

First Wednesday

By Jeffrey A. Snyder

A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

October 1, 2008 | Issue No. 66



Jeffrey A. Snyder

Jeff is a Shareholder of Thoits, Love, Hershberger & McLean, specializing in employment law and related litigation.

He can be reached at
(650) 327-4200 | Phone
(650) 325-5572 | Fax
jsnyder@thoits.com

California Amends Overtime Exemption — Simplifies the Employer's Burden to Pay Salaried Computer Professionals

Governor Schwarzenegger recently signed urgency legislation amending the overtime exemption that applies to certain computer professionals working in California. The amendment to California Labor Code Section 515.5 takes effect immediately. It allows an exemption from overtime requirements for a computer professional employee who is paid on an hourly basis at a rate of at least \$36 or, if paid on a salaried basis, an annual salary of at least \$75,000. The law is significant because it allows employers to pay these individuals a salary instead of tracking and paying for each hour of time worked. The bill is Assembly Bill No. 10 ("AB 10") and goes into effect immediately.

The Computer Professional Exemption

First, consider the computer professional exemption in the context of the general rules regarding payment of overtime. Typically, anyone working more than 8 hours in one day, or more than 40 hours in one workweek, must be paid time-and-one-half for the extra hours, unless the employee is exempt from overtime requirements. In a disputed matter, the employer bears the burden of proving that an employee is exempt. There is a minimum salary requirement and a separate duties test. AB 10 deals with the salary issue and does not change the "duties" test for computer professionals.

Changes Due to the Passage of AB 10

Under existing law, employers had to pay computer professionals at least \$36 for each hour worked to qualify for the exemption. Thus, employers had to keep track of the actual hours worked by each computer professional. For example, if the employer and employee agreed to an annual salary of \$108,000 (a robust 3,000 hours worked x \$36/hour), and the computer professional actually worked 3,010 hours, the employer would owe wages for at least 10 extra hours, and possibly additional penalties and interest.

Now, with the amendment to the Labor Code, the need for onerous timekeeping is eliminated. A straight salary can be paid without regard to hours actually worked. This makes the computer professional exemption consistent with other overtime exemptions (most typically, the professional, administrative and executive exemptions) that allow employers to pay exempt employees on a straight salary basis without worrying about how long it takes the employee to get the job done.

Note that under the new law, exempt computer professionals can be paid by the hour or on a salary basis. They can still be paid at \$36 per hour, but if the employee is working at or near a full-time schedule, the employer should pay a salary (\$75,000 or more) to avoid the hours-tracking problem discussed above. For part-timers, an hourly rate of at least \$36 should be used.

The minimum hourly rate and minimum salary will be adjusted annually for inflation according to the consumer price index (“CPI”). The CPI is expected to be released today, October 1, 2008, so these amounts will likely increase — but any increase will not be effective until January 1, 2009. (Employers can check the new hourly rate and salary requirements at: www.dir.ca.gov/dlsr/cpi/otcpi.pdf.)

The “Duties” Test Still Applies

In addition to meeting the minimum salary or hourly rate requirement, for the computer professional to be overtime exempt, he or she must continue to meet the “duties” test, as follows:

(1) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(2) The employee is primarily engaged in duties that consist of one or more of the following:

(A) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

(B) 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.

(C) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(3) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, or software engineering. A job title shall not be determinative of the applicability of this exemption.

Labor Code Section 515.5 goes on to list certain exceptions to the exemption, including trainees, technical writers, repair and maintenance personnel and certain others who do not work independently. The statute is very detailed, so it should be reviewed carefully with labor counsel or a human resources specialist if there is any question about the applicability of this exemption.

In essence, for the exemption to apply, the job duties of the computer professional must be intellectual or creative, and require the exercise of discretion and independent judgment, similar to other exemptions with which most employers are familiar.

Suggested Action

Now that California employers can pay a minimum salary, they should evaluate the exempt classification status of their computer professional employees. If those employees meet the “duties” test, then employers should consider putting these employees on a salary instead of paying them hourly.

For computer professionals working outside of California, the federal computer professional exemption would ordinarily apply. That exemption is part of the Federal Fair Labor Standards Act (FLSA), which currently has a lower hourly rate minimum requirement (\$27.63) but similar “duties” tests. If the California exemption applies to an employee, chances are that the federal exemption also applies to those having similar duties working outside of California.

First Wednesday Distribution List

- If you are not receiving this newsletter directly, please send me your e-mail address and I will add you to the First Wednesday Distribution List.
- If you would like this newsletter redirected to others within or outside your organization, please send me their e-mail addresses.
- First Wednesday is a publication of general applicability and not specific to any set of facts. Thus, it should not be relied upon for any specific case or matter without further discussion. No attorney-client relationship is formed as a result of your reading or replying to this newsletter, which is not intended to provide legal advice on any specific matter, but rather to provide insight into current developments and issues.

THOITS, LOVE, HERSHBERGER & MCLEAN

JEFFREY A. SNYDER

Two Palo Alto Square
3000 El Camino Real, Suite 500
Palo Alto, CA 94306

Phone: (650) 327-4200
Fax: (650) 325-5572
E-mail: jsnyder@thoits.com
www.thoits.com