



The Legal Assistant Management Association (LAMA)
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The International Paralegal Management Association (IPMA)
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www.paralegalmanagement.org

P.O. Box 659
Avondale Estates, GA 30002-0659
(404) 292-2976
(404) 292-2931
info@lamanet.org
www.lamanet.org

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THE FAIR PAY REGULATIONS—WHAT YOU NEED TO KNOW

Exempt or non-exempt?? That is an issue that has been facing the paralegal profession and their employers for years. While many of the major law firms in the country already pay their paralegals overtime, there are still many paralegals who do not receive it. According to the latest survey in *Legal Assistant Today*, only 49.2% of paralegals are currently paid overtime.¹ This statistic has not changed dramatically over the years. While paralegals want to be treated as professionals, those who are paid overtime are loath to give it up.

The regulations that currently govern the payment of overtime to employees in the United States are contained in the Fair Labor Standards Act. The regulations governing the minimum salary levels were last updated in 1975 and currently stand at \$155.00 per week. The job duty requirements in the regulations have not been changed since 1949. In an effort to update these regulations the Department of Labor has developed new regulations that are

¹ Hughes, Rod, "2003 Salary Survey Half Empty or Half Full?" *Legal Assistant Today*, March/April 2004.

scheduled to take effect on August 23, 2004 and are contained in 29 C.F.R. § 541. They are referred to as the Fair Pay Regulations.

As part of the revision of these regulations, comments were solicited from and provided by many organizations and professional associations, including LAMA. In a June 2003 letter to the Wage and Hour Division of the Department of Labor LAMA stated

Our membership feels employers should have the discretion to convey exempt status on those legal assistant professionals who clearly meet the criteria for Learned Professional Employees as outlined in the proposed guidelines. Based on a poll of our membership, LAMA is taking the position that senior legal assistants and specialists should be considered exempt under the Learned Professional Employees category.

While LAMA has taken a position regarding the exempt status of senior legal assistants and specialists, it is not the Association's intention to instruct any of its members whether or not they should pay overtime to their paralegals or other employees they manage. Instead, LAMA wants to summarize those portions of the regulations that may affect the personnel its members manage.

The important point to remember is that the job title alone is not a sufficient basis upon which to establish whether or not an employee is exempt or non-exempt. This status must be determined on the basis of two factors: (1) the employee's salary and (2) the employee's job duties and responsibilities. Employers also must consider other federal, state or municipal laws or regulations which establish a higher minimum wage or a lower maximum work week than those established under these new regulations.

(1) SALARY REQUIREMENTS

In the Fair Pay Regulations, the Department of Labor has established salary thresholds that define a person's non-exempt or exempt status regardless of the work he or she performs.

Minimum Salary Requirement

For any employee to be considered exempt under any category of the new regulations that person must be compensated on a salary basis at a rate of at least \$455 per week or \$23,660 per year. If this salary requirement is not met, the employee must be paid overtime regardless of his or her duties.

To meet this salary criterion the employee does not have to be paid on a weekly basis, but the regulations do state that the shortest period of payment that will meet this compensation requirement is one week. If paid on other than a weekly basis, the salary would be as follows:

Every two weeks	\$910.00
Twice a month	\$985.83
Once a month	\$1,971.66

Highly Compensated Employees

The Department of Labor's new regulations also now set a threshold above which employees are considered exempt. The new regulations state that an employee with a total annual compensation of at least \$100,000 is deemed to be exempt from overtime if the employee performs office or non-manual work and customarily and regularly performs any one of the exempt duties or responsibilities that are outlined for Executive, Administrative or Professional employees. The regulations state that an employee receiving a high level of compensation is a "strong indicator" that the employee is exempt, "thus eliminating the need for a detailed analysis of the employee's job duties."

The \$100,000 can include commissions, non-discretionary bonuses or other non-discretionary compensation earned during a 52-week period. Compensation, however, does not include board, lodging, insurance premiums for medical insurance or life insurance,

contributions to retirement plans or other fringe benefits. An employee's total compensation is based on an annualized or pro-rated fashion and the employer can utilize any 52-week period, including a calendar year, a fiscal year or an anniversary year.

To be considered being paid on a "salary basis" within the meaning of the Department of Labor regulations, the employee must:

- (1) Receive in each pay period a pre-determined amount consisting of all or part of the employee's compensation;
- (2) This amount is not subject to reduction due to variables, such as the quality or quantity of work performed;
- (3) The employee must receive the full salary for any work which the employee performs without regard to the number of days or hours worked; and
- (4) Exempt employees need not be paid for any work week in which they do not perform work.

The new regulations also outline various deductions that can be made to an employee's pay without affecting their exempt status.

(2) JOB CLASSIFICATIONS

Once an employee has met the salary threshold for exempt status described above then the employer must determine if an employee is exempt based on his job duties or responsibilities. In an effort to recognize the changing nature of the work force in the United States the new regulations have expanded the categories of employees that it addresses to five (5) classifications:

- Executive
- Administrative
- Professional
- Computer
- Outside Sales

LAMA recognizes that its members may be responsible for many types of legal personnel, including paralegals, specialists, project assistants, case managers, working managers, law clerks and litigation support personnel. It is incredibly important for each employer to individually review these regulations to determine whether or not its employees should receive overtime compensation. The three categories of Executive, Administrative and Professional are those that are relevant to LAMA's members. It is these classifications that will be discussed in detail, along with the manner in which paralegals are currently addressed by these regulations under the Learned Professional category.

EXECUTIVE EMPLOYEES

Subpart B of Section 541 provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive capacity. Such an employee is defined as someone:

- (1) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (2) Who customarily and regularly directs the work of two or more other employees; and
- (3) Who 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.

What do these requirements mean?

(1) Management Responsibilities The key requirement for the executive exemption is an employee's management responsibilities which generally include, among other activities, interviewing and selecting candidates, training employees, determining pay rates and hours of work, overseeing the work of employees, "appraising employees' productivity

and efficiency for the purpose of recommending promotions or other changes in status, handling employee complaints and grievances and disciplining employees.”

“A customarily recognized department or subdivision” is meant to distinguish a department or group of employees with a permanent status and ongoing function from a collection of employees who are occasionally assigned to specific tasks or a series of tasks.

The fact that an employee works in more than one location does not necessarily disqualify that person from the exemption nor is the exemption dependent on the “continuity of the same subordinate personnel.” The important factor is that the exempt employee is “in charge of a recognized unit with a continuing function in the organization.”

An employee can also be exempt under the executive category if he concurrently performs both exempt and nonexempt work. While this determination is made on a case by case basis, to be exempt an employee’s primary, principal, and most important duties must involve the performance of exempt work. One important factor in evaluating this is the amount of time spent by the employee performing the exempt duties. Generally, the employee must spend more than 50% of his time performing exempt work to maintain an exempt status as an executive. Other factors to be considered include the importance of the employee’s exempt duties versus the nonexempt duties and the amount of freedom from supervision enjoyed by the employee.

(2) Direction of Two or More Employees In order for a person to be exempt under the executive category, the employee “must customarily and regularly direct the work of two or more other employees.” This is defined as two full-time employees or their equivalent, meaning that the supervision can be distributed among part-time employees. Of particular note is that an employee who “merely” assists with overseeing the work of two or more employees during the absence of a supervisor or manager would not qualify for the exemption.

(3) Authority to Hire and Fire The third requirement for exemption in the executive category is the authority to hire and fire people who are under that person's supervision or direction or whose recommendations are given "particular weight" in making these decisions. Factors considered when determining if an employee's suggestions and recommendations are given "particular weight" include whether making such suggestions and recommendations are part of the job duties of the employee, how often these suggestions and recommendation are made or requested and how often the employee's suggestions and recommendations are relied upon. Suggestions or recommendations made from time to time regarding "the change in status" of a co-worker would not meet the requirement. Although an employee may not have ultimate decision-making authority with respect to an employee's change in status, his "suggestions and recommendations may still be deemed to have 'particular weight. ' "

ADMINISTRATIVE EMPLOYEES

Subpart C of Section 541 details the requirements for an employee to be exempt under the administrative capacity. Such an employee, in addition to the minimum salary requirement, must meet the following criteria:

- (1) Primary duty is 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
- (2) Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."

How are these criteria defined in the workplace?

(1) Management or General Business Operations This requirement means that the employee assists with the running or servicing of the business as opposed to working in a production line or selling a product. Such an employee may work in a variety of areas,

including tax, finance, accounting, insurance, marketing, employee benefits, internet and database administration, legal and regulatory compliance, quality control, personnel management, and human resources. Someone may also qualify for the administrative exemption if he performs work directly related to the management or general business operations of the employer's customers, e.g., working as an adviser or consultant.

(2) Exercising of Discretion and Independent Judgment In order to fulfill the second requirement for an administrative exemption, an employee must “exercise discretion and independent judgment with respect to matters of significance.” This means that the employee is involved in “the comparison and the evaluation of possible courses of conduct” and, after considering the possibilities, acts or makes a decision based on those possibilities. Although the exercise of discretion and independent judgment implies that an employee “has authority to make an independent choice, free from immediate direction or supervision,” an employee may still qualify for the administrative exemption if his decisions or recommendations are reviewed at a higher level. An employee also may still exercise discretion and independent judgment even if there are many employees at the same business who “perform identical work or work of the same relative importance.”

The regulations provide numerous examples of employees who may meet the above duties requirements to qualify for the administrative exemption, but this classification is one that requires a detailed analysis of what duties the employees perform. Performing “clerical or secretarial work” or “other mechanical, repetitive, recurrent or routine work” would not qualify as exempt work. Also, the “use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources” does not constitute the exercising of discretion and independent judgment. However, if the use of manuals or other written guidelines or procedures can only be “understood or interpreted” by those with an advanced degree or specialized training or knowledge, then the use of such manuals or

guidelines to deal with unusual or difficult issues would not affect an employee's exempt status.

The work that an exempt administrative employee performs must also be "significant, substantial, important or of consequence." There are many factors to consider when determining if an employee exercises discretion and independent judgment with respect to matters of significance. Several examples of these situations can be found in the Regulations. However, one example that may be important to LAMA members is that an employee can be exempt under the administrative category if he "leads a team of other employees assigned to complete major projects for the employer even if the employee does not have direct supervisory responsibility over the other employees on the team."

PROFESSIONAL EMPLOYEES

Subpart D of Section 541 addresses the exempt status of employees who are considered professionals, including doctors, attorneys, and teachers. This section is the most relevant to LAMA members as it contains the regulations regarding employees who may be exempt as members of the "learned professional" category. The requirements for being a learned professional are:

- (1) Must perform work requiring advanced knowledge;
- (2) This knowledge must be in a field of science or learning; and
- (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The regulations go on to clarify what these requirements mean:

- "Work requiring advanced knowledge means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work." The

regulations specifically state that “advanced knowledge cannot be attained at the high school level.”

- “Field of science or learning” includes the traditional professions, including law, medicine, theology, accounting, teaching, engineering and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades.
- “Customarily acquired by a prolonged course of specialized intellectual instruction” means that one must have specialized academic training that is a standard prerequisite for entrance into the profession. This exemption does not apply to occupations in which most employees have acquired their skills by work experience.

Section 541.301 is particularly relevant to LAMA members as it discusses several occupations, including paralegals and legal assistants, and whether or not they are exempt under the learned professional category. According to the new regulations:

Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

The Department of Labor reportedly received numerous comments from paralegals and legal assistants concerned that they would be classified as exempt, while others urged the Department to declare paralegals exempt learned professionals. However, the Department of Labor stated that no one provided any information indicating that the educational requirement for paralegals was more than a two-year associate degree from a community college or equivalent institution. While many paralegals do have a bachelor's

degree, according to the Department of Labor there was no evidence that a four-year specialized paralegal degree is a standard prerequisite for entry into the occupation.

The Department of Labor also recognized that as advanced specialized degrees become the standard prerequisite for occupations, those occupations may eventually be exempt under the learned professional category. Therefore, as paralegals move toward regulation and a bachelor's degree becomes the standard for employment as a paralegal, this profession may eventually earn an exemption as a learned profession.

No portion of Subpart D on Professionals directly addresses those non-lawyers who appear before administrative agencies, some of which require specialized training and/or licensing. However, if any LAMA members have employees in those roles, it merits a consultation with a labor lawyer.

Section 541.304 of the regulations discusses the exemption of lawyers as "bona fide" professionals because they hold a license to practice law. It also addresses those employees, such as law clerks or interns who have not yet been licensed. According to the new regulations, persons who are employed in internships or resident programs are exempt professionals, whether or not they are licensed to practice prior to commencement of the program if they enter the internships or resident programs after earning the "appropriate degree required for the general practice of their profession."

THE NEXT STEP

The Fair Pay Regulations may or may not impact how you pay your employees. Remember that the important criterion is not the person's job title, but the actual duties and job responsibilities the person performs. LAMA urges all its members to consult with their own labor attorneys as to how these new regulations affect their current staff's classification as either exempt or non-exempt.