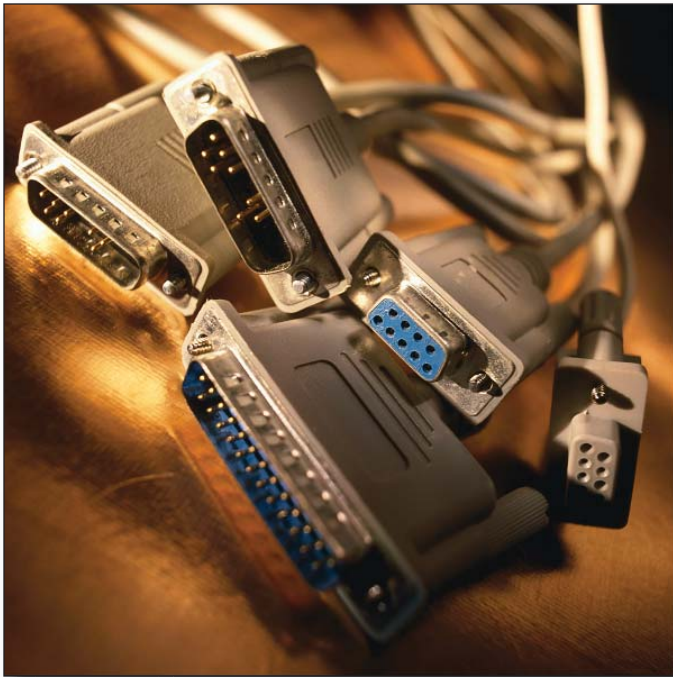


Paying Overtime: Are Your Information Technology Professionals Exempt?

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In recent years, the issue of whether employees and computer professionals in particular are exempt from the requirement to be paid overtime has been the subject of increased litigation, forcing employers to carefully scrutinize which of their employees may be exempt from minimum wage and overtime requirements. Even the Supreme Court has been willing to hear cases involving the possible exemption of employees—in June, the high court issued a 9-0 ruling finding home care workers exempt from overtime. Unfortunately, both state and federal statutory provisions are nebulous in explaining who is exempt from overtime pay, particularly with regard to computer professionals.

There are four requirements in order to find an employee exempt from overtime as a computer professional under California Labor Code section 515.5. First, the employee must be doing work that is “intellectual or creative” and “requires the exercise of discretion and independent judgment.” The term “discretion and independent judgment” generally only applies where employees exercise full freedom of choice—mere discretion in deciding which procedures to follow (where procedures have already been established) does not constitute the exercise of discretion. Moreover, these decisions must be of substance to

the employer, which means that they must have a real effect on the operations of the business. In short, employees who have freedom to make important, substantive decisions on their own may be exempt from overtime.

The second requirement for the exemption demands that the employee’s responsibilities primarily consist of: “systems analysis techniques and procedures, including consulting with users;” they must work in the “design, development, documentation, analysis, creation, testing, or modification of computer systems or programs,” or similar work with computer programs “related to the design of software or hardware for computer operating systems.”

Third, the employee must be able to engage in the “theoretical and practical application of highly specialized information to computer systems analysis.” It is important for employers to keep in mind that a job title is not controlling—courts will look to the actual job description and responsibilities of an employee to decide whether that employee is engaging in these complex job functions.

California law also requires that the employee be paid at least \$49.77 an hour as of January 1, 2007 in order to be exempt from overtime. This figure is adjusted each October by the Division of Labor Statistics and Research and is tied to the Consumer Price Index. It can also be expressed as a yearly salary equivalent.

Thus, as is the case with many state and federal wage and hour laws, California’s laws in this area are generally stricter than the federal requirements. Complying with the stricter California requirements will, in most cases, fulfill the requirements of the Fair Labor Standards Act, which only requires an hourly wage of \$27.63 in order to meet the exemption.

In addition, there are no degree requirements to be considered as a computer professional. Although many computer professionals may have bachelor’s degrees, neither California nor federal law requires an academic degree or certification of any kind for a person to be counted as a computer professional.

Finally, there are some exceptions (or exemptions to the exemption). Employees who are in training are not exempt from overtime. Even if they are engaged in computer programming, analysis, or any of the other classifications above, employees may not be exempt if they are unable to work “independently and without close supervision.” Likewise, employees who merely operate or maintain computer hardware may not be exempt. Technical writers—people who write product descriptions or documentation for software are not exempt. And employees who meet all of the above criteria, but do so in order to create digital effects for a movie, television, or theatrical production are not exempt from overtime.

Ensuring that employees are properly classified as exempt or non-exempt computer professionals can avoid costly lawsuits for back pay later on. It also guarantees a



smoother, more efficient business operation. Employers requiring assistance navigating the myriad of labor regulations concerning exemptions should contact an attorney at Cook Brown, LLP. ■