

UPDATE OF OVERTIME, EMPLOYMENT OF MINORS & OSHA ACCIDENT REPORTING REQUIREMENTS

This update provides a summary of applicable overtime law, explains the seasonal exemption to the Fair Labor Standards Act (“FLSA”), explains the law regarding hiring of minors, discusses the Occupational Safety and Health Act (“OSHA”) accident reporting requirements, and addresses possible relief the Small Business Regulatory Enforcement Fairness Act (SBREFA) offers to employers.

I. Summary of Overtime Law

The FLSA requires that most employees be paid overtime pay at time and one-half the regular rate of pay for all hours worked over forty (40) hours per workweek. However, exemptions exist for certain executive, administrative, professional, computer, outside sales, and highly paid employees. To qualify for exemption, employees must meet certain tests regarding their job duties and be paid on a salary basis of not less than \$455 per week. Job titles do not determine exempt status, but instead the employer must look at the specific job duties the employee performs. Questions regarding exempt status or overtime and minimum wage issues in general can be directed toward the Department of Labor’s helpline at 1-866-4USWAGE (1-866-487-9243).

1. Executive Exemption

To qualify for the executive exemption, all of the following tests must be met:

- The employee is paid on a salary basis of not less than \$455 per week (salary basis meaning a pre-determined amount that is not subject to deductions for number of hours worked or quality of work);
- The employee’s primary duty is managing the enterprise, or managing a customarily recognizable division or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent (i.e. four half-time employees would be the equivalent of two full-time employees); and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

2. Administrative Exemption

To qualify for the administrative exemption, all of the following tests must be met:

- The employee is paid on a salary basis of not less than \$455 per week (salary basis meaning a pre-determined amount that is not subject to deductions for number of hours worked or quality of work);
- The employee's primary duty must be the performance of office or non-manual work directly related to management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance (matters of significance referring to the level of importance or consequence of the work performed).

3. *Professional Exemption*

To qualify for the *learned professional* exemption, all of the following tests must be met:

- The employee is paid on a salary basis of not less than \$455 per week (salary basis meaning a pre-determined amount that is not subject to deductions for number of hours worked or quality of work);
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominately intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the *creative professional* exemption, all of the following must be met:

- The employee is paid on a salary basis of not less than \$455 per week; and
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

4. *Computer Employee Exemption*

To qualify for the computer employee exemption, the following tests must be met:

- The employee is paid on a salary or fee basis of not less than \$455 per week OR an hourly wage of not less than \$27.63 an hour; and
- The employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field; and
- The employee's primary duty is:

1) The application of systems analysis techniques and procedures, including consulting with users, to design hardware, software or system functional specifications;

2) 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;

3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

5. Outside Sales Exemption

To qualify for the outside sales exemption, the following tests must be met:

- The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee is customarily and regularly engaged away from the employer's place of business.

6. Highly Compensated Employees

- Employees earning at least \$100,000 per year are exempt if they perform office or non-manual work and at least one of the duties of an exempt executive, administrative, or professional employee identified above.

II. Seasonal Exemption from Overtime and Minimum Wage Laws¹

Employers who qualify for the seasonal exemption are exempt from paying both overtime and minimum wage under the FLSA. However, some state laws do not recognize the exemption, so be sure to check with your state's department of labor. To qualify for the exemption, the employer must be an amusement or recreational establishment² and:

- Does not operate for more than seven months in any calendar year OR
- During the preceding calendar year, its average receipts (revenues) for any six months of the year were not more than one-third (1/3) its average receipts for the other six months of the year. For this test, the average monthly receipts of the six months with the smallest receipts (the months do not have to be consecutive) should be compared against the average monthly receipts for the six months with the largest receipts.
- Example: An establishment is open for nine months, but closed during December, January, and February. The receipts for the six months with the largest receipts totaled \$260,000, a monthly average of \$43,333. The total receipts for the other six months totaled \$75,000, a monthly average of \$12,500. Because \$12,500 is less than one-third (1/3) of \$43,333, the exemption would apply.

III. Hiring of Minors

The FLSA provides certain age specific restrictions on the hours and types of work minors under age eighteen may perform.

- Youths 16 and 17 years old may perform any non-hazardous job for unlimited hours. Examples of tasks that generally fall within hazardous standards and are not permitted for anyone under 18 are:
- Operate or assist to operate, clean, oil, set up, adjust, or repair certain power-driven woodworking, metalworking, bakery, meat processing, and

¹ This exemption applies to amusement or recreational establishments. Leading case law has narrowed down the definition of what is an establishment. An *establishment* is defined as a "distinct physical place of business." **Therefore an administrative office with offsite recreation or camping does not fall under the exemption. To qualify for the exemption, the employer must be a distinct physical place of business which has the recreation or amusement activities take place on its establishment.** If the recreation takes place off the premises then the exemption likely will not apply.

² All perspective or already established organized camps should visit <http://www.acacamps.org/> for more information on becoming certified through this program. This is a great program that the court's look at to determine if your establishment falls within the definition of an organized camp.

paper products machinery – including meat slicers, paper box compactors, mixers, and saws.

- Drive or serve as an outside helper on a motor vehicle on a public road; but 17-year-olds who meet certain requirements may drive automobiles and trucks that do not exceed 6,000 pounds for limited amounts of time as part of their job.
- Operate power-driven hoists such as elevators, cranes, derricks, and high-lift trucks. However, 16 and 17-year-olds may operate most amusement park and recreation establishment rides.
- Youths 14 and 15 years old may only be employed outside school hours; 3 hours on a school day, including Fridays; 8 hours on a non-school day; 18 hours in a week that school meets; and 40 hours in a week that school does not meet. Also, 14 and 15 –year-olds may not work before 7 a.m. or after 7 p.m. (except from June 1 through Labor Day when the evening limit is extended to 9 p.m.). Finally, 14 and 15-year-olds may not perform the following work:
 - Work involving the operation or tending of any power-driven machinery and hoists (except office machinery). This includes most amusement park and recreation establishment rides as well as power-driven lawn mowers and trimmers.
 - All baking and most cooking. These minors may perform cooking with electric and gas grills that do not involve open flames. They may also cook with deep fat fryers that are equipped with and utilize devices that automatically lower and raise the basket into and out of the hot oil. They may not operate NEICO broilers, pressure cookers, ovens or rotisseries.
 - The cleaning of cooking equipment and the filtering, transporting, and disposing of hot oil and grease when the surfaces or hot oil or grease exceed 100 degrees.
 - All work in construction, including demolition and repair.
 - All work involving the use of ladders or scaffolding.
 - All work in freezers, but they may enter freezers equipped with safety latches for brief periods of time to retrieve items.
 - Youth 13 years of age and under are generally not allowed to work, unless employed by their parent who is the sole owner of a business or employed as an actor or performer.

IV. OSHA Accident Reporting Requirements

OSHA requires employers with more than ten (10) employees to record and report work-related injuries resulting in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or diagnosis of a serious injury or illness. Employers in certain service industries are exempt from this requirement and you should contact your local OSHA office to determine exemption under the Act. The forms for recording injuries and the telephone numbers for local OSHA offices can be accessed at www.osha.gov/recordkeeping/Rkforms.html. Forms include the OSHA 300 log for recording injuries, the OSHA 300A annual summary, and the OSHA 301 incident report form. Each of these records must be kept for five years following the end of the calendar year that the records cover. The annual summary must be completed and posted in a conspicuous place by February 1st and remain posted until April 30th each year.

Additionally, within eight (8) hours of the death of an employee or hospitalization of three or more employees as a result of a workplace incident, the employer must orally report the incident by calling the local OSHA office or 1-800-321-OSHA (1-800-321-6742). This requirement applies to all employers, regardless of exemption from the recordkeeping requirements.

V. Small Business Regulatory Enforcement Fairness Act (“SBREFA”)

The SBREFA requires the Department of Labor enforcement agencies to provide compliance advice. Employers can call the enforcement agencies to find out how a law applies to their specific facts. Reliance on erroneous Department of Labor advice may be considered in determining whether the amount of a penalty in an enforcement action is appropriate.

Topic	Toll-Free Numbers
All Department of Labor Topics	1-866-487-2365
Wage and Hour Questions	1-866-487-9243
Employment and Training Questions	1-877-872-5627
Workplace Safety and Health Questions	1-800-321-6742
TTY Number - All Topics	1-877-889-5627

The SBREFA also established a means for registering complaints about Department of Labor enforcement. You can register a complaint by calling 1-888-REG-FAIR. In certain instances, small businesses may receive a reduction or waiver of penalties, or may recoup their legal expenses when the government seeks unreasonably high penalties. For more information, call 1-888-9-SBREFA.