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What Legal Aid Programs Need to Know About the FLSA

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Background



Overview of the Fair Labor Standards Act

- The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards.
- FLSA requires employers to pay employees at least minimum wage and overtime for all hours worked over 40 in a workweek unless the employee falls into an exempt category (ex: professional, administrative, executive, computer, outside sales).
- Nonexempt workers are entitled to a minimum wage of not less than \$7.25 an hour. Overtime pay at a rate of not less than 1 1/2 times their regular rate of pay is required after 40 hours of work in a workweek. (State laws may require a higher minimum wage.)
- Exempt employees must generally satisfy a duties test and a salary test.

FLSA – The first 66 years

- The principal exemptions from overtime and minimum wage requirements largely were untouched. These exemptions required duties involving regular use of independent judgment and discretion (duties test) and payment of compensation on a salary basis (salary test)
- The salary amount needed was very low: \$155 week. A less demanding duties test was applied if the salary was \$250 week.

2004 Changes to the Regulations

The Department of Labor revised the overtime regulations in August 2004. Two key changes were:

- The “salary-level” test was amended. Under the new rules, employees had to earn a minimum salary of \$455 per week, or \$23,660 per year.
- *White-collar* employees who earned more than \$100,000 per year became automatically exempt from overtime under the regulations (HCE exemption).

2016 Revisions

In May 2016, the Department of Labor revised the overtime regulations to be effective December 1, 2016:

- The minimum wage for the salary test was increased to approximately \$913/week or \$47,476/year
- The annual compensation required to meet the HCE exemption was raised to \$134,004/year
- The compensation levels for the salary test and the HCE exemption was pegged to increase automatically
- The rules reflect that the DOL considers OT a right of employees and are intended to transfer wealth
- The DOL did not make changes to the duties tests, however

2016 Revisions

- DOL's proposed revisions were challenged in federal court in Texas by a group of states and business groups
- The judge preliminarily enjoined the rules, preventing them from becoming effective in December 2016
- On August 31, 2017, the Court granted summary judgment in favor of the groups challenging the new rules and found the proposed rules to be invalid

Nevada v. DOL

- The Court rejected the arguments of the States that the law did not apply to them
- The Court agreed with the business groups that the rule raised the salary test so high that it was no longer a reasonable proxy for the duties component of the exemptions
 - The salary level test effectively eliminated the duties test in the statute
 - DOL does not have authority to adopt a salary only test

Nevada v. DOL, con't

- DOL admitted that the salary level should be “near the lower end of the range of prevailing salaries” for exempt employees
 - The Court found this to be consistent with congressional intent, in that salary is a defining characteristic when determining who is really doing exempt duties – it should be a floor
 - DOL had instead said could not be exempt if not paid the minimum salary, irrespective of duties

Nevada v. DOL, con't

- Court: “[The DOL] has exceeded its authority and gone too far with the Final Rule. Nothing in [the law] allows [the DOL] to make salary rather than an employee’s duties determinative of whether” the employee is exempt.

Nevada v. DOL, con't

- Court also found the automatic updating provision, raising the minimum salary level every three years, to be unlawful
- In a footnote, the court suggested that adjusting an appropriate level for inflation would be okay
- In particular, the court suggested that had DOL simply adjusted the 2004 salary test level for inflation, “we wouldn’t be here today... because the [salary level] would be operating the way it has ... as more of a floor.”

The Future of the 2016 Revisions

- The DOL recently issued a “request for information” (RFI) to the public seeking input to aid in potentially revising the regulations
- The period for public comments ended on September 25.

Who are Exempt Employees?

- Executive
- Administrative
- Professional
 - Learned
 - Creative
- Computer
- Highly Compensated

Implications

Executive Exemption

- Must be compensated on a **salary basis that is at least \$455** per week currently;
- **Primary duty must be managing** the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Must customarily and regularly **direct the work of at least two full-time employees** or their equivalent; and
- Must have the **authority to hire or fire other employees**, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

- Must be compensated on a **salary basis that is at least \$455 per week currently**;
- Primary duty must be the performance of **office or non-manual work** directly related to the management or general business operations of the employer or the employer's customers; and
- Primary duty must include the exercise of **discretion and independent judgment** with respect to matters of significance.

Professional Exemption

- Learned Professional
- Creative Professional

Learned Professional

- Must be compensated on a **salary basis that is at least \$455 per week currently;**
- Primary duty must be the performance of work **requiring advanced knowledge** and work which is predominantly **intellectual** in character and includes the consistent **exercise of discretion and judgment;**
- The advanced knowledge must be in a **field of science or learning** (ex: law, medicine, theology, accounting, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status)
- The advanced knowledge must be customarily acquired by a **prolonged course of specialized intellectual instruction.**

A Few Words About Paralegals

- The DOL has repeatedly taken the position that paralegals are not exempt administrative employees.
- Likely are not learned professionals unless they possess an advanced specialized degree in another professional field and apply advanced knowledge
 - i.e., an engineer who is hired as a paralegal to provide expert advice in a patent case

Creative Professional

- Must be compensated on a salary basis of at least at \$455 per week currently;
- Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

Computer Employee Exemption

Must be compensated at a rate not less than \$455 per week or on an hourly basis at a rate not less than \$27.63 an hour;

Must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field

Primary duty must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. 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;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of these duties, the performance of which requires the same level of skills.

Highly Compensated Employees

- Highly compensated employees performing **office or non-manual work** and paid total annual compensation of \$100,000 or more which must currently include at least \$455 per week paid on a salary basis are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee.

Summary Salary and Duties Test

Salary Basis Test

- In order to satisfy the salary test for exemption, employees must either be paid at least \$455 per week or \$23,660 per year.
- The salary must be paid “free and clear” to employees. It may be paid in equivalent amounts for periods longer than one week (ex: \$910 (\$1826) bi-weekly). The payment cannot be made more frequently than weekly.
- The employee must regularly receive a predetermined amount of compensation each pay period. This compensation cannot be reduced because of variations in the quality or quantity of the work performed.
- Deductions from salary may be taken for absences for personal reasons (other than sickness or disability) of one day or more. Deductions for sick days may be taken if there is a plan, policy or practice of providing paid sick leave.

Duties Test

- The principal component is that the employee must consistently **exercise discretion and judgment.**
- The mere consideration that the employee can create significant damages in the event of a mistake is not the same as having discretion. If the employee is following a procedure spelled out for him or her, the fact that it includes some choices is not likely to be considered to be discretion.

Exemptions Do **NOT** Apply To:

- Manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. Non-management employees in production, maintenance, construction and similar occupations (carpenters, electricians, mechanics, etc) not exempt no matter how highly paid they might be.
- Police officers, firefighters, paramedics, correctional officers, rescue workers and other similar employees, regardless of rank and pay level.
- Thus, exemptions apply **only to** “white collar” employees who meet the salary and duties tests. Exemption does not apply based upon job title alone, but requires a **case-by-case assessment** of an employee’s job duties

FLSA Coverage

- Employers are not automatically covered by the FLSA
- Enterprise Coverage
 - Any entity with annual sales or business of at least \$500,000
 - Activities performed for a business purpose, not charitable activities not in competition
 - Hospitals, schools, preschools, government agencies, and businesses providing medical or nursing care are covered automatically (so-called “named enterprises”)
- Individual Coverage
 - Individual employees are covered if they engage in interstate commerce or in the production for goods for interstate commerce
 - Making out-of-state phone calls; receiving/sending interstate mail or electronic communications; ordering or receiving goods from an out-of-state supplier; handling credit card transactions or performing the accounting or bookkeeping for such activities
 - Occasional engagement in interstate commerce activities will not result in individual coverage

Public Agencies

- “Public agency” includes any agency of a State or a political subdivision of a State
- Courts generally look at whether an entity was created directly by the state or administered by people responsible to public officials or the general electorate

Avoiding Wage and Hour Pitfalls

- Review job descriptions and actual duties to determine whether employees are appropriately classified.
- Remember, job titles, nomenclature, or job descriptions do NOT establish whether a particular exemption applies. Exempt status must be determined on the basis of whether the employee's compensation and duties meet the requirements of the rule.
- Job descriptions should clearly identify every employee's primary and essential duties.
- Job descriptions should be reviewed periodically or after the employee has worked in the position for some time (e.g., several months) to determine whether the job duties originally described continue to be accurate.
- Regular audits of the duties actually performed by employees should help to determine whether employees continue to meet the requirements for exempt status.

Avoiding Pitfalls, cont'd

- Salaried employees are not always exempt – the employee must also meet the duty test
- Supervisors are not necessarily exempt
- All employees who work with computers do not qualify for the computer employee exemption

Hot Button Issues - Misclassification

- Volunteers
- Interns
- Independent contractors

Independent Contractors

- The IRS uses an “economic realities” test to determine whether an individual is an Independent Contractor
 - Behavioral Control (instructions, training & evaluation)
 - Financial Control (compensation, expenses, risk of loss, exclusivity)
 - Relationship of the Parties (benefits, permanence, agreements, key activity of business)

Hot Button Issues – Hours Worked and 24/7 Work Days

- Generally, compensable work time includes all time an employee is on duty or at a prescribed place of work and any time an employee is suffered or permitted to work.
- The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.
- This would generally include time worked at home, travel time, waiting time, training and probationary periods.
- "Workday", in general, means the period between the time on any particular day when such employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities. The workday may therefore be longer than the employee's scheduled shift, hours, tour of duty, or production line time.

Hours Worked and 24/7 Work Days, cont'd

- Attendance at seminars, lectures and training is usually compensable unless:
 - Attendance is outside the employee's regular working hours;
 - Attendance is voluntary;
 - The course, lecture, or meeting is not directly related to the employee's job; AND
 - The employee does not perform any productive work during such attendance
- Meal/Rest Breaks
 - Bona fide meal breaks of 30 minutes or more are not compensable, as long as employee is relieved of all duties
 - Breaks of short duration (5 to 20 minutes) are common and are compensable

Hours Worked and 24/7 Work Days, cont'd

- Travel
 - Ordinary home to work travel is not compensable
 - Home to work travel on special one day assignment in another city is work time, except for time that employee would ordinarily spend traveling from home to work
 - Time spent traveling from job site to job site during the workday is compensable
 - Travel that keeps employee away overnight is work when it takes place during the employee's work day or during the employee's normal working hours on a non-work day. It will not be counted as hours worked if:
 - Employee is a passenger on an airplane, train, boat or automobile;
 - The travel is during non-shift hours; and
 - No work is performed during traveling.

Hot Button Issues – Collective Bargaining Agreements

- CBA may require contractually-different rates. For example:
 - May require payment of rates higher than federal or state minimum wage
 - May require payment of overtime on bases other than 40 hours/workweek, such as hours in a day, weekend work, or work on holidays
 - May require leave hours such as holidays to be considered as hours worked for purposes of computing time

A Few Words about “Comp Time”

- Government employers may compensate employees for overtime work with paid time off (comp time) in lieu of monetary payment if certain conditions are met
- **No such thing as comp time in the private sector**
 - Private employers (including non-profits) may give employees time off from work to avoid exceeding 40 hours in a single work week
 - If an employee works overtime during the first week of the pay period, the employee may be required to work less hours in next week of pay period
- Comp time for exempt employees

QUESTIONS?