PROSKAUER ROSE LLP®

Client Alert

Law & the Workplace℠

A report for clients and friends of the Firm

October 2008

New Amendment Clarifies the Computer Professional Exemption under California Law

Gov. Arnold Schwarzenegger recently signed Assembly Bill 10 ("AB 10"), amending California Labor Code § 515.5, and extending its reach to a larger pool of employees who may satisfy the Computer Professional exemption under California law. Coined as "urgency" legislation, AB 10 became effective immediately upon Gov. Schwarzenegger's signed endorsement. AB 10 contains two changes or "clarifications" to § 515.5, the statutory provision establishing standards for the overtime exemption for computer employees: one, amending the duties or "proficiencies" component, and the other providing clarification to the compensation component, such that full-time computer professionals who meet the new minimum annual salary threshold of $75,000 (or $6,250 per month) and who satisfy the duties test are exempt from overtime under California state law. Notably, computer employees who satisfy the California standard are, in most cases, likely to be exempt under the federal Fair Labor Standards Act ("FLSA") as well. However, since the California standard for the Computer Professional exemption is more rigorous than that under the FLSA, computer employees who satisfy the federal standard do not always satisfy the California standard, resulting in much more class action litigation under the state law.

AB 10 Expands the Duties Component.

Prior to AB 10, in order to qualify for exempt status under California law, employees had to meet three duties requirements. The employee had to be:

(1) Primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment; and

(2) Primarily engaged in duties that consist of one or more of the following:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or systems functional specifications; or
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
- The documentation, testing, creation or modification of computer programs related to the design of software or hardware for computer operating systems.

and

(3) Highly skilled and proficient in the theoretical and practical application of highly specialized information to (i) computer systems analysis, (ii) programming, *and* (iii) software engineering. One's job title is not determinative of whether the exemption applies. See Cal. Labor Code § 515.5(a)(1)-(3) (emphasis added).

While this language remains largely the same under AB 10, one subtle change clarifies and expands the third criterion – the "duties proficiency" component under subsection (3). Specifically, rather than using the conjunctive "and," AB 10 amends § 515.5(a)(3) to include the disjunctive "or," making it clear that an employee is not required to be "highly skilled" in computer systems analysis, programming *and* software engineering, but only needs to have one of these skills to satisfy the "duties proficiency" component, the last of the three criteria under California law, each of which must be satisfied to classify the employee as an exempt computer professional under the state law.

AB 10 Provides an Annual Minimum Salary Threshold for Exempt Computer Professionals.

Prior to AB 10, the compensation component required that the "employee's hourly rate of pay is not less than thirty-six dollars ($36.00), or the annualized full-time salary equivalent of that rate, provided that all other requirements of this section are met and that in each workweek the employee receives not less than thirty-six dollars ($36.00) per hour worked." See Labor Code § 515.5(a)(4). The statute, however, did not state whether the "annualized full-time salary equivalent" should be calculated based on a 40-hour workweek or whether it must be calculated based on actual hours worked. AB 10 eliminates that ambiguity, providing that the computer exemption applies to full-time computer professionals who meet the minimum annual salary threshold of $75,000 (or $6,250 per month).

Prior to AB 10, California employers faced potential liability from computer professionals who argued that, based on the wording of § 515.5(a)(4), the annualized full-time salary equivalent increased whenever an employee worked more than 40 hours in any given workweek. For example, if a computer professional received an annual salary of $75,000 but worked 50 hours per week on average (or in any workweek throughout the year), the employee could argue that his or her annualized full-time equivalent should not be less than $93,600 ($36.00 per hour multiplied by 50 hours per week multiplied by 52 weeks per year).

As the number of hours worked by many computer professionals fluctuates greatly from week-to-week, such an interpretation made it impossible for employers to fix an annual salary for its employees without subjecting itself to potential liability. In addition, because employers bear the burden of establishing that the exemption exists, compliance required employers to maintain detailed records of the hours worked by its otherwise exempt computer employees. Prior to AB 10, California did not have a fixed minimum annualized salary threshold. Thus, California employers were subject to a much higher risk of having to defend against class-action misclassification claims and individual overtime lawsuits than employers in other states.

In response to the increasing number of unpaid wage and misclassification claims brought by computer employees, California employers in the high-tech industry lobbied to amend § 515.5 to include a minimum annual salary threshold requirement. While AB 10 fixes the current minimum salary threshold at $75,000 for full-time computer employees (thereby eliminating the need for employers to maintain records of hours worked for its full-time computer professionals), California employers must continue to maintain records of hours worked, and to compensate their part-time computer employees at the current minimum hourly rate.

California Employers Remain at a Competitive Disadvantage.

Even though AB 10 provides some relief to California employers, §515.5 still imposes a more stringent standard on California employers vis-à-vis the classification status of computer professionals than the standard imposed under the FLSA. For example, as stated above, the duties proficiency component under §515.5 requires that the employee be "highly skilled" *and* "proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming or software engineering." See Labor Code § 515.5(a)(3).

The FLSA, in contrast, does *not* require the employee to be "highly skilled and proficient," and, as such, has a broader, less rigorous standard to qualify for exemption as a computer professional. Nor does the federal law provide that the computer professional be engaged in work that is "intellectual or creative" *and* that "requires the exercise of discretion and independent judgment," as does the California law. Rather, under the FLSA, 29 U.S.C. § 213(a)(17), the Computer Professional exemption applies, generally, to employees whose primary duty is computer systems analysis, programming, or related work in software functions, whose hourly rate of pay exceeds $27.63, and who satisfy enumerated skill-set requirements broadly set forth in the statute.

Computer employees also may be exempt under 29 U.S.C. § 213(a)(1) of the federal law provided they are paid on a salary or fee basis at a rate of not less than $455 per week *and* satisfy regulatory requirements. As the U.S. Department of Labor's ("DOL") computer regulations and Letter Opinions reflect, exempt computer employee job titles *may* include systems analysts, applications analysts, computer programmers, software engineers and systems engineers; however, job titles alone are *not* determinative and an individualized assessment of duties actually performed is warranted in each instance. 29 C.F.R. § 541.400(a)-(b). In addition, *primary duties* must consist of the application of systems analysis techniques, or the design, documentation, testing, creation, or modification of computer systems, programs, or with respect to machine operating systems. A combination of the aforesaid duties also suffices.

Similarly, while § 515.5 requires an employee to be "primarily engaged" in work that requires the exercise of discretion and independent judgment, the FLSA focuses on the employee's "primary duty." When determining whether the primary duty test has been met, the FLSA makes a qualitative assessment of the duties performed. California, however, "adopts the requirement that the employee must be 'engaged . . . primarily' in exempt work; the term 'primarily' is defined as 'more than one-half the employee's work time.'" *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 787, 798 fn. 4 (1999) (internal citations omitted). Thus, a California employer who classifies any computer professional as exempt must be certain that the

employee spends more than 50% of his/her time each workweek performing exempt work. No similar 50% requirement exists today under the FLSA.

Further, § 515.5 excludes (i) employees in a computer-related occupation who have not yet attained the level of skill and expertise necessary to work independently and without close supervision from exempt status, and (ii) "writers engaged in writing material such as box labels, product descriptions, documentation, promotional material, set-up, installation instructions" for print and/or onscreen media, or who write content intended to be read by customers, subscribers or visitors to computer-related media such as the World Wide Web or CD-ROMS; however, the FLSA does not contain these exclusions. Finally, the minimum hourly requirement under the FLSA is $27.63, far less than the $36.00 hourly requirement under § 515.5. Thus, while AB 10 can reasonably be construed as a "win" for California employers, California employers continue to face a more stringent standard in order to show that its computer employees qualify for exempt status.

What's Next for California Employers?

In light of the new amendments to §515.5, and given the complexities of California law regarding exempt employees, California employers should consider the following as next steps. *First*, if an employer previously understood § 515.5 to require employees to be highly skilled and proficient in the theoretical and practical application of highly specialized information to all three of the listed areas, the employer should review the duties and proficiencies of its computer employees to determine whether they meet the lesser standard under AB 10, which requires skill and proficiency in only one of the three.

Second, employers should conduct periodic audits to ensure that their employees are consistently performing exempt functions and that they qualify for exempt status. As part of these audits, employers should review the job descriptions for their computer professionals to determine whether they provide an accurate description of the duties actually performed and revise, as necessary. Interviewing managers also is critical to be sure that there is a match between what the employees are actually doing and what appears on the job description. This also is a good time to update job descriptions for computer employees in light of AB 10.

Third, after conducting these audits, employers should do a cost-benefit analysis to determine whether they should offer their full-time computer professionals more than the minimum salary threshold provided for in AB 10. For example, many computer professionals work more than 40 hours per week; therefore, prior to AB 10, they would have earned significantly more than the current $75,000 minimum salary threshold. For employees who regularly work more than 40 hours per week and who were paid an hourly rate prior to AB 10, employers should calculate their annual salary based on the employee's average hours worked. Otherwise, these employees will end up making much less under AB 10 which will likely result in low morale and may lead to high employee turnover.

Similarly, since AB 10 only provides for a minimum annual salary threshold for full-time employees, employers should consider what, if any, affect AB 10 will have on its part-time employees. For example, employers should determine whether it makes more sense to pay its part-time computer professionals the minimum annual salary rather than continuing to pay them on an hourly basis. On the one hand, if those employees regularly work less than 40 hours per week, labor costs would be lower if they continue to be paid on an hourly basis. On the other hand, if the part-time employee's hours vary from week-to-week (with the employee sometimes working more and sometimes working less than 40 hours per week), in given circumstances, it might make more sense to pay the minimum annual salary rather than continuing to pay them an hourly rate. Provided the employee meets all the requirements of § 515.5, the employer will no longer have to pay overtime for hours worked in excess of 40 hours per week.

Finally, keep in mind that as the federal standard for the Computer Professional exemption is less rigorous than the California requirements and, accordingly, somewhat easier to satisfy, employees who qualify under the FLSA's Computer Professional exemption may *not* meet California's rigorous standards. Hence, for national employers with facilities in California, it is quite possible that employees in the same or similar computer job titles may be exempt in New York, Florida, and Ohio, but *not* exempt under California state law where they would then be entitled to overtime.

If you have any questions about this Client Alert, or wage-hour classification issues, please do not hesitate to call upon Proskauer's Employment Law Counseling and Training Practice Group, or any of the lawyers who are listed on this Client Alert.

BOCA RATON • BOSTON • CHICAGO • HONG KONG
LONDON • LOS ANGELES • NEW ORLEANS • NEW YORK
NEWARK • PARIS • SÃO PAULO • WASHINGTON, D.C.

Client Alert

The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

If you have any questions about the impact of this new law, please contact your Proskauer relationship lawyer or one of the lawyers listed below:

Los Angeles

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Arthur F. Silbergeld
310.284.5624 – asilbergeld@proskauer.com

Harold M. Brody
310.284.5625 – hbrody@proskauer.com

Dawn M. Irizarry
310.284.5698 – dirizarry@proskauer.com

New York

Fredric C. Leffler
212.969.3570 – fleffler@proskauer.com

Marc A. Mandelman
212.969.3113 – mmandelman@proskauer.com

Katharine Parker
212.969.3009 – kparker@proskauer.com

Boca Raton

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Boston

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Newark

Lawrence R. Sandak
973.274.3256 – lsandak@proskauer.com

Wanda L. Ellert
973.274.3285 – wellert@proskauer.com

New Orleans

Charles F. Seemann
504.310.4091 – cseemann@proskauer.com

Washington, D.C.

Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

You can also visit our Website at **www.proskauer.com**