

TO: MONTANA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS (MASBO)
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SUBJECT: NEW US DOL OVERTIME RULES
DATE: SEPTEMBER 13, 2016

On May 23, 2016, the U.S. Department of Labor and Industry (the Department) published its final rule revising certain overtime laws. Specifically, the Department revised the rules setting the minimum salary and compensation levels for executive, administrative, and professional employees to remain exempt from the minimum wage and overtime requirements mandated by the Fair Labor Standards Act (FLSA). The FLSA exempts certain executive, administrative, and professional employees from its minimum wage and overtime requirements provided that three tests are satisfied: (1) *salary basis test* – the employee is paid a predetermined and fixed salary not subject to reduction because of variations in the quality or quantity of work; (2) *salary level test* – the employee’s salary meets a minimum amount; and (3) *duties test* – the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by federal regulations.

For purposes of the *duties test*, as a general matter, executive employees are those:

- Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- Who customarily and regularly directs the work of two or more other employees; and
- Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. 541.100.

As a general matter, administrative employees are those:

- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. 541.200.

Finally, as a general matter, professional employees are those:

- 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.

29 C.F.R. 541.300.

The Department did not revise the rules requiring exempt employees to meet the *salary basis* or *duties tests*. Rather, the Department revised the rules regarding the *salary level test* and raised the minimum amounts an executive, administrative or professional employee must earn to remain exempt. This means that even if an executive, administrative or professional employee satisfies the *duties test* and is paid a salary, the employee may not be exempt if he or she earns less than the minimum amounts.

Remember, simply because an employee is paid a salary instead of on an hourly basis does not make that employee exempt. The employee must meet the minimum salary level threshold and meet the *duties test*. Likewise, there is no requirement to convert an employee to an hourly wage if the employee does not meet the salary level or duties tests.

Summary of Revisions

Beginning **December 1, 2016**, an exempt executive, administrative or professional employee **must earn at least \$913 per week or \$47,476 annually** (for a full-year worker), exclusive of board and lodging, to remain exempt. Prior to the effective date, an employer is not obligated to pay minimum wage or overtime to an executive, administrative, or professional employee who earns between \$455 per week (the current minimum level) and \$912 per week (assuming the employee satisfies the *duties test*). However, beginning December 1, 2016, if an executive, administrative, or professional employee, regardless of his or her duties, earns less than \$913 per week or \$47,476 (for a full-year worker), the employer is obligated to pay minimum wages and overtime to that employee. The amounts set are the equivalent to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) (this is the language in the actual regulations, but the Department has provided the monetary equivalents). The revised regulations also include a mechanism for the Department to update the salary level minimums every three years; this is the reason that the percentile language is used instead of actual monetary amounts. Thus, the minimum levels will automatically change beginning January 2020.

Regulatory revisions in 2004 added certain highly compensated employees to the category of exempt employees. Highly compensated employees customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee. Highly compensated employees must have the primary duty of performing office or non-manual work; non-management production line workers and employees who perform work involving repetitive operations with their hands, physical skill, and energy are not exempt regardless of how highly paid they may be. The May 2016 revisions change the minimum limit of highly compensated employees from \$100,000 to \$134,000 annually (or the 90th percentile of earnings of full-time salaried workers nationally as stated in the regulations).

The regulations were also revised to permit employers to count nondiscretionary bonuses, incentives, and commissions toward a maximum of 10% of the minimum salary level (i.e., \$913 per week or \$47,476 annually) provided such amounts are paid at least quarterly or more frequently.

Impact on School Districts

Notably, the new revisions do not impact “bona fide teachers.” In other words, regardless of whether a bona fide teacher earns a minimum of \$913 per week or \$47,476 after December 1, 2016, a bona fide teacher is exempt under the FLSA. Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Teachers include “regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors.” 29 C.F.R. 541.303.

Academic administrative personnel are also generally exempt under the FLSA. Academic administrative personnel subject to the exemption include: superintendents; principals and vice-principals; academic counselors and advisors; and other employees with similar responsibilities. To be exempt, however, academic administrative personnel must be paid “on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which [they are] employed.” 29 C.F.R. 541.204(a)(1). Thus, provided academic administrative personnel are paid a salary that equals or exceeds the entrance salary for teachers within the district, they are exempt regardless of whether this entrance salary meets or exceeds \$913 per week or \$47,476 per year.

In addition, coaches may be exempt if their primary duty is teaching as opposed to recruiting students to play sports or performing manual labor. Indeed, in defining a bona fide teacher, the regulations state:

Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools’ responsibility in contributing to the educational development of the student.

29 C.F.R. 541.303. Thus, if a teacher is employed as a coach, the coaching position is exempt. However, if another employee is employed as a coach, the coaching position will likely not be exempt (i.e., classified employee employed as a coach).

Employees whose work relates to general business operations, building management and maintenance, or the health of students and staff (such as lunch room managers), do not perform academic administrative functions and, thus, must meet the *salary basis*, *salary level* (as revised), and *duties tests* to be exempt.

In summary, beginning December 1, 2016, a school district must begin paying overtime (and minimum wage if applicable) to employees (excluding bona fide teachers and academic administrative personnel) if they work over 40 hours per week, even if previously exempt as an executive, administrative, or professional employee, if that employee’s weekly wages are less than \$913 or annually less than \$47,476. It is, therefore, advised that school districts identify those impacted previously-exempt employees who earn less than \$913 per week or \$47,476 annually to ensure that it will be compliant with the revised regulations beginning December 1, 2016, and pay overtime if the employee works over 40 hours in a work week after the effective date and is paid at

least a minimum hourly wage. A school district is not obligated to comply with the revised regulations as described above prior to December 1, 2016, but should be prepared to ensure compliance on the effective date. School districts need to also be prepared that the minimum limits identified will change again beginning January 2020 and every three years thereafter.

Exemptions Not Subject To Salary Requirements

Not all exemptions contain salary basis requirements. The exceptions to that rule are as follows:

Certain Licensed Professional Employees. The compensation requirements do not apply to employees who hold a valid license or certificate permitting the practice of law (or medicine) and are actually engaged in such practice. This exception, however, does not apply to nurses, dietitians, etc.

Computer Employees. In the case of computer employees who are otherwise exempt based on the duties they perform, the salary requirements are met if they are paid a rate of not less than \$27.43 an hour.

Outside Sales Employees. Employees meeting the requirements of the outside sales employee exemption are not subject to the salary requirements set forth herein.

Most Common Exemption Subject to Salary Requirements

Administrative Exemption

An employee qualifies for the administrative exemption if she:

- (1) Is compensated on a salary or fee basis at a rate of not less than \$913 per week;
- (2) Has a primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Has a primary duty which includes the exercise of discretion and independent judgment with respect to matters of significance.

The administrative exemption is the most frequently misunderstood and misapplied exemption. It is often used as a sort of "catch-all" exemption which employers apply to employees performing any sort of white-collar work. This view of the administrative exemption is incorrect, and has led to much misclassification and litigation. Unfortunately, the question of who is and who is not an exempt administrative employee is often difficult even for experienced employment attorneys to decipher.

1. Administrative Work

When looking at whether an employer can classify an employee as administratively exempt, the employer should look first to the nature of the work the employee performs as his primary duty.

Performing "work related to the management or general business operations of the employer" generally means performing work which is linked with the running or servicing of the business. Such work must not be of a routine or clerical nature and must be of substantial importance to the management or operation of a business. As a general rule, bookkeepers, secretaries, and clerks are not exempt. On the other hand, tax experts, credit managers, account executives, brokers, sales research experts, and personnel/human resources directors are typically deemed to perform more

“important” work and therefore stand a better chance of qualifying for the administrative exemption.

Another factor to consider is that “production” work is typically not exempt. Production work refers to any form of making or creating whatever product or service the employer offers for sale, or actually selling that product or service to the public. A simplistic way of looking at the administrative versus production dichotomy is that, if one works “behind the scenes” keeping the business running, one’s work is more likely to be considered exempt (if it is at a high enough level), whereas, if one’s work is more directly linked with providing the good or service to the public, the work is less likely to be considered exempt.

Administrative work also includes work pertaining to “the management or the general business operations of the . . . employer’s customers.” Thus, employees who provide consultation and advice to an employer’s clients may be considered to be performing exempt administrative work. The regulations make clear that selling goods or services in retail is not exempt administrative work. Thus most “inside sales” work—ranging from telephone sales made by phone bank employees, to live sales in a clothing or electronics store—cannot be classified as exempt administrative work.

The regulations provide several illustrative examples of work which is typically exempt, including:

- Tax
- Finance
- Auditing
- Budgeting
- Quality control
- Purchasing
- Procurement
- Human resources
- Employee benefits
- Public relations
- Computer network, internet and database administration
- Legal and regulatory compliance
- Advising or consulting the employer’s clients (tax experts or financial consultants)

2. Primary Duty

As with the executive exemption, employers must show that exempt work is the primary duty of an administrative employee. The fact that the employee performs some non-exempt work will not jeopardize the exemption. Again, the 50% rule is a useful guide in making this determination. Federal regulations expressly state that whether an employee’s primary duty consists of exempt administrative work will be assessed based on all the facts of the case and “with the major emphasis on the character of the employee’s job as a whole.”

Applicable law: 29 C.F.R. § 541.700(a).

3. Discretion and Independent Judgment

In order to qualify for the administrative exemption, it is not enough for an employee to have a primary duty consisting of exempt administrative work. He must also exercise discretion and judgment carrying out such duties. In general, independent judgment means that the employee

compares and evaluates possible courses of action and makes a decision after considering the options.

The employee must have authority to make an independent choice, free from immediate direction or supervision. Even though an employee's decision may be revised or reversed after review, she is still exercising independent judgment. However, the term means more than the use of a skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources.

The regulations set forth a non-exclusive, ten-factor test for determining if an employee exercises discretion and independent judgment with respect to matters of significance. DOL commentary accompanying suggests that if the answer to any two or three of these factors is "yes," the employee will likely be found to exercise discretion and independent judgment with respect to matters of significance:

- Whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
 - Whether the employee carries out major assignments in conducting the operations of the business;
 - Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
 - Whether the employee has authority to commit the employer in matters that have significant financial impact;
 - Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
 - Whether the employee has authority to negotiate and bind the company on significant matters;
 - Whether the employee provides consultation or expert advice to management;
 - Whether the employee is involved in planning long- or short-term business objectives;
 - Whether the employee investigates and resolves matters of significance on behalf of management;
- and
- Whether the employee represents the company in handling complaints, arbitrating disputes, or resolving grievances.