

# Are Paralegals Exempt Under the FLSA's New Fairpay Overtime Rules?

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Reprinted with permission from The Orange Appeal, the newsletter published by the Orange County Chapter of the Association of Legal Administrators, November 2004.

In August of this year, the United States Department of Labor ("DOL") issued the long-awaited FairPay Overtime Rules. The Fair Pay Overtime Rules are new regulations interpreting the white collar exemptions under the Fair Labor Standards Act ("FLSA"), the federal law that imposes minimum wage and overtime requirements upon most private employers. Under the former FLSA regulations, paralegals were generally considered to be non-exempt employees and, therefore, entitled to overtime compensation. Companies that employ paralegals are now asking the question: "Are paralegals considered exempt from overtime requirements under the FairPay Overtime Rules?"

Unfortunately, the FairPay Overtime Rules do not definitively answer this question, although the regulations strongly suggest that paralegals generally will not qualify for an exemption from the FLSA's overtime requirements. We discuss below the FairPay Overtime Rules' impact on the exempt status of paralegals, as well as the exempt status of paralegals under California law. First, however, we discuss the DOL's position regarding the exempt status of paralegals under the old regulations.

Under the old regulations, the DOL issued several opinion letters in which it took the position that paralegals failed to qualify for the administrative exemption—the exemption most applicable to the majority of paralegals—because they were considered to be production employees as opposed to administrative employees. The old regulations required that an administrative employee's primary duties include the performance of office or non-manual work directly related to the management policies or general business operations of the employer or its customers. Because paralegals typically produce the work product of their employer, instead of performing activities relating to the administrative operations of the employer, the DOL concluded that their duties did not satisfy this requirement of the administrative exemption. The DOL also concluded that paralegals did not satisfy the administrative exemption's requirement that the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance. The DOL found that while paralegals used specialized legal skills in their work, their duties did not require the exercise of discretion and independent judgment in matters of significance because, in many states, this would result in the unauthorized practice of law by the paralegal. Significantly, at least one federal court decision disagreed with the DOL, and concluded that paralegals could satisfy the requirements of the administrative exemption.

In addition to not satisfying the administrative exemption, paralegals generally did not qualify for the professional exemption under the old regulations, which required, among other things, that the employee engage in work that involves knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. The DOL interpreted the

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"prolonged course of study" component to mean at least a baccalaureate degree. While many paralegals hold a baccalaureate degree, paralegal specialization degrees are generally two-year programs. Hence, the DOL concluded that the actual duties of paralegals, while requiring specialized legal training, typically do not require the advanced knowledge contemplated by the regulations to satisfy the requirements of the professional exemption.

Significantly, in its opinion letters applying the old regulations to paralegal positions, the DOL appeared to be focusing on paralegals employed by outside law firms, as opposed to in-house paralegals. In-house paralegals, unlike outside paralegals, often perform activities relating to the administrative operations of their employer, including duties that directly relate to the management policies or general business operations of the employer. In addition, in-house paralegals frequently exercise much more discretion and independent judgment with respect to matters of significance to the company's business. Given the differences between outside paralegals and in-house paralegals, it is unclear whether the DOL's opinion letters interpreting the exempt status of paralegals under the old regulations apply equally to in-house paralegals.

Law firms and private businesses were hoping that the DOL would clarify the exempt status of paralegals when it issued the FairPay Overtime Rules earlier this year. While the FairPay Overtime Rules have offered some guidance, nothing in the new regulations has significantly altered the exemption analysis for paralegals under the FLSA. The administrative exemption under the new regulations continues to require that employees (a) perform office or non-manual work directly related to the management or general business operations of the employer or the employee's customers and (2) exercise of discretion and independent judgment with respect to matters of significance. As noted above, the DOL has concluded in several opinion letters that paralegals satisfy neither of these criteria, at least in a law firm environment.

In connection with the professional exemption, the new regulations offer some clarification with respect to paralegals: "[T]he 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." 29 C.F.R. 541.301(e)(7). Therefore, paralegals applying advanced degrees to their work product may qualify for the FLSA's professional exemption.

The new regulations do, however, include a highly-compensated worker provision, which applies to employees: (a) who earn a total annual compensation of \$100,000 or more (which may include commissions and non-discretionary bonuses or other non-discretionary compensation) and includes a salary of at least \$455 per week. If an employee satisfies this criteria, he or she can qualify for an exemption under the new regulations if (a) his or her primary duty includes performing office or non-manual

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work; and (b) he or she performs at least one of the exempt responsibilities of an exempt executive, administrative or professional employee.

Even under the highly-compensated employee provision, paralegals still will have difficulty satisfying the exemption criteria of the executive, administrative, and professional exemptions. First, with respect to the executive exemption, a paralegal would have to either supervise two or more other employees, have the authority to hire or fire employees, or manage the company or a customarily recognized department within the company (e.g., the company's legal department). Second, as noted above, to satisfy the administrative exemption, the paralegal would either have to show that he or she performs work directly related to the management or general business operations of the company or its customers, or that he or she exercises independent judgment and discretion with respect to matters of significance. As explained above, the DOL takes the position that paralegals generally do not satisfy either of these criteria. Third, with respect to the professional exemption, absent an advanced degree in a specialized field, even a highly-compensated paralegal would not satisfy the professional exemption.

Employers in California have an additional obstacle to overcome. Even if a California employer satisfies the paralegal exemption hurdles imposed by the new FairPay Overtime Rules, California's overtime exemptions make it even more difficult to qualify for California's overtime exemptions. California's regulations pertaining to the administrative exemption for all intents and purposes mirror the federal regulations, but also require that exempt administrative employees work under only general supervision and be primarily engaged in (i.e., spend more than 50% of their time) the performance of exempt functions. While there is no California authority interpreting this exemption as it applies to paralegals, the California exemption relies upon the old federal regulations, under which the DOL concluded that paralegals were non-exempt.

Similarly, California's professional exemption education requirement mirrors the federal requirements. In addition, however, California's professional exemption also requires that the professional employee be "licensed or certified by the State of California" and be primarily engaged in the profession of law. While no legal authority exists that attempts to apply this exemption to paralegals, California's Industrial Welfare Commission has stated that the term "law" is limited to attorneys and does not include paralegals.

Because the nature of work performed by paralegals varies widely, the determination of whether a position is exempt or non-exempt from overtime compensation must be made on a case-by-case basis under both the FLSA and California law. In light of the DOL's long-standing position that paralegals are non-exempt, however, law firms and private companies should review the job duties performed by paralegals classified as exempt employees to ensure that they fulfill the requirements necessary to satisfy both a federal and California exemption.

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