

JUNE 2003

IT PAYS TO READ SOFTWARE LICENSES

By Arthur W. Dickinson



If you are like most of us, you probably don't read the software licenses you see from time to time. Ignoring the "fine print" may suffice for "off the shelf" software used for word processing, accounting and other such tasks ancillary to your core business.

However, if a "mission critical" function of your business is dependent upon software, that fine print may become vital to the ultimate survival of your business. Among other things, you must be aware of the following:

1. Form software licenses are likely written to strongly favor the software vendor. You should not be surprised that the form agreement is one-sided, but you may be surprised to know exactly how much the vendor is favored. Depending on the size of the license transaction, form agreement provisions are negotiable.
2. You do not "own" the software, you merely have a limited "license" to use the software according to the provisions of the license (ordinarily you cannot "sell" or otherwise transfer the software or the license without the vendor's consent even if you decide to no longer use the software).
3. Payment of some significant portion of the software price should be deferred until after the software has been installed and has been operating satisfactorily on your business premises.
4. All of the vendor's promises should be made in writing and if important to you, they should be attached as an addendum to the

license (the form agreement likely excludes any matters not set forth in writing as a part of the agreement). Any warranties important to you must be set forth clearly and unambiguously.

5. The form agreement likely excludes all special damages (if there is a problem with the software, you agree in advance that the software vendor will not be liable for any of your lost profits, costs to replace lost data or any other special or consequential damages, even if the vendor knows of your reliance on the software and of "glitches" in the software that could affect your use of the software). Although typical, these exclusions should not apply to the vendor's indemnification or confidentiality obligations or the vendor's willful actions or omissions.
6. The form agreement likely limits the vendor's actual damages to amounts you paid for the software and/or for maintenance services (likely an inadequate remedy if the software does not function as promised and if your business relies on the software continuing to perform as promised).
7. Will the vendor's maintenance obligations meet your needs? Usually a vendor only promises to use limited efforts to solve software problems.

Many other typical software vendor form license agreement provisions limit your rights and remedies in ways you may not have imagined. If software is critical to any important function of your business, it is critically important to have any form license agreement carefully reviewed before you sign it. We would like to help.

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PROPOSED CHANGES TO “OVERTIME” PAYMENTS

By J. Michael Colloton



The Fair Labor Standards Act (FLSA), is the federal law which, among other things, dictates overtime pay standards. The Bush Administration proposed substantial change to these standards, through the U.S. Department

of Labor (DOL), on March 31, 2003. These proposed rule changes are subject to public comment until June 30, 2003, after which the Department will publish new, permanent regulations.

The FLSA requires time and one-half payment of an employee's regular rate of pay for all hours worked over 40 in a workweek. However, there are a number of “exemptions”, to these overtime pay requirements such as “executive,” “administrative,” “professional,” “computer” and “outside sales” employees. The FLSA itself does not define the parameter of these exemptions so it falls to the regulations issued by the Secretary of Labor to define them. These regulations have not changed much in the last 50 years, except for a periodic change in the salary amount test. Even the salary limits have not changed since 1975. The regulations generally require each of three tests to be met to determine exempt status: 1) payment of a fixed salary; 2) specified minimum salary; and, 3) job duties involving managerial, administrative or professional skills.

Highlights of the proposed changes in the regulations, now under consideration, include the following:

A. Salary Test (amount)

- All workers earning less than \$22,100.00 per year (\$425.00 per week) on a salaried basis must receive overtime pay even though they have the duties of exempt employees.

- Exempt employees in the categories listed below would have to be paid at least \$425.00 per week on a fixed salaried base.
- Employees making \$65,000.00 or more annually and meeting one or more of the tests for the below categories would also be exempt.

B. Executive Employees

“Executives” would be exempt from overtime pay if:

- Their primary duties are managing an entire operation, a department or subdivision.
- They regularly supervise two or more employees.
- They have the authority to hire and fire employees.

C. Administrative Employees

Administrative employees would be exempt if:

- Their primary duty is office or non-manual work directly related to the management and general business operations of the employer or the employer's customers.
- They hold a “position of responsibility” defined as performing work of substantial importance or requiring a high level of skill or training.

D. Professional Employees

Professional employees are exempt if:

- Their primary duty is office or non-manual work requiring advanced knowledge in a field of science or learning customarily acquired by a college degree, but also gained through the military, specialized training or work experience.

E. Creative Professional Employees

Creative professional employees would be exempt if:

- Their primary duty requires invention, imagination, originality or talent in a recognized field of artistic and creative endeavor.



F. Computer Employees

Computer employees would be exempt if:

- Their primary duties involve systems analysis techniques and determining functional applications or designing, developing, testing or modifying systems or programs or the same duties on machine operating systems or a combination of all of the above requiring the same level of skills.
- Systems analysts, programmers, software engineers and similarly skilled are exempt if paid at least \$27.63 per hour without any other tests.

G. Outside Sales Employees

Outside sales employees would be exempt if:

- Primary duties in making sales or obtaining contracts for service or for the use of facilities and their work are customarily and regularly away from the employer's place of business (no salary test at all).

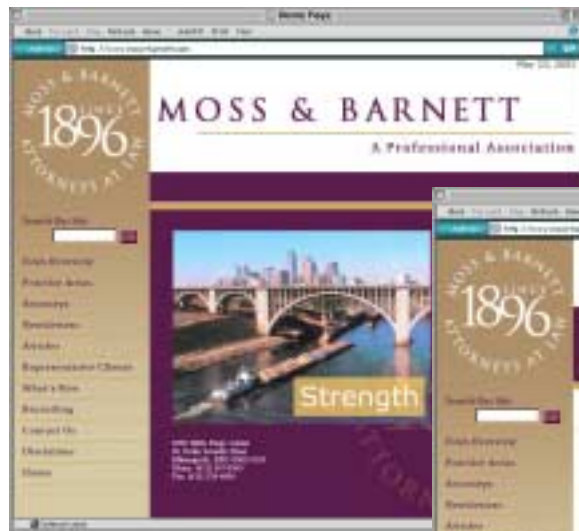
Deductions from Salary — Disciplinary Reasons

The Department also proposes to allow deductions from the salary of exempt employees for a full day's absence assessed for disciplinary reasons. Currently only hourly workers' wages are subject to such deductions. The proposal retains the salary basis rule prohibiting deductions from exempt salary employees for partial day absences.

These proposed regulation changes came about because of pressure from both businesses and groups representing employees and, therefore, the current proposals are a product of compromise. When the final regulations are published they will similarly be a product of compromise. As such, new regulations may still be difficult to apply in practice. Nevertheless, an attempt is being made to modernize these old regulations and create more clarity.

We suggest that any employer contemplating a change in the exempt status of employees consider waiting until the new regulations are issued in order to assure that their analysis of job situations is consistent with the new rules that will be adopted.

INTRODUCING M&B'S NEW LOOK



Moss & Barnett Announces New Web Site!

We are pleased to invite you to visit our newly redesigned Web site at www.moss-barnett.com.



Our new site features greatly improved graphics and more interaction, and will enable us to provide users with more news about legal developments and our firm. Please feel free to let us know your thoughts on our new site, if you have a chance to visit!

PROGRESS REPORT

By Tom Shroyer



We have much exciting news to report to our many clients and friends, as we continue to enhance Moss & Barnett's position as a premier provider of legal services for businesses and their owners.

We are pleased to note that we successfully concluded negotiations on the renewal of our office lease in the Wells Fargo Center. Since Moss & Barnett moved into our space in 1989, Wells Fargo Center has emerged to become the

leading location in the heart of Minnesota's financial center. Under our new lease, we have secured Moss & Barnett's future at the top of the Wells Fargo Center.

We recently enhanced our ability to communicate with you electronically by launching our brand new web site at www.moss-barnett.com. Our new site offers many technical improvements

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney client relationship is formed by the publication or reading of this document. Moss & Barnett, P.A. assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

over our prior site, including enhanced layout and design. The main advantage of our new site, however, is that we can add to or refresh the site's content through our Moss & Barnett IT team — thereby enabling us to more effectively and more frequently communicate with you. We hope that you will have an opportunity to visit our new site and we invite you to share your comments with us.

Most importantly, we have added John K. Rossman, Esq., and his team of two lawyers and support staff, to our Creditors Remedies and Bankruptcy Practice area. John joins senior Moss & Barnett shareholders, James A. Rubenstein, Esq., and Cass S. Weil, Esq. Jim and Cass are Minnesota Super Lawyers and Leading American Attorneys, and the addition of John Rossman establishes Moss & Barnett as one of the top firms practicing in the Creditors Remedies and Bankruptcy Practice area.

Of course, we recognize that the foundation of our firm is your loyalty and support. Thank you!

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