White Collar Exemptions: Do Employers Need To Pay Overtime Compensation To H-1B Workers?[i] [Part III[ii]]

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To claim learned professional exemption under the FLSA, the employee must work in a profession where specialized academic training is a standard prerequisite for entrance into the profession. FLSA regulations specifically state that the best evidence for meeting this requirement is having the *appropriate* academic degree. However, the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Since the minimum requirement for the H-1B visa is a baccalaureate or higher degree *or equivalent* (both for the offered job and the prospective employee) in all probabilities this would satisfy the FLSA requirement – that the employee must work in a profession where specialized academic training is a standard prerequisite for entrance into the profession – required to claim the learned professional exemption.

Determining whether an H-1B employee is exempt from the overtime and other exemptions under the FLSA becomes murky if, and when, an employee works in an occupation that does not necessarily (but could) require an advanced specialized academic degree. For instance, and as detailed in the FLSA regulations, paralegals and legal assistants may not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess a general four-year advanced degree, many specialized paralegal programs are two-year associate degree programs from a community college or from an equivalent institution.

However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge to serve in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist with patent matters, that engineer would qualify for exempt status.

On the other hand, consider the case of an individual who holds a law degree from a university in a foreign country and is working on H-1B visa with an immigration law firm. The law degree, an advanced degree, makes him/her eligible for an H-1B visa. Other paralegals without advanced degrees working at the immigration law firm would be considered non-exempt employees; whereas, the foreign paralegal with law degree working on H-1B visa would be considered exempt because he satisfies the advanced specialized degree requirement under the FLSA. However, because the other paralegals are treated as non-exempt and the employer attested on the LCA that the foreign paralegal (with the law degree on the H-1B visa) will be offered working conditions[iii] on the same basis, and in

accordance with the same criteria, as offered to the U.S. workers, the foreign paralegal may end-up either working regular 40 hours per week or getting compensated for overtime work.

Based on the foregoing, it could be concluded that employers generally are not required to pay overtime compensation to its employees working on an H-1B visa unless the H-1B worker is working in an occupation that traditionally does not require the specialized academic training as a standard prerequisite for entry into the profession. Because the H-1B visa requires that both the offered position and prospective employee should hold baccalaureate or higher degree *or equivalent,* the H-1B employee would usually qualify for FLSA's learned professional exemption.

The learned professional exemption requires that the employee must work in a profession where specialized academic training is a standard prerequisite for entrance into the profession. Since the FLSA regulations state that having an *appropriate* degree or its equivalent through work experience and a intellectual instruction satisfies the FLSA's specialized academic training requirement to claim the exemption as learned professional, and similarly having a related degree or its equivalent (both for the job offered and prospective employee) is also the threshold requirement for an H-1B visa, in all probabilities, qualifying for H-1B visa give the employee "exempt" status under the FLSA. In conclusion, employers still need to be cautious when employing workers on H-1B visa in occupations which traditionally do not require specialized academic training as a standard prerequisite for entry into the profession or they find themselves facing DOL challenges or challenges from the workers themselves about the need for the employer to have been paying overtime compensation.

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[i] This article does <u>not</u> cover rights and benefits of public agency employees under FLSA.

[ii] This is the third and final part of the three part article. This part will build on the Part II discussion (why H-1B employees are *usually* treated as an "exempt employee" under the FLSA) and will also examine situations involving H-1B employees working in occupation(s) that usually do not require an advanced specialized degree.

[iii] Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules.