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QUESTIONS ABOUT YOUR SITUATION? Call me today at (713) 370-7100 in Houston or (972) 346-6501 in Dallas, or reach me toll free at (800) 313-1877, and let's see what we can do together!

THE BASICS OF OVERTIME PAY & THE FAIR LABOR STANDARDS ACT (FLSA)

I am often asked by employees what they can do when they are SUPPOSED to receive overtime pay, however their employer refuses to do pay it, or claims that they are exempt/salaried.

So what can an employee in this position do?

Most employers' pay practices are governed by The Fair Labor Standards Act (FLSA), which was enacted in 1938. The purpose of the FLSA is to ensure that: 1) all employees receive a minimum wage, 2) men and women are paid equally when performing substantially the same job, 3) the use of child labor meets strict requirements, and 4) unless an employee is "exempt" from the requirements, he/she receives extra compensation for hours worked in excess of forty (40) in a workweek.

Many employers AND employees have a misunderstanding about what is an "exemption" from overtime under the FLSA.

Generally, under the FLSA, all employees must be paid a rate of time and one half of their regular rate of pay for all hours worked in excess of forty (40) in a workweek. However, particular employees may be exempt from this overtime requirement if they meet certain criteria. As applied to contract staffing, the most common exemptions apply to those white-collar employees who are employed in a bona fide executive, administrative, or professional position.

When is an Employee Exempt?

Most employers assume that because someone is working in what they consider a professional job, that employee is exempt from the overtime requirement of the FLSA. However, the test for exempt status is a **two-pronged test**. Not only must the employee's **duties** meet the exempt requirements, that employee must also be paid on a **salary or fee basis** as opposed to an "hourly" basis. Both the salary test and duties test must be met for the exemption to apply. An employee is not considered exempt if only one of the two tests is met. Therefore, although an employee has a professional title, or

professional duties, that employee must also be paid on a salary or fee basis to qualify as exempt from overtime under the FLSA. A professional, executive, or administrative employee will **not** meet the FLSA exemption requirements if he/she is paid on an hourly basis (with one exception discussed below).

Similarly, the payment of a salary does not, in and of itself, create an exemption. The individual who is paid a salary must still meet the duties test to qualify for exemption. Generally once it is determined that a particular employee is exempt, such an employee must receive his/her entire salary for any week in which work is performed without regard to the number of days or hours worked. When deductions are permitted, they should only be made in full-day increments.

Are There Any Exceptions?

Although numerous "miscellaneous" exceptions exist, there is really only one exception to these general principles which is extremely relevant to recruiters offering contract staffing. Professionals working in a "**computer related occupation**" who earn more than **\$27.63** per hour can still be paid on an hourly basis and remain exempt from overtime under the FLSA. Originally, the FLSA stated that the computer related employee must be paid at a rate of six and one half times the minimum wage to qualify. However, the FLSA was modified by the Small Business Job Protection Act of 1996. This modification set a firm dollar amount of \$27.63 to replace the six and one half calculation.

THE FLSA EXCEPTIONS TO OVERTIME PAY:

Administrative Exception

The Fair Labor Standards Act (FLSA) requires employers to pay an employee overtime (1 and 1/2 times his or her regular rate of pay) if that employee works more than 40 hours per week. There are four specific exemptions under the FLSA: administrative, executive, professional, and outside sales personnel. If an employee qualifies for one of these exemptions under either the "long" or the "short" FLSA tests, the employer is not required to pay overtime to that employee. For the administrative exemption to apply, the employee must perform certain office duties and regularly exercise discretion and independent judgment.

Executive Exception

The Fair Labor Standards Act (FLSA) requires employers to pay an employee overtime (1 and 1/2 times his or her regular rate of pay) if that employee works more than 40 hours per week. There are four specific exemptions under the FLSA: administrative,

executive, professional and outside sales personnel. If an employee qualifies for one of these exemptions under either the "long" or the "short" FLSA tests, the employer is not required to pay overtime to that employee. An executive must have certain management and supervisory responsibilities to qualify as an exempt employee.

Exempt Employees

The Fair Labor Standards Act (FLSA) requires employers to pay an employee overtime (1 and 1/2 times his or her regular rate of pay) if that employee works more than 40 hours per week. There are four specific exemptions under the FLSA: administrative, executive, professional and outside sales personnel. If an employee qualifies for one of these exemptions under either the "long" or the "short" FLSA tests, the employer is not required to pay overtime to that employee. Unlike nonexempt employees, who are paid for working a specific number of hours, exempt employees are paid to get a job done. They receive the same salary regardless of how few or how many hours they work in a week.

Professional Exemption

The Fair Labor Standards Act (FLSA) requires employers to pay an employee overtime (1½ times) his or her regular rate of pay) if that employee works more 40 hours per week. There are four specific exemptions under the FLSA: administrative, executive, professional and outside sales personnel. If an employee qualifies for one of these exemptions under either the "long" or the "short" FLSA tests, the employer is not required to pay overtime to that employee. In determining whether the professional exemption applies, employers need to consider certain **job characteristics and/or responsibilities**. Essentially, does the employee qualify as a professional with the job duties, autonomy, and responsibility to be exempted from receiving overtime pay.

Salaried Employees

Employees can be paid on an hourly or a salary basis. Hourly employees are considered nonexempt under the Fair Labor Standards Act (FLSA), and they must be paid overtime if they work over 40 hours in a week. The majority of salaried employees are categorized as exempt and therefore are exempted from overtime. **However, some salaried employees are classified as nonexempt and they must receive overtime compensation.** The facts surrounding that employment relationship will determine whether the employee is entitled to 1½ times his/her regular pay for work time in excess of 40 hours per week.

Sales Personnel Exemption

The Fair Labor Standards Act (FLSA) requires employers to pay an employee overtime (1 and 1/2 times his or her regular rate of pay) if that employee works more than 40 hours per week. There are four specific exemptions under the FLSA: administrative, executive, professional, and outside sales personnel. In general, an employee is classified as outside sales personnel if the individual is employed to sell goods or obtain contract orders for services, regularly spends work time away from the employer's place of business, and spends at least 80 percent of each workweek engaged in exempt work. Certain retail sales personnel paid on commission are exempt from the overtime requirements whether they work in inside or outside sales.

FLSA IN GREATER DETAIL:

Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. §201 et. seq.)

Who is Covered?

The Fair Labor Standards Act (FLSA) establishes standards for minimum wages, overtime pay, recordkeeping, and child labor. These standards affect more than 100 million workers, both full-time and part-time, in the private and public sectors.

The Act applies to enterprises with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce. For most firms, a test of not less than \$500,000 in annual dollar volume of business applies (i.e., the Act does not cover enterprises with less than this amount of business).

However, the Act does cover the following regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally, or physically disabled or gifted; preschools, elementary, and secondary schools and institutions of higher education; and federal, state, and local government agencies.

Employees of firms that do not meet the \$500,000 annual dollar volume test may be covered in any workweek when they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.

The Act covers domestic service workers, such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters, if they receive at least \$1,300 (2001) in cash

wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers.

The following are examples of employees exempt from both the minimum wage and overtime pay requirements:

- Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in the Department of Labor's regulations);
- Employees of certain seasonal amusement or recreational establishments;
- Employees of certain small newspapers and switchboard operators of small telephone companies;
- Seamen employed on foreign vessels;
- Employees engaged in fishing operations;
- Employees engaged in newspaper delivery;
- Farm workers employed on small farms (i.e., those that used less than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year); and
- Casual babysitters and persons employed as companions to the elderly or infirm.

The following are examples of employees exempt from the overtime pay requirements only:

- Certain commissioned employees of retail or service establishments;
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- Auto, truck, or farm implement parts-clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers;
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans;
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations;
- Domestic service workers who reside in their employers' residences;
- Employees of motion picture theaters; and
- Farmworkers.

Certain employees may be partially exempt from the overtime pay requirements. These include:

- Employees engaged in certain operations on agricultural commodities and employees of certain bulk petroleum distributors;
- Employees of hospitals and residential care establishments that have agreements with the employees that they will work 14-day periods in lieu of 7-day workweeks (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over eight in a day or 80 in the 14-day work period, whichever is the greater number of overtime hours); and
- Employees who lack a high school diploma, or who have not completed the eighth grade, who spend part of their workweeks in remedial reading or training in other basic skills that are not job-specific. Employers may require such employees to engage in these activities up to 10 hours in a workweek. Employers must pay normal wages for the hours spent in such training but need not pay overtime premium pay for training hours.

Basic Provisions/Requirements

The Act requires employers of covered employees who are not otherwise exempt to pay these employees a minimum wage of not less than \$5.15 an hour as of September 1, 1997. Youths under 20 years of age may be paid a minimum wage of not less than \$4.25 an hour during the first 90 consecutive calendar days of employment with an employer. Employers may not displace any employee to hire someone at the youth minimum wage.

Employers may pay employees on a piece-rate basis, as long as they receive at least the equivalent of the required minimum hourly wage rate. Employers of tipped employees (i.e., those who customarily and regularly receive more than \$30 a month in tips) may consider such tips as part of their wages, but employers must pay a direct wage of at least \$2.13 per hour if they claim a tip credit. They must also meet certain other conditions.

The Act also permits the employment of certain individuals at wage rates below the statutory minimum wage under certificates issued by the Department of Labor:

- Student learners (vocational education students);
- Full-time students in retail or service establishments, agriculture, or institutions of higher education; and
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- Individuals whose earning or productive capacities for the work to be performed are impaired by physical or mental disabilities, including those related to age or injury.

The Act does not limit either the number of hours in a day or the number of days in a week that an employer may require an employee to work, as long as the employee is at least 16 years old. Similarly, the Act does not limit the number of hours of overtime that may be scheduled. **However, the Act requires employers to pay covered employees not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless the employees are otherwise exempt.**

Special provisions apply to state and local government employment.

It is a violation of the Act to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Act. The Act also prohibits the shipment of goods in interstate commerce that were produced in violation of the minimum wage, overtime pay, child labor, or special minimum wage provisions.

Employee Rights

You may file a lawsuit, generally for the previous **two years** of back pay (three years in the case of a willful violation) **and an equal amount** as liquidated damages, **plus attorney's fees and court costs.**

Relation to State, Local, and Other Federal Laws

State laws also apply to employment subject to this Act. When both this Act and a state law apply, the law setting the higher standards must be observed.

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