

# MINIMUM SALARY TEST AND OVERTIME PAY

CHANGES ARE COMING

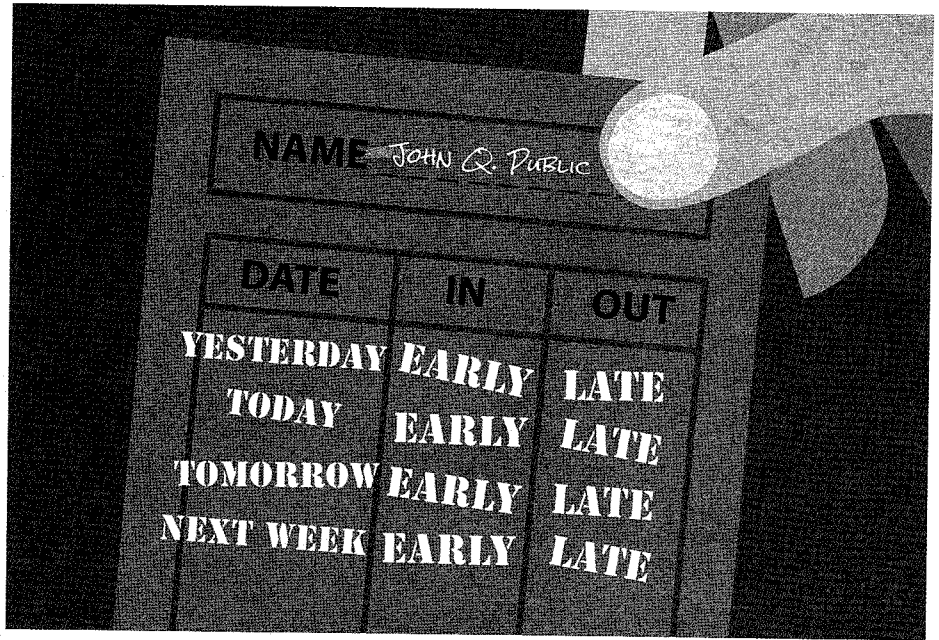
by Michael B. Berger, Esq.



**T**he issue of whether an employee is "exempt" from receiving overtime pay is governed by the federal Fair Labor Standards Act and related regulations (FLSA). Unless an employee is exempt under FLSA, the employee must be paid overtime compensation for all hours worked beyond 40 hours during a work week (at the rate of one and one-half times the employee's regular rate of pay).

Many employers are under the misconception that if an employee is paid a weekly salary (rather than on an hourly basis), that the employee is not entitled to overtime compensation, regardless of the number of hours that the employee may work. It is imperative that employers correctly classify employees as exempt or non-exempt to avoid potentially dire legal and financial consequences.

In this article, I will first present a broad overview of FLSA and the



overtime exemption requirements. I will then focus on the "salary basis" test and also discuss a recent proposal by President Obama to dramatically increase the minimum salary that must be paid for an employee to be exempt.

### EXEMPT CATEGORIES OF EMPLOYMENT

In order for an employee to be exempt from overtime compensation, there are two conditions that must generally be met. First, the employee

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must fit into one of the exempt job categories based on the worker's duties and responsibilities. The three primary exempt job categories are: administrative, executive, and professional.

A detailed analysis of what makes an employee fit into one of these categories (or any of the other less known exempt categories), is beyond the scope of this article. However, I have included a quick summary of the

criteria for each category taken directly from the *Department of Labor's Field Operations Handbook* (the DOL Handbook).

1) Administrative: "The employee's primary duty must be 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 the employee's primary duty includes the exercise of independent judgment with respect to matters of significance." A

traditional example of an exempt administrative employee would be a company's controller.

2) Executive: "The employee's primary duty must be management of the enterprise in which employed (or a customarily recognized department or subdivision thereof), the employee must customarily and regularly direct the work of two or more other employees, and the employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight." A typical example of an exempt executive employee would be a company's general manager.

3) Professional: "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, the advanced knowledge must be in a field of science or learning, and the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction." A typical example of an exempt, professional employee would be a firm's in-house attorney.

To make things more complicated, the professional exemption has three separate sub-categories (learned, creative, and teaching) each with its own separate set of criteria. The criteria quoted above for the professional exemption is for the "learned" sub-category.

The second condition that must generally (there are always exceptions under FLSA) be met for an employee to be exempt is the "salary basis" test discussed in the following section.

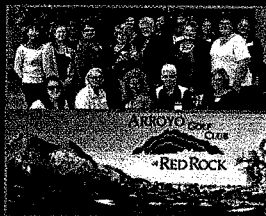
## THE SALARY BASIS TEST

Once you determine (with the help of professional guidance to be safe) that an employee fits within one of the exempt categories discussed above, in order to be exempt from overtime, the



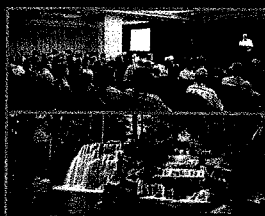
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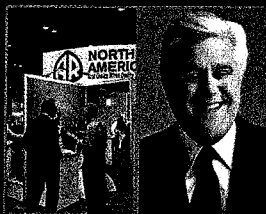
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employee must be paid on a "salary basis" at the rate of at least \$455 per week (\$23,660 on an annualized basis).

What does it mean to be paid on a "salary basis"? For a definitive answer, let's again refer to the *DOL Handbook*, which states:

Being paid "on a salary basis" means that the employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis and the predetermined amount cannot be subject to reduction because of variations in either the quality or the quantity of work performed by the employee. Except for seven exceptions specifically cited in the regulations (29 CFR § 541.602(b)(1) through (7)), an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. If the employer makes deductions from the employee's predetermined salary because of the operating requirements of the business or absences caused by the employer, the employee is not paid "on a salary basis." If an exempt employee is ready, willing and able to work, deductions may not be made for time available. However, exempt employees need not be paid for any workweek in which they perform no work.

To summarize, an exempt employee must be paid a predetermined amount (currently at least \$455 per week) and must receive the full amount each week, with limited exceptions, regardless of the number of hours or days the employee actually works.

Speaking of exceptions, the salary basis test does not apply to outside sales personnel, teachers, doctors, or lawyers. Therefore, as an example, a lawyer may be employed at a rate of \$30 per hour and be paid at that same rate, even if the lawyer works 80 hours during a work week.

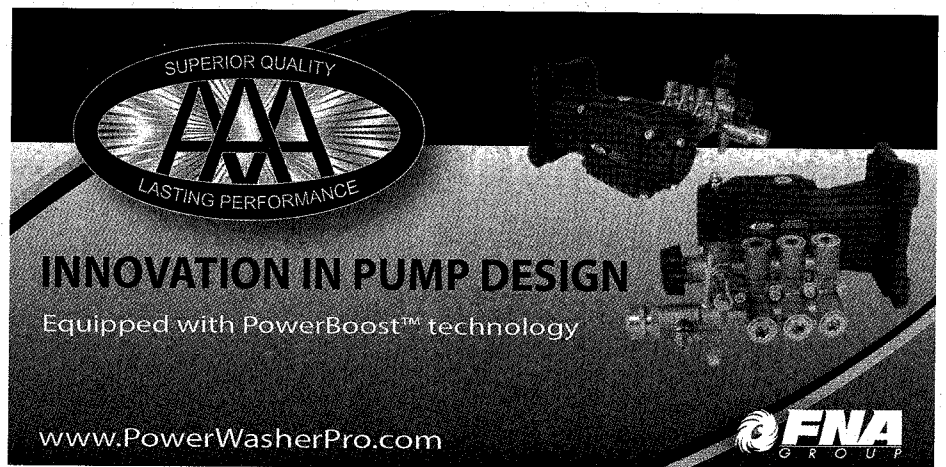
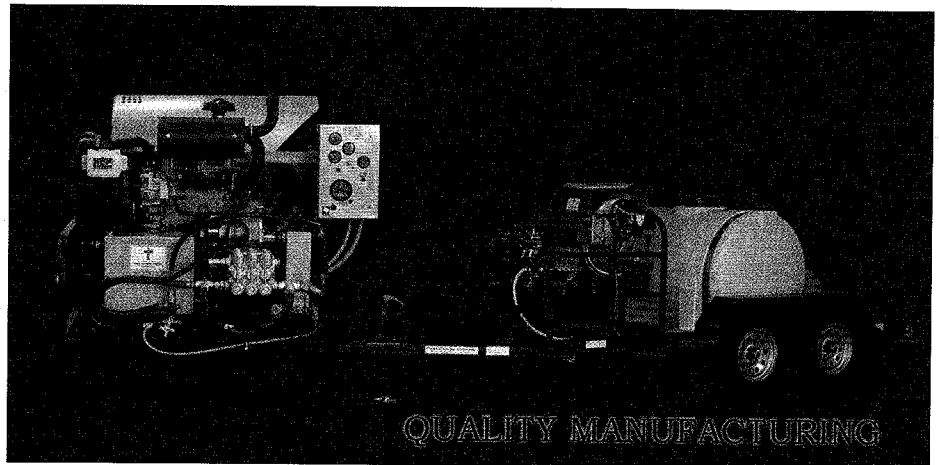
### CHANGES COMING TO THE MINIMUM SALARY?

The current \$455 minimum salary requirement is not indexed

for inflation and has been in effect since 1975. President Obama has recently proposed amending the federal regulations under FLSA that would more than double the minimum salary requirement starting in 2016. If President Obama's changes are implemented (Congressional approval is not required), then the minimum

salary threshold would increase next year to \$970 per week (\$50,440 on an annualized basis).

The proposed changes have been published for public comment and the response has been vociferous on both sides. Naturally, unions and other pro-labor groups have come out in strong support of the proposed



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changes. On the other, business groups, particularly groups representing the hospitality and retail industry have denounced the proposals as being "too much too soon."

In my opinion, requiring a store or restaurant manager to work 60 hours per week for a \$455 salary (about \$7.50 per hour) is completely unacceptable. However, the increase proposed by President Obama is too severe and could actually cost people

their jobs or a loss of benefits. Some retailers have stated that they may have to hire two part-time hourly "managers" (who would/may not be eligible to receive benefits) to replace one full-time salaried manager receiving a salary and full benefits. A happy medium would be to increase the \$455 minimum salary requirement (it has been 40 years after all) to around \$700 and then update the amount each year

to keep up with inflation (like social security benefits).


## RECOMMENDATIONS AND CONCLUSION

Determining whether an employee is exempt from overtime can be extremely difficult (the *DOL Handbook* mentioned above is 96 pages long). If you are at all unsure whether you are properly treating your employees as exempt or not, please consult with your attorney or a professional human resources person. The consequences for miscategorizing an employee as exempt can be severe and costly. Please bear in mind that FLSA is meant to protect employees and that if an employer's classification of an employee as exempt is challenged, the employer will bear the burden of proof. If an employee prevails in a lawsuit seeking unpaid overtime, the employer will owe "time and half" on all claimed overtime worked by the employee, interest, court costs, and attorney's fees. If the miscategorization is broad based, an employer could end up facing a class action lawsuit with potentially devastating financial consequences.

Please consult with your legal counsel or a professional human resources expert. As in many situations, an ounce of prevention is worth a pound of cure.

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