

## Should Paralegals Get Paid Overtime?

By Beth Deragon and Meredith Lasna



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Law firms utilize paralegals to perform a variety of duties resulting in hours of preparing attorneys for trial, mediations, and closings. What if a paralegal works 52 hours in a workweek? Does the firm have to pay overtime? Unless a paralegal meets the limited qualifications for exemption under the Fair Labor Standards Act (FLSA), the answer is yes.

The FLSA exempts from minimum wage and overtime requirements employees employed in a bona fide executive, administrative, or professional capacity and/or those who are highly compensated. Of the types of bona fide professionals considered exempt, the learned professional is considered most frequently when determining a paralegal's status. In some circumstances, a paralegal may qualify as highly compensated.

To qualify for the learned professional employee exemption: (1) the employee

must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684 per week; (2) the employee's primary duty must be 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. Although many paralegals have postsecondary education, they generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field.

In an opinion letter dated December 16, 2005, the United States Department of Labor explained that the professional employee exemption is available when a paralegal has an advanced specialized degree in other professional fields and applies that

advanced knowledge to their primary job duty. The opinion included examples of an engineer hired by a law firm as a paralegal to provide expert advice on product liability cases or to assist on patent matters and a paralegal who possessed an MBA and an accounting degree and passed the uniform CPA exam who "performed primarily expert work in her advanced fields of study." Paralegals who do not apply the knowledge from their advanced specialized degrees to their work or who perform "conventional legal duties" typically do not qualify for this exemption.

The USDOL has also considered whether a paralegal could be exempt as a highly compensated employee. This exemption applies if: (1) the employee's "primary duty includes performing office or non-manual work;" (2) the employee receives total annual compensation of at least \$107,432; and (3) the employee "customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional

employee." 29 C.F.R. § 541.601.

If the salary threshold is met, a paralegal would have to perform a duty directly related to the management or general business operations of the firm "customarily and regularly" to be exempt. To satisfy this third prong, the employee need only perform one or more exempt duties more than occasionally. 29 C.F.R. § 541.701 (noting that the duty's "frequency ... may be less than constant"). An exempt duty is more than occasional if it is performed normally and recurrently every workweek, but not if it is an isolated or one-time task. *See id.* Additionally, this exempt duty need not be the employee's "primary duty." See 29 C.F.R. § 541.601(a)(2); *Smith v. Ochsner Health Sys.*, 353 F. Supp. 3d 483, 498 (E.D. La. 2018).

In an opinion letter of July 1, 2019, the USDOL considered paralegals' actual job duties including "keeping and maintaining corporate and official records, assisting the finance department with bank account matters, and budgeting – that are 'directly related to the management or general business operations.'" The DOL concluded that those paralegals were highly compensated employees. Therefore, if the salary threshold is met, a paralegal with a finance background whose duties include, but do not need to be limited to, bookkeeping for the firm, could qualify as exempt.

Typically, paralegals are not considered exempt under the administrative exemp-

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tion. An employee qualifies for the administrative exemption if: (1) the employee is “compensated on a salary or fee basis at a rate of not less than \$455 per week”; (2) the employee’s “primary duty” is “office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”; and (3) the employee’s “primary duty includes the exercise of discretion and independent judgement with respect to matters of significance.” 29 C.F.R. § 541.200(a). The USDOL found that the paralegals did not exercise discretion and independent judgment sufficient to qualify for the administrative exemption. Although a case-by-case analysis is required, federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgement:

- Has authority to formulate, affect, interpret, or implement management policies or operating practices.
- Carries out major assignments in conducting business operations.
- Performs work that affects business operations to a substantial degree, even if the assignments are related to the operation of a particular segment of the business.
- Has authority to commit the employer in matters that have significant financial impact.
- May waive or deviate from established policies and procedures without prior approval.
- Has authority to negotiate and bind the company on significant matters.

- Provides consultation or expert advice to management.
- Is involved in planning long- or short-term business objectives.
- Investigates and resolves matters of significance on behalf of management.
- Represents the company in handling complaints, arbitrating disputes, or resolving grievances.

The USDOL considered that the ABA Code of Professional Responsibility requires that lawyers supervise work delegated to laypeople in concluding that paralegals would not have the amount of authority to exercise independent judgement on legal matters to bring them within the administrative exemption.

In most cases, paralegals will be considered non-exempt employees and must be paid minimum wage and overtime for any time worked over 40 hours in a workweek. Firms may pay paralegals on a salary basis but must still pay overtime when due. The USDOL leaves open the possibility that paralegals could be exempt under the professional exemption or as highly compensated, but those occasions will be rare, and firms should consult legal counsel before making that determination.

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ported, OSHA has COVID-19 categorized with tuberculosis, hepatitis and the plague, which do have to be reported if confirmed and work-related. See *OSHA Guidance* ¶ 9.

Prior to the COVID-19 pandemic, employers were required to pay for and fit-test employee respirators, including N95 masks, when employees were exposed to hazardous airborne material. If an employee chooses to wear a non-required respirator to protect against COVID-19, the employer does not have to provide or fit-test it. If an employer determines that PPE is necessary due to the high risk of exposure to COVID-19, such as in a healthcare setting, the employer then must require, provide and fit-test the PPE. *Id.* at ¶ 4.

Also, employers may not discriminate or retaliate against an employee who reports a work-related illness. In addition to notifying workers of their rights to a safe and healthful work environment, employers must ensure that workers know whom to contact with questions or concerns about workplace safety and health, and that there are prohibitions against retaliation for raising workplace safety and health concerns or engaging in other protected occupational safety and health activities. *Id.* at ¶ 10.

Ultimately, employers not covered under the Healthcare ETS are not required to have written policies and procedures related to their COVID-19 pandemic responses; nevertheless, non-healthcare employers may still be asked to produce such documents in the midst of an OSHA investigation. Therefore, employers should take

time to compile any written policies and communications, and to memorialize any unwritten practices and communications related to the employer’s response to the pandemic. In addition, employers should be mindful of the OSHA-required COVID-19 PPE and reporting regulations. It is important employers are prepared to provide evidence of their COVID-19 pandemic response in the event of an OSHA investigation.

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employment context. Use of a forum selection clause cannot be “unreasonable or unjust” and should be presented with the employment offer. The forum selection language should also include the phrases “arise out of,” and be “in any way connected to” the employment relationship. Each phrase has a different meaning. The former is generally understood to invoke causal connection while the latter means simply “connected by reason of an established or discoverable connection.”

Like many employment matters, good planning will avoid headaches down the road. Defending an employment case can be challenging enough; defending it across the country is worse.

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