

**In This Issue:**

October 2008

In a last-minute legislative move, California relaxes the overtime exemption for computer professionals.

## **Legislative Swiftware on Software Engineers: AB 10 Revises the Overtime Pay Exemption for Some California Computer Software Engineers**

**By R. Brian Dixon and Christopher E. Cobey**

California, which nurtured Silicon Valley into a global phenomenon, has finally acted to stem the off-shoring of computer jobs by simplifying and reducing the compensation requirement for overtime-exempt computer professionals. The new legislation, contained in Assembly Bill (AB) 10, which took effect on September 30, 2008, as urgency legislation, may also stem the outpouring of computer jobs from California to other states by substantially harmonizing the duties requirements of the overtime exemption with those under federal law and under the laws of most other states.

### **The Pre-AB 10 Computer Software Professional Overtime Exemption**

According to the most recent estimate from the U.S. Department of Labor's Bureau of Labor Statistics, there are approximately 218,000 computer engineers, programmers and analysts in the fields of applications and systems software employed in California who are entitled to overtime unless they are covered by Labor Code section 515.5's exemption from overtime payments. Before the enactment of AB 10, the exemption applied only if the following duties and compensation requirements were met:

- The employee's primary duty is work that is intellectual or creative and that requires the exercise of discretion and independent judgment.
  - A. The employee's primary duty consists of one or more of the following:  
The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
  - B. 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.
  - C. The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

- The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.
- The employee receives an hourly rate of pay of \$36.00 or more, “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.” The minimum hourly rate is adjusted each year based on the increase in the Consumer Price Index.<sup>1</sup>

AB 10 continues all of the above requirements, but allows an exempt employee to be paid an annual salary of \$75,000 or more for full-time employment, as infrequently as once a month, and in a monthly amount of not less than \$6,250. AB 10 also changes the requirement that an employee be engaged in “computer systems analysis, programming, and software engineering,” to being engaged in “computer systems analysis, programming, or software engineering.”

## The Legislative Evolution of AB 10

AB 10 is an excellent example of an alternative - and expedited - path for some California legislation, such as “spot bills.” Originally introduced on December 4, 2006, (the first day of the 2007-2008 legislative session), AB 10 was completely rewritten three times in the legislative process. On September 15, as the legislature was in its last throes of producing a budget already 80 days past the constitutional deadline, the Assembly Budget Committee “adopted” AB 10 from the sponsoring assemblymember and rewrote it yet a fourth time. It was this version that the legislature passed.

One consequence of this unusual history is that the final bill never received a hearing from any policy committee of the California Legislature. There is but a single, substantive committee report on the bill (authored by a consultant to the Assembly Committee on Labor and Employment). It states that the purpose of the bill is to expand the overtime exemption for computer professionals if the employee’s primary duty is exempt work and the employee:

- is paid on a salary basis;
- earns not less than \$75,000 per year;
- is employed full time;
- is paid at least once per month; and
- in an amount not less than \$6,250 per month.

The expanded exemption became effective on the date the legislation was signed by the Governor, as an urgency statute - on September 30, 2008.

## The “Compensation” Element of the Revised Overtime Exemption

The compensation requirement has been simplified by allowing employees who are paid a salary, and only a salary, to be designated by employers as overtime-exempt computer professionals. An employer may, if it wishes, pay additional compensation for hours of work beyond a salaried employee’s regular schedule.

When the overtime exemption for computer professionals was first added to the Labor Code in 2000, an employee could be overtime exempt only if the employee were paid a specified rate per hour. The statute was subsequently amended in 2005 to provide that an employee could be overtime exempt if the employee was paid a salary *and* was paid additional hourly compensation such that the total, when divided by the hours worked in the week, equaled the minimum compensation requirement. While the recognition that most exempt employees are paid salaries was helpful, the hourly compensation requirement still made necessary the recording and monitoring of the number of hours worked, and the provision of additional compensation when necessary. The Labor Commissioner had specifically concluded that, under section 515.5, prior to its amendment by AB 10, “[t]he burden is on the employer to prove the exemption and,

thus, records of hours worked must be kept.”<sup>2</sup>

AB 10's change means that a computer professional in California who meets section 515.5's other requirements may now be paid a salary, and only a salary (additional hourly wage payments are no longer required), and thereby satisfy the compensation requirement for overtime-exempt status. The employer's option to pay an otherwise-qualifying exempt computer professional on an hourly basis has been preserved by the new legislation.

The \$75,000 annualized salary needed for a computer professional to be overtime exempt under AB 10 is substantially higher compensation than the minimum salary required for an employee to qualify as an overtime-exempt executive, administrative, or learned or artistic professional employee. The minimum salary that must be paid exempt executive, administrative, and learned or artistic professional employees is two times the state's minimum wage, which is currently \$8.00 per hour. This calculation results in a salary of \$640.00 per workweek or \$33,280 based on a 52-workweek year. It is important to remember that, unlike the exemptions for other white-collar employees, both the salary and the hourly rate required to qualify for the computer professional exemption are subject to a unique provision by which those amounts increase every January 1st based upon the change in the cost of living.

The salary which now can be paid for an employee to be overtime exempt is distinctive in two respects:

First, the salary must be paid in a monthly amount of not less than one-twelfth of the annual salary. This precludes backloading an employee's compensation so that most of it is paid toward the end of the year. This may also preclude an employer from counting guaranteed incentive compensation that is paid less frequently than once a month toward the minimum amount needed to be exempt.

Second, the reference to payment of the required salary not less than monthly suggests that a different pay-timing requirement may exist for computer professionals. However, the monthly compensation requirement may be intended to do no more than incorporate the relatively obscure option for paying some employees monthly which already exists in the Labor Code.

Though no definition of the term “full-time employment” appears in section 515.5, the preceding section (Section 515) defines “full-time employment” for that section as: “... employment in which an employee is employed for 40 hours per week.”<sup>3</sup> No other definition of “full-time employment” appears in the Labor Code.

## The “Duties” Element of the Expanded Overtime Exemption

The second change made by AB 10 is just one word in the statute, but that change harmonizes California law much more closely with federal law and eliminates a sometimes challenging issue for employers.

As originally enacted in 2000, the exemption for computer professionals required that an exempt employee be “highly skilled and ... proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, *and* software engineering.”<sup>4</sup>

The use of the conjunctive “and” led the Labor Commissioner to conclude that an employee could only be exempt if the employee were a programmer, systems analyst, and systems engineer all rolled into one.

With the change of this “and” to “or” in section 515(a)(3) by AB 10, the employer's burden to prove that the position in question includes all three functions (computer systems analysis, programming, and software engineering) is removed. This change also aligns California law with the federal exemption, which also uses “or” to join the various types of computer professionals who can be overtime exempt.

Still unresolved under both California and federal law is the scope of the terms “systems analyst” *and* “software engineer,” as neither term is defined in the respective statutes, and there is no universal definition of what duties are included in those job titles.

## The Differences Remaining Between the California and Federal Exemptions

Differences do remain between the California and federal overtime exemptions.

The California exemption continues to include ill-defined requirements, which are similar to those that were eliminated when the United

States Department of Labor (DOL) revised the federal definition of overtime-exempt employees on August 23, 2004. These include the requirements: (a) that an employee be “highly skilled and proficient in the theoretical and practical application of highly specialized information” in computer systems analysis, programming or software engineering; (b) that an exempt employee’s primary duty entail the consistent exercise of independent judgment and discretion; and (c) that an employee have generally attained a level of skill and expertise which allows him or her to work independently and generally without close supervision. The California exemption continues to require that an exempt employee’s primary duty be intellectual or creative.<sup>5</sup>

In addition, the California exemption continues to have some minor variations from the federal exemption in the definition of exempt work. The California exemption varies the terms used to describe the third type of exempt work so that all of the activities listed must relate to the “design” of particular software or hardware.<sup>6</sup> That software or hardware must, under the California’s exemption, relate to “computer operating systems,” while under federal law, the activities must be related to the development of “machine operating systems.”

The California exemption excludes a variety of individuals who are not accomplished computer professionals or who merely use computers. Of particular note are the exclusion of writers of consumer-oriented material, such as box labels, product descriptions, documentation, promotional material, start-up instructions, and similar written information either for use in print or other electronic media including the World Wide Web.<sup>7</sup> The California exemption also excludes employees who are engaged in any otherwise-exempt computer activities for the purpose of creating imagery effects used in the motion picture, television or theatrical industries.<sup>8</sup>

## How the New Law Affects Pending Litigation

The current high tide of California wage and hour class actions has been analyzed in other Littler publications:]

- Littler’s July 2008 ASAP, “*A Ray of Hope: California Court of Appeal Decides Compliance with Meal Period Obligations Requires an Opportunity, Not a Guarantee*”
- Littler’s June 2008 ASAP, “*Another Federal District Court Weighs in on the Unsettled Question of Whether California Employers Need Only ‘Provide’ Employees with Meal Periods or Must ‘Ensure’ Meal Breaks Are Taken*”
- Littler’s April 2008 Littler Report, “*Total Wage and Hour Compliance: An Initiative to End the Wage and Hour Class Action War*”

The impact of AB 10 on pending wage and hour lawsuits by or on behalf of employees in computer occupations will depend in part on the status of the litigation - whether it has just commenced, whether a class has been certified, or whether the case is about to be tried. Whether AB 10 will allow once-abundant computer professional jobs to remain in the state remains to be seen.

.....  
 R. Brian Dixon is a Shareholder in Littler Mendelson’s San Francisco office. Christopher E. Cobey is Special Counsel in Littler Mendelson’s San Jose office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Dixon at bdixon@littler.com, or Mr. Cobey at ccobey@littler.com.

<sup>1</sup> Cal. Lab. Code § 515.5(a) (emphasis added).

<sup>2</sup> Division of Labor Standards Enforcement Policies and Interpretations Manual, sec. 54.7 (Dec. 2006).

<sup>3</sup> Cal. Lab. Code § 515(c).

<sup>4</sup> Id. § 515.5(a)(3).

<sup>5</sup> Id. § 515.5(a)(1).

<sup>6</sup> Id. § 515.5(a)(2)(C).

<sup>7</sup> Id. § 515.5(b)(5).

<sup>8</sup> Cal. Lab. Code. § 515.5(b)(6).