

First Wednesday

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

September 7, 2011
Issue No. 99



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New Case-law on the Exempt Professional Employee in California

All types of business owners and managers get tripped-up dealing with this complex area of the law. Two recent cases clarify the rules in California concerning the Professional exemption, and serve as a primer or reminder of some of the basics of classifying employees as exempt (from overtime pay and meal and rest breaks) or non-exempt (meaning the employee must be paid overtime when working over eight hours a day or 40 hours per week and must get meal and rest breaks).

These cases deal with unlicensed accountants and law clerks, and are must-reads for professional service firms. You know who you are!

The Basics

California employees must generally be paid overtime and get meal and rest breaks. This is the rule, and should be the starting point for anyone considering a new hire. If, and only if, the employee's duties fall within an exception to the rule, can the employee be classified as exempt and not eligible for overtime pay. Of course employers can still give exempt employees bonuses – extra money for a job well-done - and exempt employees should take meal and rest breaks. But exempt employees are paid a set rate and are not entitled to overtime. They are paid to get the job done, regardless of how many hours it takes or whether or not they take all of their breaks.

The exceptions to the rule are set forth by the California Industrial Welfare Commission (the IWC) in the form of "Wage Orders". Wage Order 4-2001 defines Professional, Executive, and Administrative exemptions. Each of these exemptions has its own "test" and must be analyzed in light of the specific facts regarding an employee's job duties. The employee's title or monthly salary does not decide the issue. Only by looking at the employee's duties and comparing them with the several determining factors in the specific exemption, and ensuring that the salary exceeds two times the State minimum wage for full-time employment can we determine if the employee is exempt from the overtime and meal and rest break law.

Campbell v. PricewaterhouseCoopers LLP (PwC) (2011) 642 F.3d 820

In June, the Ninth Circuit federal court overturned a lower court's decision on a new issue involving the Professional exemption. The court ultimately found that unlicensed accountants could still be exempt from overtime and meal and rest break requirements depending on their job duties.

Wage Order 4-2001 defines a Professional exempt employee as an employee who: (a) is licensed or certified by the State of California and primarily engaged in the practice of law,

medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; **or** (b) is primarily engaged in an occupation commonly recognized as a learned or artistic profession.

Ignoring the “or” in the wage order, 2000 unlicensed accountants who were former or current employees of PwC filed a class action suit alleging that because they were unlicensed, they could not be exempt under subsection (b) of the Professional exemption under any circumstances. The plaintiffs’ position was that unlicensed employees working in any of the eight professions listed in subsection (a) could not be exempt under any other exemption. The district court sided with the plaintiffs and granted summary judgment against the employer.

The Ninth Circuit court disagreed. It found the wage order unambiguous. The wage order says it applies to *any employee* who satisfies either subsection of the Professional exemption, and subsection (b) does not exclude employees in any profession. The Court emphasized that each case requires a fact-specific inquiry. PwC’s unlicensed accountants in the business group that was the subject of the lawsuit might perform duties that met certain tests set forth in the wage order, or they might not – the factual dispute would have to be decided by a jury. The lower court’s ruling that unlicensed accountants were categorically unable to fall under any other exemption was rejected.

The Court also noted that if it were to accept the lower court’s analysis, other technically unlicensed professionals listed in the eight professions in subsection (a) would be non-exempt, which would lead to absurd results. Non-exempt employees might then include a New York-licensed attorney working as in-house counsel for a California corporation or a medical school graduate working as Resident at a hospital in order to obtain a license. The Court ended its discussion of the Professional exemption with the admonition “...[L]ogic is of paramount importance in shaping legal precedent affecting the wages of California’s hundreds of thousands of professional employees.” Last, the Court said the unlicensed accountants might also meet the test for exempt Administrative employees and sent the case back to the lower court for trial.

Zelasko-Barrett v. Brayton-Purcell, LLP (2011) 198 Cal. App. 4th 582

Not long after the *Campbell* case, the California Court of Appeal came to the same result when considering whether a law school graduate working as a law clerk while awaiting bar results could possibly be exempt under subsection (b) of the Professional exemption. Like the accountants in the *Campbell* case, the former employee (now a licensed California attorney) argued that he was entitled to overtime and meal and rest breaks when he worked as a law clerk.

The former law clerk argued that he did not perform exempt tasks, was not in a “professional capacity”, was not engaged in work covered by the Professional exemption, and was misclassified. He also argued that he did not customarily and regularly exercise discretion and independent judgment in the performance of his duties as required under the exemption. The defendant law firm countered that the employee performed the same functions as a junior attorney, conducting research, writing, meeting clients, propounding and managing discovery, and using discretion to tailor facts, among other things.

The Court cited the *Campbell* case and affirmed that the former law clerk could be exempt outside of subsection (a) of the Professional exemption, if the criteria of the specific exemption was met based on the facts of the case. The purpose of the learned professional exemption under subsection (b) is “to expand the scope of the exemption” beyond the eight professions noted in subsection (a). The learned professional exemption depends upon completion of an advanced course of study and requires that the employee have “knowledge of an advanced type in a field of science or learning” customarily acquired by a prolonged course of study. If the law clerk performed duties that met the tests for the Professional or Administrative exemptions, he could be exempt even though not a licensed attorney.

Take-away

Employers must understand why employees are exempt or non-exempt. In both of the cases described above, there were different levels of unlicensed accountants and law clerks, further complicating the issue.

The determination of exempt status (the exception to the general rule) must be made by looking at the employee’s actual duties, not merely the job title or the amount of pay. When employees are misclassified as exempt, the employer can pay a hefty price. For one thing, the employer may have to defend overtime claims without having time records. When that happens, employees can ask for the highest number of overtime hours they think they worked, and the employer may not have an effective way to disprove the claim. Add to that the penalties for missed meal and rest breaks (up to two hours pay for each day missed), interest, waiting-time penalties and attorneys’ fees, and it becomes a costly mistake.

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