

# ANDREW T. MIRSKY

---

TEL: (202) 339-0303 • FAX: (202) 339-0302  
EMAIL: AMIRSKY@ANDREWMIRSKY.COM

## LABOR DEPARTMENT REVISED OVERTIME RULES, PARTICULAR IMPACT ON PUBLISHERS

New U.S. Department of Labor overtime rules impact editorial and other publishing companies under the Department's "Creative Professionals" exemption category. The Department's revised rules still generally classify employees in terms of salary levels. However, the impact of the revised rules is most noticeable in terms of job duties. Prior rule distinctions of job categories by title or administrative group are today nearly irrelevant. This article was published on November 30, 2004.

### Regulatory Framework

#### A. Salary Levels

The Department's new rules raise the income ceiling under which employees are automatically entitled to overtime pay for hours worked past 40 hours in a week. Previously, that salary level was \$8,060, or \$155 a week; it is now \$23,660, or \$455 a week. In other words:

1. Salaries Below \$23,660. Employees earning salaries **below \$23,660** are automatically entitled to overtime pay (1.5 times hourly rate) for hours worked past 40 hours in a week. It does not matter what their job duties or titles are.
2. Salaries of \$100,000 or More. Employees earning salaries of **\$100,000 or more** will generally not be entitled to overtime pay. This reflects a practical change in the law, because new rules now exempt employees making \$100,000 or more if they also have limited executive, administrative or professional employee duties – and these categories are defined broadly enough to practically affect most employees. Specifically, employees making \$100,000 or more are exempt if they have almost any sort of managerial responsibility (e.g. supervisory responsibility of even just 1 person), or duties related to the management or general business operations of the company.
3. Salaries Between \$23,660 and \$100,000. For employees earning salaries **between \$23,660 and \$100,000**, exemption from overtime pay eligibility depends on job duties. The crux here is that, for employees in this salary range, there are a number of broad categories of job duties exempting employees from overtime eligibility. These exemption categories are defined broadly to exempt many individuals not previously exempt. The *Wall Street Journal* correctly pointed out that “many white-collar workers could find themselves defined as executives, administrative workers or ‘learned professionals’” – and thus exempt from overtime pay. The exemptions:

*Executive Exemption* – Employees with duties of managing the business or a department; directing the work of at least two full-time employees, having hiring and firing authority or influence over same.

*Administrative Exemption* – Employees with duties of performing work directly related to the management or general business operations of the company.

*Computer Employee Exemption* – Defined to include computer systems analyst, programmer, software engineer or similar, with certain prescribed technical duties under the rules. Can

still be exempt if compensated hourly rather than on salary, so long as hourly wage is still at least \$27.63 per hour.

*Learned Professional Exemption* – Includes employees who perform work requiring “advanced knowledge”, defined by the law as work “which is primarily intellectual in character and which includes work requiring the consistent exercise of discretion and judgment.” Commentary has cited jobs such as chefs, athletic trainers and funeral directors and embalmers, for example, as learned professionals, demonstrating the practical breadth of this exemption category.

*Creative Professional Exemption* – Employees whose work is primarily intellectual in character or requires invention, imagination or creativity in artistic or creative fields. For journalists and others employed in editorial or other creative jobs at publishing companies, the applicable exemption is this Creative Professional Exemption.

The Department’s application of the revised rule seems almost a default assumption of exemption. For example, “Creative Professionals”, including specifically writers and editors at publishing companies, are not exempt from overtime eligibility if, as described by the Department of Labor, “they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.”

Larger publishers that are party to collective bargaining and guild agreements are affected primarily in future negotiations of their contracts, since overtime policy is typically governed contractually. Past legal guidance has been confusing, at best. *Editor & Publisher* cites disparate cases from the early 1990s involving the *Concord* (N.H.) *Monitor* and the *Washington Post*. *Monitor* reporters and photographers were deemed not professionals (and therefore entitled to back pay for overtime), while another court ruled a *Post* reporter was an artistic professional and therefore exempt. Many publishers simply opted for a conservative approach rather than test the rules.

The revised rules may be of more practical significance to smaller publishers not subject to newsroom collective bargaining agreements, particularly those that historically have taken a more aggressive posture against overtime. The Department of Labor offers two illustrations of the non-exempt reporter situation:

- a. Reporters who re-write press releases or who write standard recounts of public information by gathering facts on routine community events. These reporters are not exempt from overtime eligibility.
- b. Reporters whose work products are subject to substantial control by their employer. These reporters are not exempt from overtime eligibility. This latter group does not mean that, simply because a writer’s work is subject to editor review, he or she is non-exempt. This is not believed to be the intended meaning of “substantial control” by an employer. Rather, again, the determining factors for the journalist exemption are the amount of creativity and originality involved, and the amount of employer control exercised.

This will be a case-specific and company-specific policy determination based on circumstances and similar treatment within a company. The inexactness of the guidelines remains, despite changes to the law. The practical effect, though, is a general broadening of the catch-all definition of “artistic” or “creative” professional, and the consequent reduction of the ranks of those writers and editors with a strong argument for overtime. Management determination of company policy to best meet business productivity and staffing needs

remains largely unaffected by the new rules, since extensive use of comp time and other work incentives in lieu of overtime will almost certainly continue. And again, these distinctions still apply only to employees earning salaries between \$23,660 and \$100,000.

4. Outside Sales Employees. The new rules relax the definition of “outside salesperson”, allowing employers to more easily classify outside salespeople as exempt. Outside Salespersons need not meet the above salary minimums, and (a) their primary duties are making sales and (b) they are customarily and regularly engaged away from the employer’s place of business. As such, outside sales employees are generally exempt from overtime pay eligibility.

## **B. Practical Matters**

1. Regarding “Salaries”. As referenced in the new overtime rules, “salary” must be a predetermined and fixed salary – that is, contingent bonuses, commissions and similar compensation arrangements do not apply toward measuring an employee’s salary to determine overtime eligibility. In addition, with several exceptions described below, hourly wages do not count as “salary” and employees paid by the hour always are entitled to overtime.

2. Regarding Hourly Employees. As with all categories of employee (except for Computer Employees and Outside Sales Employees), journalists and reporters paid by the hour will not be exempt from overtime pay eligibility. Likewise, employees earning salaries of \$23,660 or less will always be eligible for overtime pay, and those earning \$100,000 or more will generally be exempt.

3. Regarding State Laws and Applicability to Small Businesses. State laws, including particularly those of Connecticut, Maryland, New Jersey and Pennsylvania, may supersede federal laws and require overtime pay in circumstances not required by the federal rules and unique to a company’s circumstances. The federal rules do not apply to businesses generating less than \$500,000 a year in revenue and that do not participate in interstate commerce. If your business may be subject to these circumstances, please contact me or your state’s labor office for more information.

4. Regarding Company Policies. The overtime rules can be difficult to navigate, while violations can risk fines and employee lawsuits. Consistency in application is as important as a written company policy to establish company policy (obviously) and provide some shield from liability, as well as provide a mechanism for employee complaints. The policy may be stand-alone or may be incorporated in the company’s personnel or other policies. The U.S. Department of Labor offers a sample policy statement, which is attached to this article. The sample policy can also be accessed on the Department’s website at:

[http://www.dol.gov/esa/regs/compliance/whd/fairpay/modelPolicy\\_PF.htm](http://www.dol.gov/esa/regs/compliance/whd/fairpay/modelPolicy_PF.htm).

\* \* \*

### **\*ATTACHMENT – U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Model Salary Basis Policy, Overtime Security for the 21<sup>st</sup> Century Workforce\***

For more information about these new rules and how they may impact your business, please contact me by email ([amirsky@andrewmirsky.com](mailto:amirsky@andrewmirsky.com)) or by telephone ((202) 339-0303). Thank you.

ANDREW T. MIRSKY

2924 M STREET, NW (2ND FLOOR)  
WASHINGTON, DC 20007

148 W. 23<sup>RD</sup> STREET (SUITE 3E)  
NEW YORK, NY 10011

**U.S. Department of Labor**  
**Employment Standards Administration Wage and Hour Division**

MODEL SALARY BASIS POLICY  
Overtime Security for the 21st Century Workforce

*The information below is designed to provide an example of what constitutes compliance for purposes of §541.603(d) (addressing "Effect of improper deductions from salary") and is for illustrative purposes only. Other policies may comply with §541.603(d) which contain more or less information.*

**SAMPLE SALARY BASIS POLICY**

The Fair Labor Standards Act (FLSA) is a federal law which requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

**Salary Basis Requirement**

To qualify for exemption, employees generally must be paid at not less than \$455 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least \$455 on a salary basis or on an hourly basis at a rate not less than \$27.63 an hour.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any workweek in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

**Circumstances in Which the Employer May Make Deductions from Pay**

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions (see Company Policy on penalties for workplace conduct rule infractions). Also, an employer is not required to pay the full salary in the initial or terminal week of employment; for penalties imposed in good faith for infractions of safety rules of major significance, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. In these circumstances, either partial day or full day deductions may be made.

### **Company Policy**

It is our policy to comply with the salary basis requirements of the FLSA. Therefore, we prohibit all company managers from making any improper deductions from the salaries of exempt employees. We want employees to be aware of this policy and that the company does not allow deductions that violate the FLSA.

### **What To Do If An Improper Deduction Occurs**

If you believe that an improper deduction has been made to your salary, you should immediately report this information to your direct supervisor, or to [insert alternative complaint mechanism(s)].

Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, you will be promptly reimbursed for any improper deduction made.