

Employers With 'Learned Professionals' Get Break From Labor Panel

By Jonathan Fraser Light

An electrical engineer with 11 years of experience and a bachelor's degree in engineering works 60 hours per week, usually independently on sophisticated engineering projects for a manufacturer.

An environmental engineer with eight years of experience and a bachelor's degree in environmental science works in the lab 50 hours per week.

A program manager with 10 years of experience and a bachelor's degree in business oversees development projects for a defense contractor 60 hours a week but does not supervise anyone directly.

Until late December 2006, each of these California workers may well have been classified as a nonexempt employee entitled to overtime and required to take rest and meal breaks. This would have surprised many California employers, who may have assumed that these employees were classified as exempt from overtime and break rules under California law. Indeed, under federal law, each likely would have been classified as exempt.

Not so in California, until an important, but quiet, change to California enforcement policy that expands the "learned professional" exemption. In short, no longer will California require learned professionals to have a master's degree as one of the components of the exemption.

Several other requirements apply, however, and employers need to be careful not to classify certain employees as exempt learned professionals simply because they have a bachelor's degree.

In fact, only the employees in the first two examples above now qualify for the exemption under the applicable criteria.

First, a brief overview of the exemptions, which are set forth generally in each of the California Wage Orders, one or more of which must be posted by the employer at its work site, depending on the nature of the employer's business. The Industry and Occupation Wage Orders are found at 8 California Code of Regulation Section 11000 et seq.

Simply reading the wage orders will not be enough, however, because the wage orders require significant interpretation under related federal regulations, court interpretations and the California Labor Commission's Division of Labor Standards Enforcement opinion letters and Enforcement Policy and Interpretations Manual.

The learned-professional exemption covers two general categories outside the scope of the more commonly used categories of "executive exempt" — the classic manager or supervisor category — and "administrative exempt." That category encompasses the human resources manager or senior financial analyst who might not supervise anyone but who works on higher-level company policies and other activities related to the general management of the company, as opposed to its nuts-and-bolts work.

Two other significant exempt categories, among others, are also available. "Outside salespersons" and "inside salespersons" may qualify for exempt status, but several tests apply, and the inside-salesperson exemption is not available to many employers.

More on these categories in a subsequent article.

Learned professionals may be classified as exempt if they are licensed by the state of California in one of eight specific categories of employment: law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting (Section 1A(3)(a) of each wage order).

Just having a license, however, is not necessarily indicative of professional exempt status. For example, pharmacists and most licensed nurses are specifically excluded from the professional exemption under state law. Certificated paralegals also are exempt.

Federal law may treat these exemptions differently, but employers need to remember that they are subject to both state and federal law and must follow the law that most favors the employee. That is usually state law in these exempt/nonexempt analyses, but there is at least one exception.

Employers also need to be aware that, under California law, all exempt employees must spend more than 50 percent of their time — "primarily

engaged in" under the wage orders — performing exempt work. Federal law uses a less-rigid "primary duties" test that can be interpreted as significantly less than 50 percent.

Such employees also must earn a salary of at least two times California minimum wage for a full-time, 40-hours-a-week worker, \$30,000 annually.

The second prong of the professional exemption, for those employees who do not have an appropriate state license, is in Section 1A(3)(b) of the wage orders. That section provides that employees may meet the professional exemption if they "are engaged in an occupation that is commonly recognized as a learned or artistic profession."

For the exempt artistic professional, the criteria follow: "Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work." Section 1A(3)(b)(ii).

This section has not been affected by the new Division of Labor Standards Enforcement interpretation, and each job will require individual analysis. For example, a graphic artist who creates sophisticated advertising from scratch likely will be exempt, but someone who merely rearranges a logo, tag line and a camera-ready photo on a page probably will not be deemed an exempt artistic professional.

Interpretation of subparagraph (i) of this section, which covers learned professionals, created the problem recently rectified by the Division of Labor Standards Enforcement: "Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual,

or physical processes, or work that is an essential part of or necessarily incident to any of the above work." Section 1(A)(3)(b)(i).

Federal regulations define this long course of study to mean that it results in an advanced degree, that is, something higher than a high-school diploma, meaning at least a bachelor's degree.

The California Wage Orders purport to rely on parallel federal regulations, cited specifically in the orders, to define the learned and artistic professions. Section 1A(3)(e). Nevertheless, through a series of nonbinding opinion letters over the years, the Division of Labor Standards Enforcement has interpreted the advanced-degree requirement to mean at least a master's degree.

The genesis for this deviation from the federal standard is a mystery, because neither California nor federal law provides any basis for the division's interpretation. Presumably, it arose from the common parlance in academia that an advanced degree means at least a master's degree, but that is not the interpretation contained in any applicable employment law or regulation.

The division explains its position on issues in opinion letters to employers or practitioners and in its Enforcement Policies and Interpretations Manual. In late December 2006, the division quietly modified Section 54.8.5 of the manual by providing a specific example of what it now interprets as an advanced degree for learned professionals: "Example: advanced degree in a specialized field, i.e., B.S. in Chemistry."

Our office has confirmed informally that this reflects a change in philosophy based on the new labor commissioner's view of this issue: Nothing in California or federal law suggests that a master's degree is required.

This is of course good news for employers, who have struggled with the issue for years and often employed potentially risky exempt-employee categorization plans. For example, the electrical engineer with more than 10 years of experience and only a bachelor's degree in engineering was classified exempt on the theory that his longtime work

in the industry was similar enough to the "prolonged course of intellectual instruction" equivalent to a master's degree. Shorter-tenured employees created even more risk of being misclassified as exempt under this hybrid test.

Employers now have clarity on this key issue, but they must be cautious about applying the exemption across the board. A bachelor's degree in English literature held by a manufacturing company's program manager, who supervises no one and is a manager only in title, might not satisfy the test because the degree does not relate to the field in which the manager works.

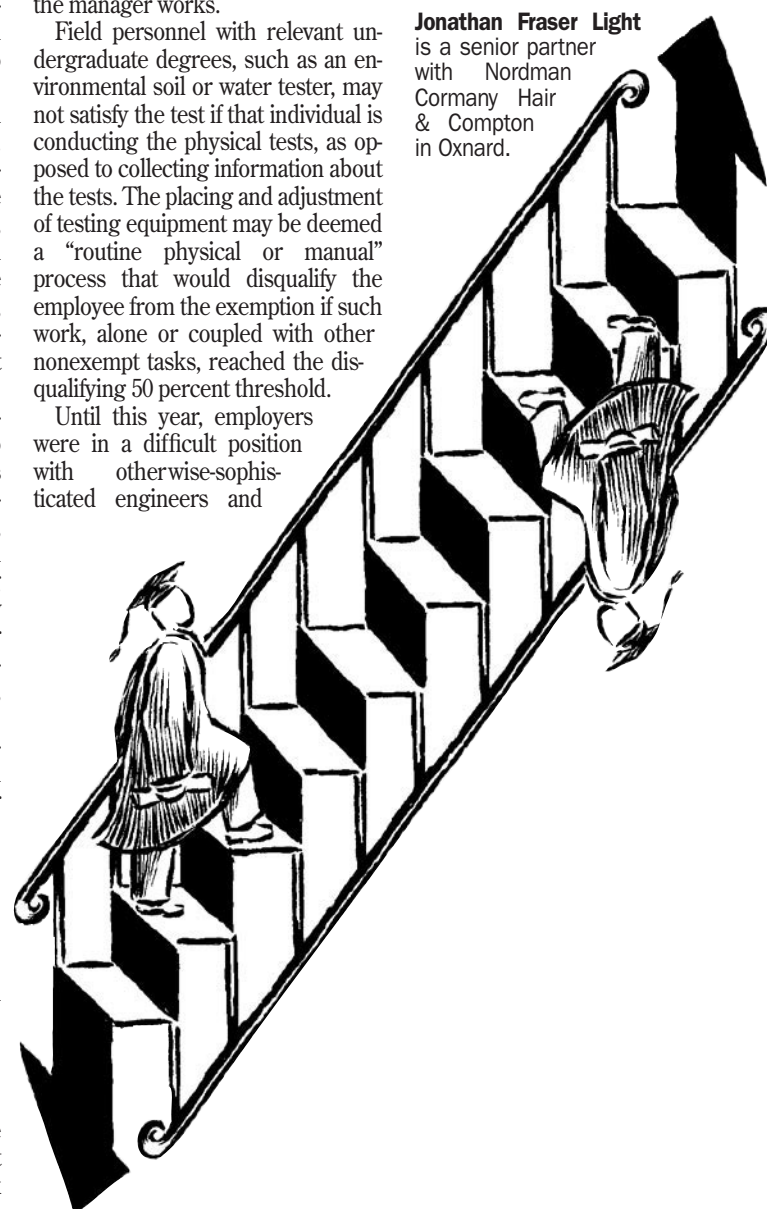
Field personnel with relevant undergraduate degrees, such as an environmental soil or water tester, may not satisfy the test if that individual is conducting the physical tests, as opposed to collecting information about the tests. The placing and adjustment of testing equipment may be deemed a "routine physical or manual" process that would disqualify the employee from the exemption if such work, alone or coupled with other nonexempt tasks, reached the disqualifying 50 percent threshold.

Until this year, employers were in a difficult position with otherwise-sophisticated engineers and

other high-level professionals who did not necessarily qualify for the learned-professional exemption because of the absence of a master's degree.

California employers are cautioned, however, not to be overly aggressive in moving all degreed employees to exempt status. The nature of the work may prevent categorizing certain engineers or other employees as exempt from overtime and break rules. Regardless, this is overall very good news for California employers and clarifies a historically troublesome issue.

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