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CALIFORNIA OVERTIME EXEMPTIONS – EXEMPT VERSUS NON-EXEMPT EMPLOYEES

[Disclaimer: The following is an analysis of Section 510 of the California Labor Code – an analysis that given the subject matter necessarily skirts a number of legal issues; however, while what follows raises a number of legal questions, it does NOT constitute a legal opinion by any measure of that definition.]

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In May the United States Department of Labor abrogated the previous Administration's rules governing employers' obligations re overtime pay to "non-exempt" employees. Specifically, the Biden Labor Department overturned the Trump Administration's rules that had abrogated the rules set by the Obama Administration. It did so by reverting to a modernized version of the "totality of the circumstances" test established by the United States Supreme Court in1949.

Given that 25 American states, many of them golf rich sunbelt states, do not maintain separate standards but rather hew to the standard set by the federal government, the national golf community has paid much attention to what the new rules mean for golf businesses within those 25 states. The National Golf Course Owners Association (NGCOA) has produced some excellent podcasts and webinars on the subject and generously shared them with the PGA of America and the PGA's Sections.

As is often the case (nay, almost always the case), California sets its own rules with respect to employer obligations with respect to overtime pay. The purpose of this "White Paper" is to very generally summarize California's rules on the subject – a general educational exercise, not the kind of legal deep dive that ONLY lawyers steeped in the practice of employment/labor law can provide.

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California Labor Code § 510 requires **overtime pay** for **non-exempt employees** at one-and-a-half times their regular rate of pay when they work (a) more than 8 hours in a workday, more than 40 hours in a workweek, or more than six consecutive days in a workweek.

Non-exempt employees get double-time pay for working more than 12 hours in a workday or more than 8 hours on the seventh consecutive day in a workweek.

Under California law, **exempt employees** generally have a white-collar job, get paid as a salary rather than an hourly wage, and are not entitled to wage and hour laws protections such as

overtime pay or meal breaks and rest breaks. For 2024 in California, exempt employees must earn at least $1,280 a week **($66,560.00 yearly**).

Exempt employees generally fit into the following five categories, although there are exceptions that are not applicable to the golf industry: Executive employees, administrative employees, licensed professionals, IT/tech employees, and/or outside sales employees.

Absolute rule of thumb: An employee cannot be made exempt by being paid on a salary as opposed to hourly rate or by signing an agreement that he/she is an "exempt" employee; he/she can only be an exempt employee if his/her job duties meet the legal definition under the California Labor Code.

The full text of the pertinent section of 510 that describes the rules for exempt employees is as follows:

> 510. (a) Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one–half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work. The requirements of this section do not apply to the payment of overtime compensation to an employee working pursuant to any of the following:
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> > (1) An alternative workweek schedule adopted pursuant to Section 511.
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> > (2) An alternative workweek schedule adopted pursuant to a collective bargaining agreement pursuant to Section 514.
> >
> > (3) An alternative workweek schedule to which this chapter is inapplicable pursuant to Section 554.
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> (b) Time spent commuting to and from the first place at which an employee's presence is required by the employer shall not be considered to be a part of a day's work, when the employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code.
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> (c) This section does not affect, change, or limit an employer's liability under the workers' compensation law.

The section of the Code that describes the categories of exempt employees most common to the golf industry is paraphrased for brevity and clarity as follows:

1. **White-collar jobs (executive, administrative, and professional employees)** – To be exempt, "white-collar" employees cannot simply work in an office setting but must

- Have primary duties that are executive, administrative, or professional (this generally means that 50% or more of their work time must be devoted to such tasks such as general business operations);
- Regularly and customarily exercise discretion and independent judgment at work; and
- Earn a salary equivalent to at least twice the state minimum wage for full-time employment (40 hours/week) – **in 2024 $66,560.00** on an annualized basis.

[Note: Since the income threshold, now set at **$66,560.00** on an annualized basis, goes up automatically as the state's minimum wage law goes up, that annualized income threshold will go up as the minimum wage goes up, although the legislature could at any time (with the governor's signature) increase the basis formula to require that it go up higher than that, which in a state as labor-friendly as California is not beyond possibility.]

2. **Computer professionals** – This exemption applies to employees who work primarily in computer systems analysis, software or hardware design or computer system or program design or development. All of the following must be true:
   - The employee is primarily engaged in intellectual or creative work that requires the exercise of discretion and independent judgment;
   - The employee is highly skilled and proficient in the application of highly specialized information to computer systems analysis, programming, or software engineering; and
   - The employee earns at least $55.58 per hour, or $115,763.35 per year paid on a monthly basis (these figures are as of 2024 and will increase with inflation).[7]
3. **Outside salespeople** – To be exempt, the following must apply:
   - The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
   - The employee must be customarily and regularly engaged away from the employer's place or places of business.
4. **Commission-earning employees** – This exemption applies to people who earn:
   - More than one and one-half times the minimum wage (as of 2024, more than $24.00 per hour); and
   - Earn more than half of their compensation from commissions.

Caveat: **AB 2257** provides for those who offer PGA golf professionally licensed services per the exception granted therein for "business to business for professional services" to offer them not as

either exempt or non-exempt employees, but rather independent contractors. The 12-pronged test to establish that independent contractor status is as follows:

2776. [Business to business for professional services exception]

Section 2775 and the holding in Dynamex do not apply to a bona fide business-to-business contracting relationship, as defined below, under the following conditions:

(a) If an individual acting as a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation ("business service provider") contracts to provide services to another such business or to a public agency or quasi-public corporation ("contracting business"), the determination of employee or independent contractor status of the business services provider shall be governed by Borello, if the contracting business demonstrates that all of the following criteria are satisfied:

(1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

(2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses.

(3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.

(4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration.

(5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business.

(6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.

(7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.

(8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services.

(9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any

proprietary materials that may be necessary to perform the services under the contract.

(10) The business service provider can negotiate its own rates.

(11) Consistent with the nature of the work, the business service provider can set its own hours and location of work.

(12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

Though the 2nd prong of the test is troublesome to the degree to which it is inscrutable and thus subject to an adverse appellate construction, the test has proven effective in terms of permitting myriad agreements between IC PGA golf professionals and owners/operators of the driving ranges integral to their independent businesses.

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With the proviso that the above does not in any way constitute a legal opinion by any meaning of the term, the above does provide the cursory glimpse of the overtime rules for exempt and non-exempt employees that apply to California to allow one to understand the wide gap that separates the rules applicable in California to the rules applicable to those American states that adhere to the standards and tests set by the federal government – rules very recently and substantially changed by the US Department of Labor.