



**The Hagan Law Firm, Inc.**

350 Cambridge Ave. | Suite: 150 | Palo Alto | CA 94306

TEL: (650)322-8498 | FAX:(650) 322-8499

www.Haganlaw.com

## **EXEMPT AND NON-EXEMPT EMPLOYEES AND OVERTIME WAGE LAWS**

**By**

**Jennifer J. Hagan, Esq.**

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**The minimum wage in California for 2010 is \$8.00 an hour. The Federal minimum wage is \$7.25. Effective January 1, 2006, the City of San Francisco set its own minimum wage for any business work performed by adult and minor employees who work two or more hours per week within the geographic boundaries of the city. The minimum wage in 2010 is \$9.79 per hour and is normally adjusted annually based on increases in the regional consumer price index. For more on the SF Wage law go to <http://www.sfgov.org/olse/mwo>.**

Effective January 1, 2000, California State Assembly Bill 60, (AB60), reinstated overtime pay for any work time over eight (8) hours in a single day. Specifically, the Labor Code requires that employees be paid time-and-one-half for all hours worked after eight in one day, and double-time for all hours worked after 12 in one day. Minimum wage compliance is not met by “averaging” the wages for different types of work by the same employee (See *Armenta v. Osmose, Inc.*, 135 Cal. App. 4<sup>th</sup> 314, 2005). All employees must be paid time-and-one-half for all hours worked over 40 hours in one work week. Defining the work week is important in the determination of overtime pay.

**However, there are certain employees which are exempt from overtime compensation.** In order to determine if a certain employee is exempt from overtime pay, an analysis of that particular employee’s job title and duties must be made.

1. **Exempt Employees.** Most employers believe that so long as an employee is paid a salary, they are exempt from the requirement to pay overtime wages. This is not correct. Income or salary alone does not determine exempt status, and salaried employees are not automatically exempted from overtime compensation. Job titles do not designate an employee as exempt or non-exempt.

Exempt employees are those characterized as executive, administrative, and professional employees who are primarily engaged in the duties which meet the test of exemption. According to Labor Code Section 515<sup>1</sup>, an executive, administrative, or professional employee is limited to those persons who are:

- engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment.

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<sup>1</sup> See the case of *Murphy v. Kenneth Cole Productions*, 134 Cal. App. 4<sup>th</sup> 728 (2005) for an in depth analysis and discussion of the managerial “executive exemption.” This is probably the most abused and misunderstood exemption in California.



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- licensed or certified by the State of California to practice law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting; or
- engaged in a “commonly recognized...learned or artistic professions.”

Aside from these job classifications, the law requires that the aforesaid employees must actually be “PRIMARILY ENGAGED” in exempt work. This means that the employee must be performing exempt tasks at least 50% of the time.

As a general rule, an employer is not required to pay an exempt employee for any workweek in which he/she performs no work. However, if the employee performs any work during a week, then that employee is entitled to receive his/her full salary.

2. **Exemption for Computer Professionals.** Computer Professionals may be characterized as exempt employees, provided that they meet certain conditions, including that they earn a minimum hourly rate of not less than **\$37.94**. If a computer software programmer does not make the minimum hourly rate of \$37.94 (**\$79,050** annually) then he/she must be paid overtime. The California Department of Industrial Relations (DIR) has announced that the minimum compensation required to qualify for the state's computer-professional exemption in 2010 will remain unchanged from 2009. The minimum hourly rate and salary requirements for the computer-professional exemption under Labor Code Section 515.5 are adjusted annually for inflation according to the Consumer Price Index (CPI). The DIR has allowed a fixed salary of \$79,050 per year to be paid no matter how many hours are worked. As long as this salary is paid, and the other requirements of the exemption are met, there is no right to overtime pay.

The Computer Professional exemption has duties-based requirements. To qualify for this exemption, an employee must spend more than fifty percent (50%) of his/her time engaging in one or more of the following job duties:

- a) applying systems-analysis techniques and procedures, including consulting with users, to determine hardware, software, or system-functional specifications;
- b) designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs, including prototypes, based on and related to user or system-design specifications; or
- c) documenting, testing, creating, or modifying computer programs related to the design of software or hardware for computer operating systems. In addition, an employee's job duties must be intellectual or creative and require the exercise of discretion and independent judgment. Lastly, the employee must be highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.



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### 3. Non-Exempt Employees.

**IF AN EMPLOYEE IS PAID ON THE BASIS OF AN HOURLY WAGE, OR COMMISSIONS, THAT EMPLOYEE CAN NEVER BE EXEMPT.**

**DESPITE THE PAYMENT OF A SALARY, IF AN EMPLOYEE DOES NOT MEET THE JOB DUTIES TEST UNDER THE ADMINISTRATIVE, EXECUTIVE OR PROFESSIONAL EXEMPTIONS, THAT EMPLOYEE IS NOT EXEMPT.**

All hourly employees are therefore non-exempt and entitled to overtime payment according to AB60. This has substantial implications for any employer that bills out and pays its service employees at an hourly rate. For an employer, this means that despite characterizing a particular employee as executive, administrative, or professional, if the employer pays that employee on an hourly basis, or on a commission basis, that employee will never be viewed as exempt, and the employer will be liable for payment of overtime wages.

A classic misclassification of an employee is that case of “working managers” in the restaurant industry. Such an individual has some managerial duties and a managerial title, but is engaged in non-exempt duties such as cooking, seating guests, record keeping and serving more than 50% of their working time. Where a manager performs the same kind of work as subordinates, that’s a red flag that such an employee is not exempt from the payment of overtime wages. These “Working Managers” are usually found in certain service industries such as restaurants, retail stores and motel/hotels, and they are non-exempt employees.

### **FAILURE TO PAY OVERTIME WAGES**

Employees may file complaints with the Labor Commissioner to recover unpaid wages and they may also file civil lawsuits. The labor commissioner has the authority to investigate complaints, hold hearings and take action to recover wages, and assess penalties and make demands for compensation. Therefore, mis-categorizing an employee and failing to pay appropriate overtime wages as they are due may subject the employer to restitution of the amount due to the employee, penalties, fines, and scrutiny as to payment of all employees by the Department of Labor Standards Enforcement.

A new civil penalty was enacted under AB60 which provides that for violation of any wage or hour provision of the Labor Code, the employer may be fined by the Labor Commissioner \$50 per underpaid employee for the first offense, and \$100 per underpaid employee for the second and subsequent offenses. This is in addition to paying the underpaid employees the full amount of underpaid wages.

**Outside salespersons** are not usually not subject to minimum wage laws as long as they spend more than 50% of their working time away from the employer’s place of business.

**Inside salesperson** is one who sells merchandise, a product, or a service in a store or via a company telephone. Inside sales people a usually non-exempt and therefore minimum wage and overtime requirements apply to them.

**Commissioned inside sales employees** are not entitled to overtime wages if their earnings exceed 1 ½ times the minimum wage and more than half of the employee’s compensation represents the commissions. IWC Wage Orders 4 and 7.



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4. **Mandatory Overtime.** With the exception of limitations under certain wage orders, or union contract, or as otherwise stated in an employer's company policy, employees in California have no statutory right to refuse a request to work overtime. If an employee refuses to work overtime, an employer may take disciplinary action, including termination of that employee. Certain limitations include, Wage Order #4 which provides that no employee may be terminated or disciplined for refusing to work more than 72 hours in any workweek, except in the case of an emergency.

5. **Make-up Time.** Employers are not required to allow make-up time for employees that missed work. However, if the employer allows it, then the employee may work additional hours over eight hours a day but not be entitled to receive overtime wages. In order to qualify for make-up time, the employer must have a written request from the employee for make-up time, the employee cannot work more than 11 hours in any single day, and the make-up time must be completed in the same workweek.

### **FEDERAL OVERTIME LAWS**

Federal law on employee status differs from California State Law. While a California employee must be "primarily engaged" in exempt work (as in performing exempt tasks over 50% of the time), this is not the requirement of the federal law. Instead, federal law requires that it is the employee's "Primary Duty" that determines exempt or non-exempt classification, regardless of how much time the employee spends performing exempt or non-exempt tasks.

Federal law also specifically provides for an exempt status for Computer-Related Professionals. Computer systems analysts, computer programmers, applications programmers and systems analysts, software engineers, software specialists, and other similarly skilled workers in the computer software field are eligible for exemption as professionals. This exemption applies only to highly skilled employees, and not to trainees or employees in entry level positions.

### **SOME RECENT WAGE AND OVERTIME CASES**

In May, 2009, WalMart Stores obtained Court approval to pay \$85 million dollars to settle 30 wage and hour lawsuits. The settlement covered cases filed in federal court in 29 states and is only part of the resolution of a global settlement of \$640 million. In 2007, Wells Fargo settled a class action wage claim case in California for \$12.8 million. Pacific Bell settled a class action overtime lawsuit for \$35 million, Radio Shack settled the same type of lawsuit for \$30 million. Smart & Final settled for \$22 million. Bank of America settled for \$22 million. Starbucks settled for \$18 million and Perdue Farms settled for \$10 million.



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*Mill v. Superior Court of Los Angeles* (Cal. App. B184760 Decided Jan. 27, 2006), the Court decided that Labor Code 226.7 imposes a penalty on employers who fail to ensure that mandated break periods are provided to their employees. If an employee is not completely relieved of their duties during a break, then it does not qualify as a break and the employer must pay “as a penalty” an additional one hour of pay in addition to paying the employee for actual time worked.

*National Steel & Shipbuilding Co., v. Superior Court San Diego* (Cal. App. D046692 Decided Jan 20 2006); Section 226.7 has the dual function of deterring employers from requiring their employees to work through mandated meal and rest periods and compensating employees required to work through these periods. The Legislature could have, but did not, label the statutory payment of section 226.7 as a "penalty," and the entire statutory scheme suggests that the payment under section 226.7 is primarily in the nature of a statutory remedy to employees. Because the payment obligation under 226.7 is statutory, employees shall have three (3) years to bring an action for restitution pursuant to Civil Code Section 338.

*Murphy v. Kenneth Cole Productions*, 134 Cal. App. 4<sup>th</sup> 728 (2005). Murphy was a store manager at a retail store. He argued that he was not an exempt employee because he had no independent authority to hire and fire employees, no input into decisions to buy inventory and he was required to report to a district manager. The Court found that Murphy was not exempt as a “an executive” because KCP did not prove three of the elements for exemption. Exemptions are narrowly construed, and as affirmative defenses, must be proved by the employer.

*California School of Culinary Arts v. Lujan*, 112 Cal. App.4<sup>th</sup> 16 (2003). Employer, the Culinary School, failed to pay its instructors overtime on the grounds that the instructors were subject to the professional exemption. The DSLE disagreed, contending that the exemption did not apply because the Culinary School was not an accredited college or university, but instead a trade school. The trial court granted the Culinary School’s request for summary judgment and the Appeals court upheld it holding that a trade school has all the indicia of a “college.” The Court further held that the DSLE’s policies and procedures manual does not have the force of law and its merely an underground regulation.

### **LINKS TO ADDITIONAL INFORMATION**

California Labor and Wage laws may be obtained by accessing the following websites:

1. [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html)
2. [www.dir.ca.gov](http://www.dir.ca.gov) (Department of Industrial Relations).
3. [www.leginfo.ca.gov/bilinfo.html](http://www.leginfo.ca.gov/bilinfo.html) (Legislative Counsel).

*The information provided herein is not intended as legal advice and should not be acted upon. If you have additional questions about this subject matter or would like to consult with an attorney about payment of overtime or other Employment issues, please call Jennifer J. Hagan or James Hagan at The Hagan Law Firm (650) 322-8498.*