat sum as a bonus, but also a straight-time hourly amount or even a time and one-half calculation, as long as the guaranteed salary amount is also paid.

So employers have some flexibility in tailoring job duties and compensation to fit their needs, while still preserving the benefit of the professional employee exemption.

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