



California Sales Professional Exemptions

PART 4 OF 5: OVERVIEW OF CALIFORNIA EXEMPTION

Welcome

Free Webinar Series

Part 4 of our 5 Part Series

Part 5 December 16 @ 10AM

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Agenda

Inside Sales Exemption

Outside Sales Exemption

FLSA Inside Commissioned Sales

Not subject to overtime if:

...the employee's regular rate of pay **exceeds one and one-half times the applicable minimum wage for every hour** worked in a **workweek** in which overtime hours are worked; and

...**more than half the employee's total earnings** in a representative period must consist of commissions.

To satisfy the first of these tests, "[t]he employee's '**regular rate**' of pay must be computed ... on the basis of his hours of work in that particular workweek and the employee's compensation attributable to such hours."

CA Inside Commissioned Sales

The CA Wage Orders generally provide that commissioned employees need not be paid overtime if:

...their earnings exceed **one and one-half times the minimum wage** and

...**more than half** of that employee's compensation **represents commissions**

Only applies to Wage Orders 4 and 7.

Commissioned Inside Salesperson

Wage Order 4

Professional, Technical, Clerical, Mechanical, and Similar Occupations

Professional, semi-professional, managerial, supervisory, lab, research, clerical, office work, mechanical operations.

Wage Order 7

Mercantile Industry

Any industry, business or establishment for purpose of purchasing, selling or distributing goods or commodities at wholesale or retail; or for the purpose of renting goods or commodities.

The Numbers

1.5 X the Minimum Wage

For 2016, this is \$15 per hour

Minimum weekly pay (40 hours) = \$600

More than Half From Commissions

Half of \$600 = \$300

To satisfy, commissions need to be in excess of \$300

Peabody v. Time Warner Cable (2014)

Only applies to inside commissioned sales employees.

An employee could be **exempt** under the "commissioned employee" **exemption in one pay period** and **non-exempt in the next pay period**.

Employers **may not attribute** commission wages **paid in one pay period to other pay periods** to meet minimum wage requirements.

For **pay periods that employees are not exempt**, the employees **must be paid overtime** in accordance with California law.

Employers required to maintain time records on commissioned employees as those employees are exempt only from overtime requirements and not from meal/rest period or other requirements for non-exempt employees.

Implications of Peabody

Employers can define commissions as being earned monthly, quarterly or less frequent basis and there is no obligation to pay unearned commission wages in any pay period.

The minimum earnings requirement depends on the amount of wages actually paid in a pay period.

Thus, employers can't attribute wages paid in one pay period (e.g., when commissions are paid) to a prior pay period.

Considerations

Employers should consider **whether commissioned employees qualify** for exemption under federal and state law.

Employees whose commission earnings **fluctuate** could be exempt in one pay period and not exempt in the next.

Since commissioned employees might be non-exempt in many pay periods, employers must keep **time records** for these individuals as if they were non-exempt employees.

Employees must be paid **at least 2 times per calendar month**.

Possible Solutions

Increase hourly rates to ensure that the employee is paid at least 1.5 times the state minimum wage (in 2016 at least \$15 per hour) for all hours worked in a workweek, exclusive of commission.

Revise the commission plan so that commissions are earned and paid each pay period, while ensuring that the employee's total earnings each workweek exceed 1.5 times the minimum wage; or

If commissions cannot be calculated each pay period, advance a portion of the commissions to meet the minimum earnings requirement.

Remember...employees must continue to be paid at least twice a month, and more than half of the their compensation must represent commissions.

Federal Outside Salesperson

Employees whose **“primary duty”** is **making sales** and who **regularly work away from the employer’s place of business** may be exempt from minimum wage and overtime pay requirements.

Focus is more on **“primary duty”**.

For example:

Ability to enter contracts

Attending sales conferences (if designed to impact the employee’s sales efforts)

California Outside Salesperson

Per the California DIR...

...Any person, **18 years of age or older** who customarily and regularly works **more than half the working time away from the employer's place of business selling** tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities.

Focus is primarily qualitative.

California Outside Salesperson

It can be difficult to determine whether a particular activity qualifies as “sales activity” for purposes of determining whether a position falls under the outside sales exemption.

The California Supreme Court has held that time spent “directly involved in selling items” or “obtaining orders or contracts” counts toward the outside sales exemption, but **time spent on tasks that are merely “incidental to sales” does not.**

California Complications

Employees required to work away from the **office more than 50% of the time.**

The DLSE found that a salesperson who works out of a temporary trailer or model home selling homes in a new development **is working at the “employer’s place of business,”** even though the salesperson is not working at the builder’s headquarters office.

Office is not limited to company facilities or offices...**working from a home office is considered working from the office.**

Misclassification discovery to review phone, computer and email records and other evidence of work performed.

California Complications

Tenured outside sales professional achieve their results by forging bonds with customers over the years.

This can lead to reduced need for customer face time and increased role as trusted advisor.

Thus, the sales effort being reduced to emails, phone calls, and infrequent customer visits.

The issue...the employee's selling "out of the office" falls below 50%.

Common Misclassified Roles

Commonly misclassified workers under the outside sales exemption include:

- Pharmaceutical sales representatives
- Insurance salespersons
- Commissioned delivery drivers
- Manufacturer's representatives that do marketing and merchandising at retail stores

Keep in mind...

Employers need to regularly evaluate their job descriptions, tasks being performed by their outside sales professionals, and commissioned inside sales professionals wages.

The CA minimum wage is set to jump to \$10 January 1, 2016.

A union-backed proposal to increase CA's minimum wage to \$15 per hour has been cleared to being collecting signatures for a ballot initiative in 2016. This would involve a \$1/hour increase annually.

There is already an increase in misclassification litigation due to the pending FLSA legislation. This is likely to grow in CA due to a history of misclassification litigation explosions and other laws that many employers have failed to implement or follow.



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