



PARK WATCH ™ LEGAL DEVELOPMENTS NEWSLETTER

DOWDALL LAW OFFICES, A.P.C., Attorneys at Law

SOUTHERN CALIFORNIA: 284 NORTH GLASSELL STREET, FIRST FLOOR, ORANGE 92866 PH. 714.532.2222, FAX 532.3238, 532.5381
 NORTHERN CALIFORNIA: 770 "L" STREET, SUITE 950, SACRAMENTO 95814 PH. 916.449.3959, FAX 449.3969

OVERTIME REGULATIONS: – OBAMA JOB-KILLER EFFECTIVE DEC. 1, 2016

By Terry R. Dowdall, Esq.

■ **Upshot** *Businesses must comply with the Fair Labor and Standards Act (FLSA) plus California law and local ordinances. New regulations more than double the minimum salary threshold needed to qualify for exemptions from minimum wage obligations for "exempt" employees.*

Effective December 1, 2016, new revisions to federal overtime regulations governing exemptions to the FLSA take effect. Most notably, the revisions more than double the minimum salary threshold needed to qualify for the minimum wage rate exemption. The revisions also (among other things) raise the amounts that must be paid, schedule automatic adjustments to the salary threshold every three years, and increase the annual salary threshold for the "highly compensated employee" exemption. There is no change to the "duties tests."

For once, federal requirements exceed current state law. The federal salary threshold necessary to qualify for exemption from the FLSA's overtime requirements will exceed the minimum required in California. Compliance is complicated by the repeated increases over the next several years for California's annual increases to minimum wage, which will reach \$15.00 per hour by 2022.

■ Key Points

There are *five things* to know about the new rule on overtime:

- The salary threshold for Exempt Employees is *increased* to \$913/week (\$47,476 per Year).
- The salary threshold for "Highly Compensated Employees" is *increased* to \$134,004 annually.
- There will be an automatic salary threshold increase every 3 years.
- The "Duties Test" to establish who is an Exempt Employee remains unchanged.
- For retailers, the new rule does not seem to impact the manufactured home retail sales exemption.

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In this Issue:

- 2016: New Employment Law Regulations 1

Coming Events:

- ★ **WMA Convention & Expo**
 Green Valley Ranch Resort & Spa
 in Henderson: Oct. 10-13, 2016

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■ For communities, the new rule also does not seem to impact credit toward employee wages for lodging (assuming employee signed the required written employment contract).

■ Drilling Down into the Details

Increase in the Salary Threshold. Effective December 1, 2016, the minimum salary at which a full-time salaried worker can be exempt from overtime rules increases from \$455 per week, or \$23,660 per year, to **\$913** per week, or **\$47,476** per year. This change means that if you have an employee currently exempt and paid at annual salary less than \$47,476, that employee is now eligible for overtime when working over 40 hours per week.

For example, if you have a property supervisor classified as exempt (not eligible for overtime) with an annual salary of \$30,000, on December 1, 2016, that employee will become eligible for overtime pay when working over 40 hours per week because that is less than \$47,476 per year.

Indexing Every Three Years. The minimum salary threshold for the white-collar exemptions will be indexed every three years, with the first change resulting from indexing to occur on January 1, 2020. The new salary threshold will be indexed to the 40th percentile of all full-time salaried workers in the lowest-wage Census Region. The DOL will post this figure and publish it in the Federal Register at least 150 days prior to the effective date of the new salary threshold, which means that employers will have approximately five months' notice of the new minimum salary threshold when it changes every third year.

Highly Compensated Employee Exemption Threshold. The FLSA provides for a highly compensated employee (HCE) exemption. Besides meeting a minimal duties test, an HCE's total annual compensation under the current (i.e., 2004) regulations must be at least \$100,000, of which at least \$455 per week must be in the form of a salary. Under the final regulations, the new minimum total compensation threshold will be increased to \$134,004, of which at least \$913 per week must be in the form of a salary. The DOL based the \$134,004 figure on the 90th percentile of all salaried employees nationally and did not make any distinctions based on Census Region. The final rule also indexes the total compensation and salary level requirements for the HCE exemption every three years, consistent with the timing of the indexing of the minimum salary level for the white-collar exemptions. The total compensation level will track the 90th percentile of all employees nationally, and the minimum salary level will be the same as for the other white-collar exemptions.

No Change to the Duties Test. The DOL did not make changes to the duties tests for any of the exemptions in the final regulations. In the proposed regulations, the DOL had solicited comments as to whether a "percent of time" test should have been added into the regulations similar to the 50 percent "primarily engaged in" exempt duties test that exists in California.

■ California Overtime Requirements

Under California law nonexempt employees (subject to an hourly wage and not able to be salaried, such as many resident managers) are entitled to daily overtime for all hours worked in excess of 8 hours per day as well as weekly overtime for hours worked in excess of 40 hours in a workweek.

To dodge minimum wage obligations, the employee must be "exempt." I suggest some basic tests to determine if employees are exempt. In many cases, the resident manager is not exempt, because the necessary duties for exempt employees have not been entrusted by the employer. In many cases, a property supervisor that the resident manager reports to is exempt. In any event, if the duties test is satisfied, the minimum salary threshold provides that the exempt employee be paid a salary that is at least twice the state minimum hourly wage rate based upon full-time employment. "Full-time employment" is defined as 40 hours of work per week. The current minimum salary required for an exempt employee under California law is \$41,600 annually, or \$800 weekly and \$3,466.67 monthly. For an employer that employs 26 or more employees, the annual minimum salary requirement for exempt employees will be:

Effective Date	Minimum Wage	Weekly Salary	Monthly Salary	Annual Salary
January 1, 2017	\$10.50	\$840	\$3,640	\$43,680
January 1, 2018	\$11.00	\$880	\$3,813.33	\$45,760
January 1, 2019	\$12.00	\$960	\$4,160	\$49,920
January 1, 2020	\$13.00	\$1,040	\$4,506.67	\$54,080
January 1, 2021	\$14.00	\$1,120	\$4,853.33	\$58,240
January 1, 2022	\$15.00	\$1,200	\$5,200	\$62,400

Twenty-Five or Fewer Employees. For an employer that employs 25 or fewer employees, the minimum wage increase progression is delayed by one year and starts on January 1, 2018. The minimum salary thresholds are the same but effective one year later and start on January 1, 2018.

Twenty-Six or More Employees. For Under these scheduled increases, California's minimum salary threshold for employees of employers with 26 or more employees will not meet or exceed the new federal minimum salary threshold of \$913 per week or \$47,476 per year until January of 2019. Employers with exempt employees who earn a sufficient salary to meet one, but not both, state and federal exemptions, will need to make a change.

■ Practical Considerations to Comply with the New Rules

Your probable options? (1) increase salary to meet both exemptions; (2) reclassify the exempt employee as a nonexempt employee; or (3) maintain exempt status under California law and apply nonexempt status under federal law.

1. Identify salaried employees (supervisory personnel mostly) who currently make less than \$47,476 per year (or \$913 weekly). Create a plan for these employees, noting outcomes may vary by employee. The rules require weekly compliance. Thus, an employer cannot average hours over a month. For non exempt employees, such as your community resident managers and personnel, California IWC Wage Order #5 probably applies and many labor counsel will advise against trying to assert exempt status. The penalties can be devastating if the employer gets it wrong.

2. Determine actual hours worked per week. This is critical to understanding the economic impact of the rules.

3. Based on actual hours worked, determine the appropriate hourly rate for affected employees.

4. Consider mobility and the unintended consequences of Obama's law on a disgruntled employee: good employees are hard to find in this business. A trusted and valuable exempt employee who gets reclassified to non-exempt may feel disrespected for having to track hours worked and overtime (which can be required to be requested before paid; might this engender resentment?)

5. The FLSA still allows credit toward employee wages for employer provided housing. This remains unchanged under the new overtime rule. However, like crediting bonuses, this is a bit tricky. For instance, the credit should be based upon "reasonable cost" which is "not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees." In other words, "reasonable cost" "does not include a profit to the employer."

■ Proper Classification, Penalties for Mis-classification

One area of law park owners continue to struggle with is the proper classification of employees as exempt versus nonexempt, or independent contractor versus employee. In California, the tests to determine whether an employee is exempt are different than the federal standards and *extremely subjective (read, employee slanted)* thereby leading to differing interpretations and expensive litigation.

Similarly, who qualifies as an independent contractor is overwhelming and confusing. Different state agencies utilize different factors to determine independent contractor status, thereby leaving an employer with little guidance or certainty on the issue. The consequences an employer faces for misclassifying an employee as exempt or as an independent contractor are harsh and moreover *ignore* good faith to make proper classifications.

Exempt or Non-Exempt?

An employee who is properly classified as exempt under one of California's six main exemptions generally is excluded from the wage-and-hour requirements in California, such as minimum wage, overtime pay, and meal and rest periods, as well as record-keeping requirements. The problem for many employers is that aside from the salary basis requirement in each exemption, the criteria utilized to decipher between an exempt employee versus a nonexempt employee is ambiguous, thereby creating a significant risk for employers. Before deciding to classify your resident manager as an exempt employee, consider whether he, she or they meet the exemption tests.

Executive Exemption

Assuming that the employee earns at least the minimum requirement, the employer must then evaluate whether the employee spends more than 50% of time customarily and regularly exercising his or her independent judgment and discretion in these duties:

- Responsibilities involving the management of the business and/or an established department within the business;
- Directing the work of two or more employees; and
- The authority to hire or fire other employees, or has ability to make recommendations regarding the hiring, firing or promotion of other individuals.

The challenge for a lot of employers under this exemption is what activities qualify as use of independent discretion and judgment as opposed to routine duties. The Division of Labor Standards Enforcement has defined this term to mean "the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance."

The admonition to remember is that "An employee who merely applies his or her memory in following prescribed procedures or determining which required procedure out of the company manual to follow, is not exercising discretion and independent judgment."

Administrative Exemption

The employee also must receive a minimum monthly salary of two times the minimum wage and spend 50%+ of time customarily and regularly exercising independent judgment and discretion in performance of the following duties:

- Responsibilities involving office or non-manual work that is directly related to the business's management policies or general business operations;
- Regularly and directly assisting a proprietor or an employee employed in a bona fide executive or administrative capacity; or
- Performing specialized or technical work that requires special training, experience or knowledge with limited supervision.

What duties qualify as office or non-manual work? One case says it depends on whether the activities fulfill the *administration* of the business versus simply the *ultimate end product* of the business—widely referred to as the "administrative/production dichotomy"¹ (insurance company employees not exempt because "claims adjusting" was the end product, rather than administrative work). Generally, the experts say, the functions are "end product."

Consequences for Mis-Classification as Exempt v. Non-Exempt

Allegation of unpaid overtime. The financial consequences for misclassifying an employee are hellish. Since exempt employees do not keep time cards, park owners would not have time records of time worked. The evidence record is lop-sided in employee's favor. Unpaid wage claims are often filed concurrently with an Unfair Business Practice

¹ *Bell v. Farmers Insurance Exchange*, 97 Cal.App.4th 805 (2001).

claim, extending the “look back” statute of limitations to four years.²

Miscellaneous Claims.

Companion claims often advanced include inaccurate itemized wage statement for not listing the hours worked and hourly rate on the wage statement, missed meal and break periods, and statutory penalties. When the misclassification affects a category of employees as opposed to just one employee, the litigation is usually filed as a class action, thereby imposing the dreaded multiplier for all affected employees based on the proof of just the representative. Short trial, big damages. Of course, attorney’s fees: recovery of one dollar in unpaid wages or penalties opens the door to attorney’s fees.

Many park owners are subject to IWC Wage Order #5. It states:

(P) Public Housekeeping Industry" means any industry, business, or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the Commission, and includes, but is not limited to the following:

(1) Restaurants, night clubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs, and all similar establishments where food in either sold or liquid form is prepared and served to be consumed on the premises;

(2) Catering, banquet, box lunch service, and similar establishments which prepare food for consumption on or off the premises;

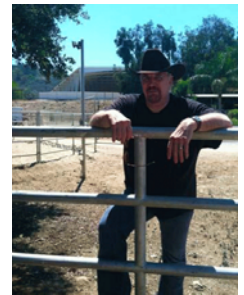
(3) Hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings, and similar establishments offering rental of living, business, or commercial quarters;

Credit for Lodging.

Wages for non-exempt employees can be offset with the value of lodging; however, this only applies if there is a written employment contract signed by the employee. Else the lodging is free. Some owners prefer not to have any written contracts with the managers. Whatever the perceived benefits, lodging is free in such cases.

- Single Employee: 2/3 of the ordinary rental value, and in no event more than \$381.20 per month.
- Couples employed, 2/3 of the ordinary rental value, and in no event more than \$563.90 per month

Any questions? Call us at 714.532.2222 or 916.444.3959. Thanks!



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² Cortez v. Purlator Air Filtration Products Co., 23 Cal.4th 163, 178-179 (2000).