

Being a Paralegal in California: Who Qualifies, and Can A Paralegal Be Exempt From Overtime Under the “Learned Professionals” Exemption?

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Business and Professions Code § 6450, the California paralegal definition statute,¹ took effect on January 1, 2001. B&P Code § 6450 defines a paralegal as a non-lawyer who performs substantive legal work under the supervision of an attorney, meets defined educational, training or work experience qualifications, and participates in Mandatory Continuing Legal Education as required by law.

Educational Requirements

B&P Code § 6450 requires those individuals who hold themselves out as paralegals to possess at least one of the following:

- A paralegal certificate from an ABA-approved paralegal program;
- A certificate from an accredited paralegal program that requires at least 24 semester units in law-related courses;
- A bachelor’s (or advanced) degree and one year of law-related experience under the supervision of an attorney who has three years’ experience practicing law in California, and a written declaration from such attorney that the person is qualified to perform paralegal tasks; or

Paralegals, like attorneys, have MCLE requirements. Paralegals must complete:

- Four hours of general law or specialized area of law MCLE every two years; and
- Four hours of ethics MCLE every three years.

This is a staggered MCLE requirement. For example, a person who was a paralegal when the bill became effective in 2001 would have the following deadlines:

Topic	MCLE Requirement	Deadline
General Law / Specialized Area of Law	4 hours	12/31/03
		12/31/05
		12/31/07
Ethics	4 hours	12/31/04
		12/31/07
		12/31/10

¹ The term “legal assistant” is synonymous with “paralegal” under Business & Professions Code § 6450.

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Individuals who became paralegals after January 1, 2001, would follow a similar schedule, with the staggered deadlines tied to the date he or she became a paralegal.

The paralegal shall certify to his or her supervising attorney at the end of each given period as to the completion of such requirements and shall maintain a record of all such certifications. All MCLE courses must meet the requirements of B&P Code § 6070.

Attorneys are responsible for the negligence and/or misconduct of the paralegals whose services they utilize. As such, attorneys have a vested interest in making sure their paralegals meet the requirements of B&P Code § 6450. Moreover, law firms should be prepared to prove in court in instances seeking fee recovery that the paralegal performing the invoiced services for which fee recovery is requested is in fact a paralegal as defined in B&P Code § 6450.

For more information on the Paralegal Definition statute (such as a sample compliance log, FAQ, etc.), please visit the California Alliance of Paralegal Associations' website at www.caparalegal.org and click on “definition.”

Learned Professional Overtime Exemption

In the November 2004 Labor Law Corner, Brian Sinclair discussed generally whether paralegals were exempt from overtime under the U.S. Department of Labor's New FairPay Overtime Rules (“Are Paralegals Exempt Under the FLSA's New FairPay Overtime Rules?”). He concluded it would be quite difficult for a paralegal to qualify as exempt under the “learned professionals” exemption.

In confirmation of Brian's predictive skills, on January 7, 2005, the DOL issued a new opinion letter on whether paralegals can be exempt under the Learned Professionals Exemption, 29 C.F.R. § 541.301. The DOL was responding to a request from a paralegal who met the salary basis requirements under the revised regulation and who possessed a four-year degree and a paralegal certificate, and who had taken numerous continuing legal education courses throughout the paralegal's 22 years of service.

The Opinion Letter is reprinted here in its entirety:



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

January 7, 2005

FLSA2005-9

Dear Name*,

This is in response to your letter to Secretary Chao concerning the application of the professional exemption under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) to paralegals. Please note that the Department of Labor issued revisions to 29 CFR Part 541, effective August 23, 2004 (copy enclosed). The updated Part 541 regulations apply prospectively, beginning on August 23, 2004. Our response is applicable under the updated version of the regulations that clarify and make no substantive changes in the primary duty test requirements for the professional exemption.

You state that your employer has recently reclassified your position as a paralegal to a nonexempt status. You possess a four-year degree from an accredited university, a paralegal certificate, and have taken continuing legal education courses in your twenty-two years of service as a paralegal. You also indicate that you satisfy the salary basis requirements under the revised regulations.

With respect to the professional exemption, as discussed in 29 CFR 541.300 of the regulations, the term “employee employed in a bona fide professional capacity” in Section 13(a)(1) of the FLSA shall mean any employee: (1) compensated on a salary or fee basis at a rate of at least \$455 per week; (2) whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

The primary duty test under the learned professional exemption at § 541.301 includes three elements: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The phrase “work requiring advanced knowledge” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.

As the regulation provides in § 541.301(e)(7), “[p]aralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.” Therefore, unless you possess an advanced specialized degree in another professional field, that degree is a standard prerequisite for entry into that field, and you apply advanced knowledge in that field in the performance of your paralegal duties, your position as a paralegal cannot qualify for the professional exemption under the updated regulations implementing Section 13(a)(1) that became effective on August 23, 2004. Hence, your position as a paralegal is covered by the overtime and minimum wage provisions of the FLSA.

As the preamble to the final rule noted at 69 FR 22154-55, the Department received numerous comments during the notice and comment period urging the Department to declare that paralegals are exempt learned professionals. However, “none of these commenters provided any information to demonstrate that the educational requirement for

“Primary duty test under the learned professional exemption . . . includes three elements: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

“...learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields . . . For example, . . . an engineer [hired] as a paralegal to provide expert advice on product liability cases . . .”

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paralegals is greater than a two-year associate degree from a community college or equivalent institution.” Id. at 22154. Furthermore, there was “no evidence in the record that a four-year specialized paralegal degree is a standard prerequisite for entry into the occupation.” The final rule, thus, reaffirms the longstanding position of the Department that paralegals and legal assistants do not qualify for the learned professional exemption.

We trust that this information is responsive to your inquiry. If you require further assistance, please feel free to visit our FairPay website at www.wagehour.dol.gov or contact our local district office located at 1321 Murfreesboro Road, Suite 511, Nashville, TN 37217, tel. (615) 781-5344, fax. (615) 781-5347.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosure

Note: * The actual name(s) was removed to preserve privacy.

The DOL opined that, notwithstanding the many comments it received during the rulemaking process urging exempt professional status for paralegals, “none of the commenters [established] that the educational requirement for paralegals is greater than a two-year associate degree from a community college....” The DOL thus reaffirmed its longstanding position that most paralegals cannot qualify for the learned professional exemption.

Although many of us in the legal profession may wish to view ourselves as “creative” or “artistic” in the way we conduct our practices, notably the DOL did not even attempt to address whether a paralegal could qualify for the “creative professionals” exemption under that prong of the regulatory test for professional exemption. Under the “creative professionals” exemption, the “requirement of ‘invention, imagination, originality or talent’ distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy.” 29 C.F.R. § 541.302(c). The DOL reserves the “creative professionals” exemption for persons such as actors, artists, musicians, composers, screenplay writers (!), and novelists.

While law firm paralegals thus face steep hurdles in qualifying for exempt status, paralegals who work for a corporation (e.g., in a corporate General Counsel’s office) could theoretically qualify for exemption – but under the administrative exemption. In-house paralegal work, in contrast to a law firm’s production of legal work, would not necessarily constitute disqualifying “production work.” If a corporate law department paralegal met the other standards for administrative exemption (appropriate salary basis of compensation; and primary duty consisting of work “directly related to the general business operations of the employer” and involving “the exercise of discretion and independent judgment with respect to matters of significance”), the paralegal could qualify for the administrative exemption under federal law. 29 C.F.R. § 541.200 - .203.

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Bear in mind, however, that California’s definition of “primary duty” means “more than 50% of the time.” In addition, an administratively-exempt person in California also must either (i) perform “under only general supervision work along specialized or technical lines requiring special training, experience or knowledge,” or (ii) execute “special assignments and tasks ... under only general supervision.” Industrial Welfare Commission Order 4-2001 Sec. 1(A)(2)(d), (e).

Thus, the path to “truly exempt” status for a paralegal in California is daunting, and in almost all cases will need to start with corporate employment rather than law firm employment!

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