



Are Social Workers Exempt or Nonexempt? Help!

Reprinted from *Ask Rita in HR* with permission from Blue Avocado, www.blueavocado.org, September 19, 2011, By Ellen Aldridge

Dear Rita in HR: Should social workers be classified as exempt or nonexempt? In the process of updating our job descriptions I have looked at many from other agencies and am confused in particular about one issue: in some cases social workers are classified as exempt (exempt from overtime) and in other cases they are nonexempt. What are they? Signed, Dazed & Confused.

Dear Dazed: Good news! We received some clear guidance last week with the first federal appellate decision directly addressing the overtime exempt status of social workers in *Solis v. State of Washington DSHS* (9th Cir. 2011) No. 10-35590. The quick answer is that some, but not all, social workers meet the professional exemption — and surprisingly, it doesn't only depend on the job duties: it also depends on the educational prerequisites of the position.

The *Solis* court held that the Washington social workers were not exempt from the Fair Labor Standards Act (FLSA). The responsibilities of the social workers in the *Solis* case look at first glance as if they would make the positions exempt. For example, they were responsible for:

- Investigating child abuse and neglect
- Developing and recommending treatment plans to courts
- Evaluating child and family progress in meeting treatment plans
- Placing children, and
- Recommending whether parental rights should be terminated.

But the court stated they were nonexempt not because of the job duties, but because the jobs did not require sufficient educational prerequisites.

"Exempt" compared to "non-exempt"

As a fast refresher: the FLSA (administered by the Department of Labor — DOL) is the federal law that requires employers to pay overtime compensation to employees who work more than 40 hours in a week. All employees must receive overtime pay unless the employer can prove that the position is exempt from the FLSA. When considering social workers there are three relevant exemptions — the so-called "white-collar" exemptions — executive, administrative, and professional. Social workers who supervise two or more employees may fall under the executive exemption, but they would not meet the criteria for the administrative exemption. Thus, if a social worker does not supervise two or more employees, the only other possible exemption for a social worker is "learned professional."

Under the [DOL regulations](#), to be classified as an exempt learned professional the primary duties of the employee must require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." The regulations go on to state that the professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through experience.

In the *Solis* case, the State of Washington required that its social workers have:

- A college degree in "social services, human services, behavioral sciences or allied field," or all three of the following:
- A degree and 30 semester credits or 45 quarter credits in social services
- A minimum of 18 months' experience as a social worker
- Completed additional formal training provided by their employer.

The court held that these educational prerequisites were not sufficient to meet the standard for the professional exemption because they did not amount to "specialized intellectual instruction."

When can social workers be classified as exempt?

So what would it take for a social worker's educational requirement to satisfy the "advanced learning" requirement for the professional exemption? The *Solis* court looked favorably on the conclusions reached in two DOL opinion letters that found that the following educational

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requirements met the test:

- A master's degree in social work, human services, drug and alcohol, education, counseling, psychology, or criminal justice, or
- A bachelor's degree in human behavioral science which includes 30 semester or 45 quarter hours either in development of human behavior, child development, family intervention techniques, diagnostic measures, or therapeutic techniques, such as social work, psychology, sociology, guidance and counseling, and child development.

Alternatively, requiring a social worker to be licensed by the state, if the licensing procedure requires a specialized course of study, would also be sufficient. What is not sufficient are general degree requirements that can be satisfied with any number of diverse academic majors such as:

- A bachelor's degree in social sciences
- A bachelor's degree in human services, behavioral sciences, or an allied field.

Remember: you cannot use years of experience as a social worker alone to meet the professional exemption despite the vast knowledge that a non-degreed social worker may have. Simply stated, an employee cannot be an exempt professional unless the job requires the employee to have previously completed a course of specialized intellectual instruction.

So go through your job descriptions and review the minimum educational qualifications in light of the primary duties of the position to evaluate whether the educational prerequisites are narrowly drafted to evidence specialization for the work that the employee will perform. Be as specific as possible about the number and type of courses that are required if the degree is not directly related to the position (for example, a biology degree for a biologist).

Lastly, don't forget that in addition to the educational requirement to qualify for the learned professional exemption, the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is "predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment."

For additional details on the professional exemption see the [DOL's fact sheet on the professional exemption](#).

On Reflection

What is scary about the *Solis* case is that it was not a lawsuit filed by a group of disgruntled employees, but was an enforcement action filed by the DOL based on the complaint of a single employee . . . and it overturned the overtime exempt status of hundreds of employees in 44 field offices. Undertaking a proactive review of your job descriptions and overtime classifications is a great way to avoid this fate and steer clear of the Obama administration's increased enforcement activities.

Non-Federal Share Decision

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The DAB received further clarification that ACF did not have authority under the statute and regulations governing the Promoting Responsible Fatherhood Program to retroactively waive the matching fund requirement.

Based on these clarifications, the DAB concluded that there was no basis to reverse ACF's disallowance and ordered Circle of Parents to provide reasons why the DAB should not uphold the disallowance. The DAB also noted that Circle of Parents materially failed to meet the express terms of the grant and that nothing in the record supported retroactive relief, even if ACF had the authority to grant

Make sure your organization understands what the requirements are and, if the funding source permits waivers, how your organization may request one.

it. The DAB explained further that ACF could have reasonably concluded that Circle of Parents' arguments on appeal – its use of best efforts, the bad economy, the fundraising prohibition and its communications with ACF – were insufficient to support a retroactive reduction of the

non-federal share. The DAB observed that Circle of Parents' ability to exceed the federal share requirement in fiscal year 2011 showed that challenges to raising non-federal funds were possible to overcome.

Circle of Parents' Response to Order to Show Cause

Circle of Parents argued that its communications with ACF, some of which were documented in emails submitted to the DAB, showed that ACF: (1) had the discretion as part of the grant closing process to proportionately reduce the grant or perform a "de-obligation" to compensate for the unmet match; and (2) had encouraged Circle of Parents to make a good faith effort to meet the match requirements. Based on these communications, Circle of Parents asserted that it was led to believe that ACF would reduce or de-obligate the match requirement when the grant ended since Circle of Parents was making every effort to meet the match requirement. Circle of Parents also requested that the excess it earned in meeting its fiscal year 2011 match should be used to cover the incomplete matches from prior fiscal years.

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