



EMPLOYMENT



8050 West 78th Street • Edina, MN 55439 • 952-941-4005 • www.hjlawfirm.com

Do I Have To Pay Overtime?



By: [Karl E. Robinson, Esq.](#)

In these challenging economic times, many businesses are asking more from all of their employees, including their salaried employees. As a result, many businesses are requiring their salaried employees to work more hours and complete tasks that were previously performed by hourly or temporary employees. For example, a salaried employee may now be doing both the management work that he or she has always done, as well as additional work that was previously performed by lower level employees who have been laid off. Anytime a company's salaried employees are working more than 40 hours in a week, there is the potential for unpaid overtime compensation liability if these salaried employees are not exempt employees under federal and

state overtime laws. The answer to whether such salaried employees are exempt from the overtime laws requires an examination of what the employee's actual day-to-day duties and responsibilities are—not merely a look at his or her job title and how they are paid. Accordingly, when an employee's duties and responsibilities change, his or her classification as exempt or not exempt may also change.

In general, the Federal Fair Labor Standards Act ("FLSA") requires that most employees be paid at least the federal minimum wage for all hours worked and be paid overtime at time-and-a-half for all hours worked in excess of 40 hours in a week. The FLSA provides an exemption from the overtime laws for employees who are considered "executive," "administrative," "professional," or "outside sales employees." See generally 29 CFR Part 54. Likewise, under Minnesota law, similar exemptions apply to bar the application of state minimum wage and state overtime laws from applying to employees who are considered "executive," "administrative," "professional," or "outside sales employees."

To determine whether an employee is exempt from overtime laws because he or she is an "executive" employee (often referred to as a manager), the Court will apply a four-part test. This test includes an examination of: (1) whether the employee's salary is at least \$455 per week; (2) whether the employee's primary duties include managing the business or a department or division of the business; (3) whether the employee directs the work of two or more other full-time employees; and (4) whether the employee has the authority to hire or fire other employees or, if not, whether the employee's suggestions and recommendations as to such hiring and firing or other change of status of an employee is given particular weight by the ultimate decision maker. For an employee to be considered an "executive employee" who is exempt from the overtime laws, all four parts of this test must be met. Application of this test focuses on what an employee's actual day-to-day job duties, not simply what may be written in a job description or what the employee's duties were when he or she began employment months or years before. As a result, an employee who is initially exempt from the overtime laws because his or her work duties and responsibilities satisfied this four-part test may later become a non-exempt employee entitled to overtime pay because of changes in his or her work duties and authority.

Similarly, to determine whether an employee is exempt from overtime laws because he or she is an "administrative" employee, the Court will examine three factors: (1) whether the employee's salary is at least \$455 per week; (2) whether the employee's primary duty is the performance of non-manual work directly related to the management or general business operations of the company or the company's customers; and (3) whether the employee's primary duty includes the exercise of discretion and independent judgment regarding significant matters. For an employee to be considered an "administrative employee" exempt from the overtime laws, all three factors must be satisfied. Application of this test, like the test for an executive employee, focuses on what an employee is actually doing in his or her day-to-day job duties.

Likewise, for an employee to be exempt from overtime laws because he or she is a "learned professional" employee, the employer must show that: (1) the employee's salary is at least \$455 per week; (2) the employee's primary duty is the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; (3) the advanced knowledge must be in a field of

science or learning; and (4) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. There is a separate test for a “creative professional” employee. This test requires that: (1) the employee’s salary is at least \$455 per week; and (2) the employee’s primary duty is the performance of work requiring invention, imagination, originality or talent. For an employee to be considered a “professional employee” who is exempt from the overtime laws, one of these tests must be satisfied. Once again, the Court will examine on what an employee is actually doing in his or her day-to-day job duties to determine whether either test has been met.

Finally, an employee is exempt from the overtime laws as an “outside salesperson” if the employee’s (1) primary duty is making sales and (2) the employee is customarily and regularly engaged in his or her duties away from the employer’s place or business. Again, the Court will examine the actual, day-to-day duties of the employee and where he or she performs such duties in applying this test.

If an employer treats an employee as exempt from the overtime laws, but the employee is actually not exempt from the overtime laws, then the employee will likely have a claim against the employer for unpaid overtime compensation if the employee has worked more than 40 hours in a week. In addition, such an employee would likely have claims for “liquidated damages” under the overtime laws, which essentially are civil penalties that double the amount of overtime compensation owed to the employee. Such an employee can also recover his or her reasonable attorneys’ fees and other costs incurred in bringing such a claim. As a result, it can be a costly mistake for a business to misclassify an employee as being exempt from overtime laws if, in reality, the employee is not exempt.

So, what is the best way for a business to seek to protect itself from such potential costs and liability that could result from the misclassification of an employee? The answer is to consult with an attorney and obtain sound legal advice on the proper classification of the company’s employees. The attorneys at Hellmuth & Johnson can assist Employers with these issues by explaining the details in a manner that is both professional and comprehensive. For further information, contact Karl Robinson at kerobinson@hjlawfirm.com or 952-746-2153.

Is Unemployment Discrimination Allowed?



By: [Mark E. Rath, Esq.](#)

It is widely accepted and understood that discrimination against prospective employees based on things like national origin, sex, age, or race, just to name a few, is not permissible. Placing an ad that excludes applicants based on any of these factors would certainly create undesirable consequences. However, some companies are placing want- ads that require potential applicants to be currently employed in order to be considered for employment. In other words, companies are discriminating against prospective job applicants based on the fact that they are not working. Can they do this? At the moment, they can.

Obviously, excluding applicants because they are not working makes it difficult for workers who have lost their jobs to be re-employed, potentially exacerbating the unemployment problem, and undoubtedly creating additional barriers to employment for those who want to work. With unemployment soaring, efforts are being made in Washington and around the country to prohibit the practice of requiring that applicants for open positions already be employed. Federal legislation has been proposed that would prohibit employers from refusing to consider unemployed applicants. The recently proposed Fair Employment Opportunity Act of 2011 (H.R. 2501) and the Fair Employment Act of 2011 (H.R. 1113) have been introduced to do just that. The New Jersey Legislature recently enacted N.J.S.A. 34:8B-1, a new law prohibiting employers from publishing any job listing stating that current employment is a requirement for job consideration. The purpose is to level the playing field, allowing the unemployed the same opportunities for employment as their employed competition.

The legislation is certainly intended to combat high unemployment. However, the concern is that it might only create new litigation on the part of growing numbers of the unemployed, possibly have a chilling effect on hiring, and further exacerbating the unemployment problem. Is there a perception that the unemployed are less desirable job candidates or is this practice merely an effort by some companies to limit the applicant pool for open positions, as benign as a requirement of 5 years experience to be considered for the job? Time will tell and the debate will undoubtedly go on. In the meantime, take great care in drafting advertisements for employment amid these concerns, so as to avoid a negative perception of discrimination in hiring, whether legislative efforts are successful or not.

H&J Announcements

H&J Adds New Attorneys ...

Russell “Mick” Spence, Jr., has joined the firm as a partner in the Business & Corporate practice group. He litigates and counsels entertainment, intellectual property and business clients in a wide variety of legal matters. Combining his passions for creativity, commerce, advocacy and success, Mick has established a reputation as the go-to attorney for both creative talents and entrepreneurial businesses. We look forward to his complimentary practice strengthening the business services we provide, while expanding our growth to benefit both existing and new clients.

Joshua R. Ward has also joined the firm as an associate and is a member of the IT & eCommerce and Business & Corporate practice groups. He obtained his JD from William Mitchell College of Law where he served on the Editorial Boards of the *William Mitchell Law Review* and *Cybaris: An Intellectual Property Law Review*.



Hellmuth & Johnson, PLLC • 8050 West 78th Street • Edina, MN 55439 • T 952-941-4005 F 952-941-2337

Appeals • Banking & Finance • Community Associations • Construction • Construction Defects
• Collections, Creditors' Remedies & Bankruptcy • Employment • Estate Planning • General Business &
Corporate • Insurance Defense • Information Technology & eCommerce • Litigation • Medical Malpractice
& Personal Injury • Mergers & Acquisitions • Property Owners Insurance Coverage • Real Estate

Advertising Material