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Recent
Developments

GOVERNOR SIGNS BILL THAT CHANGES CALIFORNIA'S OVERTIME LAWS (September 27, 2000)

Summary:

Last week, Governor Davis signed [SB 88](#) (discussed in our [September 13th E-Update](#)), which instantly changed California wage and hour law. This legislation creates a new exemption for employers who work in the computer field, and also modifies certain amendments to the state's Wage Orders.

The most publicized part of the new law is the enactment of a special exemption for computer software professionals who: (1) are *primarily* engaged in work that is intellectual or creative, and (2) are paid at the equivalent of an hourly rate of \$41.00 per hour (\$85,280 per year).

The new law also imposes a new hurdle for the traditional exemption tests: Now, a person employed in either an administrative, executive or professional capacity must *customarily and regularly exercise discretion and independent judgment*. This follows AB 60's amendment that exempt employees must "primarily" (i.e., more than 50% of the time) be engaged in exempt duties.

What are the Effects of SB 88?

1. SB 88 creates a computer software professional exemption if the employee:

- Is *primarily* engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment; and
- Is *primarily* engaged in duties that consist of application of systems analysis techniques and procedures; the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, or documentation, testing, creation or modification of computer programs related to the design of software or hardware for computer operating systems; and
- Is highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming and software engineering; **and**
- Receives the equivalent of on hourly rate of \$41.00 per hour (\$85,280 per year).

The exemption does not apply if:

- The employee is entry level or a trainee;
- The employee does not work without close supervision;
- The employee is engaged in the operation of computers or in the manufacture, repair or

maintenance of computer hardware and related equipment;

- The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and the computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation;
- The employee is a technical writer; **or**
- The employee is creating imagery effects for motion pictures or television.

2. SB 88 creates a new exemption for certain nurses:

In addition to the new exemption for computer software professionals, certain specified registered nurses (including certified nurse midwives, certified nurse anesthetists, and certified nurse practitioners) that were arguably not exempt under the "professional" exemption may now be exempt. These specified nurses now qualify as exempt professionals if they are primarily engaged in performing duties for which their respective certification is required.

3. SB 88 adds a new test for currently exempt employees:

Under the new law, employees will only be exempt if – in addition to the other aspects of their respective tests – they also "customarily and regularly exercise discretion and independent judgment," and are "primarily" (more than 50% of the time) engaged in exempt duties. Although subtle, this is a profound change. It means those employees who were formerly exempt – either because of their "professional" status or because they supervised others – are now exempt *only* if they also customarily and regularly exercise discretion and independent judgment and primarily engage in exempt duties.

Because this new law was passed as "urgency" legislation, these new rules took effect **immediately** upon the Governor's signature.

WHAT THIS MEANS:

Because SB 88 takes immediate effect, every employer should thoughtfully evaluate the duties of its exempt employees. If the employee does not *customarily and regularly* exercise discretionary powers and *primarily* (more than 50% of the time) engage in exempt work, the employer should carefully re-examine the propriety of the employee's exempt status.

Additionally, every employer who employs computer software professionals should evaluate whether any of these employees – who are currently treated as non-exempt – satisfy the duties and remuneration requirements that would allow them to be reclassified as exempt under SB 88.

If you have any questions about this or any other topic, please contact Leonid M. Zilberman (lzilberman@paulplevin.com) or at (619) 744-3648 at Paul Plevin & Sullivan.

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Send comments to info@paulplevin.com. Last modified 09/27/00