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- Events Schedule
- Attorneys
- Offices
- Archives

INDUSTRIES

- About BS&K
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- Home

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SEARCH:

Information Memos, Articles, White Papers**Labor and Employment Law: Are Paralegals At Your Firm Entitled To Overtime Pay? (6/15/06)**

By Robert A. Doren, *Buffalo Law Journal*, (6/15/06)

As occupations, job titles and work responsibilities continue to evolve, many employers face the unenviable task of classifying their workforce pursuant to the Fair Labor Standards Act and corresponding state-law provisions.

Because they perform a wide variety of tasks, from administrative functions to in-depth research and the drafting of documents, paralegals are not easily classifiable by legal employers under the FLSA. While paralegals are an essential part of any legal employer's office, are they exempt from FLSA overtime provisions?

Based on Department of Labor regulations and a Dec. 16, 2005, opinion letter, the answer for most paralegals remains no. However, the classification of paralegals remains a fact-specific endeavor that legal employers should conduct on a case-by-case basis.

The FLSA requires employers to compensate employees who are not within a defined exemption with overtime pay when they work more than 40 hours in one week. The act contains exemptions, however, for certain classes of employees relating to their profession and/or skills. Based on their skills and responsibilities, paralegals arguably might qualify under the FLSA's professional and administrative exemptions.

Learning curve

Under the "learned professional exemption," a subcategory under the FLSA professional exemption, an employee must be compensated on a salary or fee basis at a rate of not less than \$455 per week. The exemption requires an employee's primary duty to be "the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" (29 CFR § 541.301[a], 2004).

The best evidence that employees meet the primary duty definition is whether they possess an academic degree required for their work. Under its 2004 revised regulations, the DOL concluded that "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" (29 CFR § 541.301[e][7]).

However, paralegals possessing specialized advanced degrees in other professional fields may qualify for this exemption if they apply the skills in performing their duties. For example, the DOL concluded, "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." Likewise, registered nurses who are hired to review and analyze medical records for personal-injury cases may be exempt because they must utilize their advanced degrees to perform those functions.

A matter of discretion

Paralegals may also qualify for the administrative exemption, which provides that they be compensated at not less than \$455 per week, and their primary duties must entail 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 include the "exercise of discretion and independent judgment with respect to matters of significance" (29 CFR § 541.200[a], 2004).

Employees who evaluate different courses of conduct or make decisions after considering various possibilities generally meet the discretion requirement.

To determine whether an employee exercises "discretion and independent judgment," employers should consider if the employee: (1) formulates, affects, interprets or implements management policies or operating practices; (2) performs major assignments related to the operations of the business; and (3) conducts work substantially affecting business operations (29 CFR § 541.202[b], 2004). "Matters of significance" refers to the "level of importance or consequence of the work performed" (29 CFR § 541.202[a], 2004).

The DOL defines "work directly related to the management or general business operations" to require an employee to "perform work directly related to assisting with the running or servicing of the business" (29 CFR § 541.201[a], 2004). The regulations state that employees performing work directly for their employers in areas such as tax, finance, accounting, safety and health, employee benefits, labor relations, and legal and regulatory compliance could be eligible for the administrative exemption (29 CFR § 541.201[b], 2004).

Because law-firm paralegals generally perform work for clients, this regulation would not provide a basis for these paralegals to qualify

under the administrative exemption. However, paralegals who assist in-house counsel perform tasks related to the management of the corporation -- as distinguished from outside clients -- whether it involves audits of the company by outside agencies, for example, or determining how to defend the company from outside claims.

In-house paralegal duties may involve the level of independent discretion necessary to fall under the administrative exemption on the same basis as human-resources managers and purchasing agents do (29 CFR § 541.203, 2004).

The path to exemption

Based on the new DOL regulations, most paralegals remain outside of the learned professional or administrative exemptions. However, legal employers should be wary of automatically designating all of their paralegals as non-exempt because a paralegal's status may be determined on an individual basis. Employers should also take particular note that the DOL will consider the heightening of academic standards in various professions.


Indeed, many years ago, engineers were once considered non-exempt employees and now, based on increased education requirements, they are firmly within the "learned professional" exemption. A similar progression in educational requirements may allow paralegals to satisfy the DOL's learned professional exemption requirements in the future.

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