

## Minimum Wage opinion letter 07-14-08 - Highly Compensated Employees

July 14, 2008

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I am writing in response to your request, on behalf of your client, for this Office's written opinion regarding the applicability of the Massachusetts Minimum Fair Wage Law, M.G.L. c. 151. Specifically, you have asked if state overtime law, M.G.L. c. 151, §1A, recognizes the relaxed duties requirements for "highly compensated employees" included in the federal Fair Labor Standards Act (FLSA) regulations. See 29 C.F.R. §541.601. [\[1\]](#)

It is my understanding that your client is a company in the insurance/financial services industry that does business in Massachusetts. The company employs Senior Sales Representatives (SSRs) who receive over \$100,000 in total annual compensation. [\[2\]](#) All SSRs customarily and regularly perform the following duties:

- 1) SSRs coach, mentor, and evaluate the performance of approximately three junior sales representatives. The SSRs meet at least once per week with these individuals to evaluate their sales, sales techniques, sales lead source evaluation, and sales goals/quotas. The SSR completes a performance review form during each meeting. SSRs also complete quarterly reviews of the junior sales representatives, which are a significant component of their annual review process. The SSRs' recommendations regarding promotion or advancement are given significant weight by the company.
- 2) SSRs participate in the recruitment and hiring of sales representatives; and their input regarding a particular candidate is given significant weight by the company.
- 3) SSRs engage in marketing and sales promotion activities, such as building relationships with other employers and professional associations, and organizing community marketing events.

Additionally, some of the SSRs manage and oversee an office, and some supervise and direct the day-to-day work of one Sales Associate. It is your position that the SSRs are exempt from overtime under the FLSA because they meet the requirements for "highly compensated" executive employees, and you would like confirmation that this exemption is also recognized under state overtime law.

Under the FLSA, executive, administrative and professional employees are exempt from overtime if they meet certain tests regarding their job duties and are paid on a salary basis at not less than \$455 per week. 29 C.F.R. §541 (hereinafter referred to as the "EAP Regulations"). An "executive" employee meets the "duties test" if :

1. The employee's primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
2. The employee customarily and regularly directs the work of two or more other employees; and
3. The employee has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

29 C.F.R. §541.100. The EAP Regulations include a special rule for "highly compensated employees." These employees are exempt from overtime if:

1. The employee earns a total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
2. The employee's primary duty includes performing office or non-manual work; and

3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

29 C.F.R. §541.601 (emphasis added). See also U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division Fact Sheet #17H.

The Massachusetts Overtime Law, M.G.L. c. 151, §1A, also includes a provision which exempts "bona fide executive, or administrative or professional person[s]" from the requirement for overtime compensation. M.G.L. c. 151, §1A(3). The Massachusetts Minimum Wage Regulations were amended in 2003 to provide that "[t]he terms ' *bona fide* executive, or administrative or professional person' in M.G.L. c. 151, §1A(3), shall have the same meaning as set forth in Part 541 of Title 29 of the U.S. Code of Federal Regulations [the EAP Regulations]." 455 C.M.R. §2.02(3). The intent of this regulatory change was to clarify the meaning of these terms under state law, in order to encourage employer compliance and strengthen enforcement.

The EAP's salary, salary basis, and duties tests are incorporated by reference into the state regulation, and this incorporation includes the provisions for "highly compensated employees." [3] Therefore, this agency will apply the three-factor test articulated in 29 C.F.R. §541.601 to determine the applicability of the state overtime exemption to a particular employee. Based on the information you provided, the SSRs qualify for the exemption as "highly compensated employees." They meet the salary and salary basis tests, primarily perform office or non-manual work, and perform at least one of the duties listed under the executive exemption, i.e. their suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight by their employer. [4]

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,

Lisa C. Price  
Deputy General Counsel

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[1]As you know, most employers are also subject to the federal minimum wage and hour law, found in the Fair Labor Standards Act (FLSA), and regulations promulgated thereunder. For information about applicable federal wage and hour laws, you should contact the U.S. Department of Labor.

[2] In response to a follow-up e-mail from this Office, you confirmed that the total annual compensation received by these employees meets all the requirements of 29 C.F.R. 541.601(b)(1), which includes, among other things, a requirement that employees receive at least \$455 per week on a salary or fee basis.

[3] This category of highly compensated employees was added to the EAP Regulations in 2004, and is included in a new general section on "Salary Requirements." While this constituted an organizational change within the EAP Regulations, the concept of a different test for more highly paid employees has been part of the FLSA "salary test" since 1949. See Part 541-Preamble: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer Professional and Outside Sales Employees, Final Rule, 69 Fed. Reg. 22122, 22173-74 (August 23, 2004) (previously referred to as the "special proviso for high salaried" executive, administrative, and professional employees").

[4] The SSRs who manage offices may meet other duties test criteria as well.

\*\*\*= Names have been Omitted