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## **Overtime Exemptions For Computer Professionals**

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California is the land of high tech and Silicon Valley. Unfortunately for the tech industry, the state legislature has ignored the newest breed of "white collar" employees -- the computer professional. This article examines the overtime and wage hour requirements for computer professionals under current federal law and the evolution of current California law, including a bill passed on September 5, 2000 by the state legislature.

### I. The Federal Exemption for the "Computer Professional"

If certain requirements are satisfied, the highly skilled "computer professional" may be exempt from overtime under the federal Fair Labor Standards Act ("FLSA"). This special exemption requires that an individual's "primary duty" consists of:

work that requires theoretical and practical application of highly-specialized knowledge and computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer software field. 29 C.F.R. 541.3(a)(4).

These individuals must also consistently exercise discretion and independent judgment in the performance of their work, which must be intellectual and varied in character. 29 C.F.R. 541.3(b), (c).

In addition to the overtime exemption, the FLSA also allows these exempt computer professionals to be paid on an hourly basis, unlike the other traditional "white collar" exemptions where a salary is required. These "computer professionals" meet the hourly exemption if they are compensated at a rate of \$27.63 or more per hour and may be described as:

any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is -  
(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 design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills.

29 U.S.C. 213(a)(17).

## II. The "Computer Professional" Under California Law

Prior to the adoption of Assembly Bill 60 ("A.B. 60"), which took effect January 1, 2000, computer professionals might be able to squeeze under one of two traditional state exemptions from overtime requirements, even when paid hourly. Such a squeeze was possible via California's administrative and professional exemptions. The passage of A.B. 60 made qualification impossible under those exemptions. Days ago, however, California's legislature passed a bill which would make California law largely consistent with the federal "computer- related" exemption, discussed above. The bill awaits signature from the governor. This tangled history is discussed in detail in this section.

### A. The Computer Professional Before January 1, 2000

Prior to the adoption of Assembly Bill 60 ("A.B. 60"), which took effect January 1, 2000, computer professionals might be able to squeeze under one of two traditional state exemptions from overtime requirements, even when paid hourly. Those two exemptions are discussed immediately below.

#### 1. The Administrative Exemption

Under prior California law, language under California's "administrative exemption" allowed employees to argue that high-level computer-related employees who exercise discretion and independent judgment and whose duties involve the general business operations of the employer qualified for the administrative exemption. For example, California's administrative exemption specifically covered employees that performed work along "specialized or technical lines requiring special training, experience or knowledge" or employees that performed "special assignments" under only general supervision. The administrative exemption under California law looked only to the "remuneration" or total "payment" (at least \$1150 per month) of the employee; there was no salary requirement.

It was not a simple process for the computer professional to meet California's administrative exemption, however. To qualify under California's administrative

exemption, a computer professional must be acting in a capacity that is ancillary to the business as a whole -- the so-called "special assignments" referred to above. The tech person at a law firm or accounting firm, for example, might qualify as "administrative" because the work he or she performs is not part of the general business of practicing law or accounting. By contrast, the web programmer at an Internet movie company is engaged in the main line of the business, showing movies via the Internet, and hence could not qualify under the administrative exemption.

## 2. The Professional Exemption

Under prior California law, the "professional exemption" also potentially provided an exemption for computer personnel. If an employee in a computer-related field had a sufficient amount of postgraduate education, or if the work performed required a significant amount of imagination, he or she might have qualified for the "professional exemption" as a member of a "learned or artistic profession." Prior to January 1, 2000, this exemption had no minimum "remuneration" or salary requirement. Thus, payment on an hourly basis had no effect on the availability of the exemption.

The availability of this exemption, however, should not be overemphasized. In the computer industry, many highly paid workers do not have the level of formal education necessary to meet the requirements of the "learned profession," and much of the work performed is arguably not creative enough to meet the requirements of the "artistic profession" which must still be established under California law. Both California and federal law define "artistic profession" as those professions traditionally recognized as an artistic endeavor requiring creativity and imagination. The question of whether computer designers are "traditional artists" is unsettled and may turn on the specific facts of each case.

By analogy, the court in *Stanger v. Vocafilm Corp.* held that employees employed by a manufacturer and distributor of sound slide films were not employed in a bona fide "professional capacity." *Stanger*, 151 F.2d 894 (1945). Noting that the films were primarily used by the Navy to teach the construction, operation, and maintenance of complex machinery, the court found that the employees' duties consisted of retouching and blocking out photographs, drawing additions to photographs, making isometric and schematic drawings, and doing free-hand cartoons. The court pointed out that under the artistic exemption the work performed must be predominantly original and creative. Such creativity was not exercised. The court observed that the story for the series of films was obtained from a small group of artists, of which the employees were not members, and that the organization of the films was planned by directors. Uniform production of the films was essential, the court said, and the individual frames could in no way reflect the peculiar genius or style of the individual who made them. Even in the case of their drawings, said the court, the employees worked from photographs, blueprints, or sketches, and their job was only to make the drawings more like originals. One can see how a similar analysis might be applied to computer professionals like web site designers.

To cite another example, a court recently held that work done by newscasters is not sufficiently creative to meet the artistic exemption. The court noted that:

... the reporters used primarily intelligence, diligence and accuracy, rather than creativity, to report facts. They were told which stories to cover and informed of the focus or angle of the story before they covered it. Occasionally, they were told who to interview. They used essentially a standard format of pictures and sound to cover most stories and attempted to obtain both sides of the story. (Emphasis added.)

*Nordquist v. McGraw-Hill Broadcasting Co.*, 32 Cal. App. 4th 555 (1995), citing *Dalheim v. KDFW-TV*, 706 F. Supp. 493 (1988). In all such cases, it is the employer who bears the burden of proving that the employee falls within the artistic exemption. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197 (1974) and *Martin v. Malcolm Pirnie, Inc.*, 949 F. 2d 611, 614 (2d Cir. 1991), cert. Denied, 113 S. Ct. 298 (1992).

#### B. The Computer Professional After January 1, 2000

A.B. 60 received most of its attention for reinstating California's daily overtime rules. The bill, however, contained a more subtle change to California wage and hour law, effectively eliminating the tech industries use of the two overtime exemption routes, outlined above.

A.B. 60 adopted the federal "salary basis" requirement for an employee to be eligible for the administrative, executive and professional exemptions under California law, replacing the former remuneration or total payment requirement. Now employees who are paid on the basis of an hourly wage, or commissions, or piece rates, cannot be exempt from payment of overtime under the administrative, executive or professional exemptions.

Such an effect may not have been intentional. The legislative intent behind the change in the law was ". . .to explicitly adopt the federal salary basis test, to the extent it is consistent with California wage and hour law." So said the chief counsel for the Labor Commissioner in a memorandum dated December 23, 1999. Unfortunately for the tech industry, California failed to also adopt the specific federal exemption from the salary basis requirement for highly paid computer professionals.

#### C. The Immediate Future of the Computer Professional Under California Law

On September 5, 2000, the California legislature took a step to redress this oversight. The legislature sent a bill to the governor that would largely make California consistent with the federal exemption for the "computer professional." The bill as written, however, sets the minimum hourly rate for an exempt computer professional at \$41 per hour, which is considerably higher than the federal figure of \$27.63. If the governor signs the bill, the "urgency legislation" would become effectively immediately.