



## MEDIA, ENTERTAINMENT AND FIRST AMENDMENT NEWSLETTER

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### **New Overtime Rule: What it Means for the Media Industry and the Industry's Response**

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The Department of Labor's (DOL) Final Rule on overtime is set to take effect December 1, 2016, and could qualify many more journalists, photographers, and other creative professionals for overtime pay under the Fair Labor Standards Act (FLSA). The FLSA requires employers to pay employees at least the minimum wage plus overtime pay (time-and-a-half) for every hour worked over 40 hours in a given week.

However, there are many exemptions to these requirements, including one for an individual employed in a "creative professional" capacity.<sup>3</sup> A creative professional is exempt from the FLSA's minimum wage and overtime requirements so long as he or she (1) earns at least \$455 per week; and (2) has a primary duty of performing work that requires "invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor."<sup>4</sup> This salary basis, however, is about to increase dramatically. Under the DOL's Final Rule, the minimum salary basis for exempt employees will more than double, pulling many more professionals—those who earn less than \$913 per week (or \$47,476 per year)—into the nonexempt category and qualifying them for mandatory overtime pay.<sup>5</sup>

#### IN THE NEWS

Laura Prather was recently a panelist at the Austin Film Festival's panel "Is Your Script or Production in Jeopardy!" on October 15, 2016.

#### **Who is a creative professional?**

A creative professional is an employee who uses invention, imagination, originality, or talent in his or her daily work. Courts determine whether this exemption applies on a case-by-case basis.<sup>6</sup> But it is generally safe to say that actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, and novelists are creative professionals.<sup>7</sup> Music, writing, and the graphic arts are the typical fields of artistic endeavor.<sup>8</sup> The classification gets trickier when it comes to journalists and reporters.

The crux of this determination is whether the employee’s “primary duty” is “the performance of work requiring invention, imagination, originality, or talent, as opposed to routine mental, manual, mechanical, or physical work.”<sup>9</sup> If the work could be reproduced by a person with general manual or intellectual ability or training, the exemption will not apply.<sup>10</sup> For example, a painter who is given only the subject matter of her painting and must use her creative ability to create a final product might be classified as an exempt creative professional.<sup>11</sup> On the other hand, the duties of copyists, animators, and photo retouchers probably do not require enough creativity to be exempt.<sup>12</sup>

There are no hard-and-fast rules about which jobs should be classified as exempt creative professionals. However, courts have provided enough guidance to give newspapers, periodicals, and broadcasters a good idea of which journalists and reporters may be classified as exempt. The following principles may also be helpful when looking at other categories of media employees.

- **Collecting and regurgitating facts is not exempt creative work**—Employees of newspapers, magazines, television stations, and other media are generally not exempt if they merely “collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product.”<sup>13</sup> Thus, a newspaper reporter who rewrites press releases or standard recounts of public information by gathering facts on routine events is not exempt.<sup>14</sup> However, a journalist who conducts investigative interviews, analyzes public events, writes editorials or other commentary, or performs on air in radio, television, or other electronic media will likely be exempt.<sup>15</sup>
- **Complexity matters**—Newspaper reporters who write about simple and straightforward issues that do not require much analysis are generally not exempt.<sup>16</sup> “This work does not require any special

imagination or skill at making a complicated thing seem simple, or at developing an entirely fresh angle on a complicated topic.”<sup>17</sup> On the other hand, a reporter who must spot trends, cover complex political issues, and present them in an artful manner is likely exempt.<sup>18</sup> This work requires the reporter to “cultivate sources, utilize his imagination and other skills in seeking information, and continually develop his finely tuned interviewing skills,” and to “decide what facts need to be gathered, discover sources of information, decide what information to include and exclude, choose interesting and accurate language, decide on context to add, and organize facts in coherent and logical form.”<sup>19</sup>

- **Originating story ideas indicates invention and creativity**—For television news reporters and producers, the focus is on originality. A reporter who is assigned stories by a manager and follows a standard format is generally not exempt because his work depends primarily on intelligence, diligence, and accuracy rather than creativity.<sup>20</sup> But a news writer for a national nightly news program who coordinates coverage of news and writes headlines, teasers, transitions, voice-overs, and stories must use invention and originality in his work and is generally exempt.<sup>21</sup> Similarly, a producer who generates story ideas and then develops, shoots, writes, and edits news stories must use creativity and talent and would likely also qualify as a creative professional.<sup>22</sup>

Of course, many journalists perform both exempt and nonexempt work. In such a case, classification turns on the “primary duty” of the journalist—“the principal, main, major, or most important duty that the employee performs.”<sup>23</sup> The primary duty is “what the employee does that is of principal value to the employer, not the collateral tasks that the employee may also perform.”<sup>24</sup> Although the primary duty “is often the task that occupies the majority of the employee’s time, it is not always so.”<sup>25</sup> A court decides the primary duty of an employee based on the facts in the case and looking at the job as a whole.<sup>26</sup> Factors to consider

include: the relative importance of the exempt duties as compared to other types of duties; amount of time spent on exempt duties; employee's relative freedom from direct supervision; and relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.<sup>27</sup>

This overtime regulation has attracted significant attention because so many currently exempt employees will soon fail to meet the new salary threshold required to be considered exempt. In addition to creative professionals, currently exempt white collar learned professional, executive, administrative, computer, outside sales, and highly compensated employees will also be affected by the changes.<sup>28</sup>

### Media group object

Recognizing the considerable impact the Final Rule will have on employers, state officials and business groups, including the National Association of Broadcasters (NAB), the National Newspaper Association (NNA), and the Texas Association of Broadcasters (TAB) object to the new rule and hope to stop it from taking effect on December 1st.<sup>29</sup> TAB acknowledges that an increase to the salary threshold is needed, but argues that the DOL's proposed increase is too drastic, does not account for changing economic conditions, and will disproportionately impact certain industries and geographic areas.<sup>30</sup> NAB, NNA, and TAB support legislation authored by Senator Lamar Alexander (R-Tennessee), which would implement a more moderate increase of the salary threshold—to \$692 per week (\$36,000 per year)—and exempt certain organizations, including non-profits and universities, from future increases.<sup>31</sup>

States and business groups are not the only ones concerned with the Final Rule's potential impact. In September, the House of Representatives passed H.R. 6094, the Regulatory Relief for Small Businesses,

Schools, and Nonprofits Act, which would postpone the effective date of the Final Rule until June 1, 2017.<sup>32</sup> The legislation has been introduced in the Senate, but no action has been taken yet.<sup>33</sup> The Executive Office of the President has already made clear that if presented with H.R. 6094, President Obama will veto the bill.<sup>34</sup>

### Next steps

Whether these efforts to postpone or mitigate the effects of the Final Rule succeed, employers must begin to prepare for a higher salary threshold before December 1st. Employers should audit their classification of employees and overtime policies, reclassify employees as necessary, and determine who may soon be entitled to overtime.

The DOL has provided a range of options for employers with employees affected by the new rule. For each affected employee newly entitled to overtime pay, employers may:

- increase the salary of an employee who meets the duties test to the new salary level to retain exempt status
- pay overtime rate for any overtime hours worked
- reduce or eliminate overtime hours
- reduce the amount of pay allocated to base salary and add pay to account for overtime hours, to hold total weekly pay constant; or
- use some combination of these options.

Additional information regarding the Final Rule may be found at the [Department of Labor's Wage and Hour Division website](#).

<sup>1</sup> [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees](#), 81 Fed. Reg. 32391 (proposed July 6, 2015) (to be codified at 29 C.F.R. pt. 541).

<sup>2</sup> 29 U.S.C. §§ 206, 207(a)(1)-(2).

<sup>3</sup> 29 C.F.R. §§ 541.300(a)(2)(ii), 541.302.

<sup>4</sup> 29 C.F.R. § 541.302.

<sup>5</sup> Final Rule, 81 Fed. Reg. 32391, 32405.

<sup>6</sup> 29 C.F.R. § 541.302(c).

<sup>7</sup> *Id.*

<sup>8</sup> 29 C.F.R. § 541.302(b).

<sup>9</sup> 29 C.F.R. § 541.302(a).

<sup>10</sup> *Id.*

<sup>11</sup> 29 C.F.R. § 541.302(c).

<sup>12</sup> *Id.*

<sup>13</sup> 29 C.F.R. § 541.302(d).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 (3d Cir. 1994) (reporters whose bread and butter work consisted of writing up wedding announcements, school lunch menus, arrests from the police blotter, and other similarly straightforward pieces were not exempt).

<sup>17</sup> *Id.* at 700.

<sup>18</sup> *Sherwood v. Washington Post*, 871 F.Supp. 1471, 1478 (D. D.C. 1994) (reporter whose “task was to act as a ‘translator’ and make the political events in Richmond meaningful to persons living in and around Washington” was properly classified as exempt).

<sup>19</sup> *Id.* at 1473.

<sup>20</sup> *Dalheim v. KDFW-TV*, 706 F.Supp. 493, 505 (N.D. Tex. 1988) (reporters who used a standard format in setting out competing viewpoints on each story were not exempt because their work was “not predominantly original and creative because they do not produce analytical, interpretive, or highly individualized reporting.”).

<sup>21</sup> *Freeman v. Nat’l Broadcasting Co., Inc.*, 80 F.3d 78, 81 (2d Cir. 1996).

<sup>22</sup> *Id.*

<sup>23</sup> 29 C.F.R. § 541.700(a).

<sup>24</sup> *Truex v. Hearst Communications, Inc.*, 96 F.Supp.2d 652, 657 (S.D. Tex. 2000).

<sup>25</sup> *Id.*

<sup>26</sup> 29 C.F.R. § 541.700(a).

<sup>27</sup> *Id.*

<sup>28</sup> 29 C.F.R. §§ 541.100, 541.200, 541.300, 541.400, 541.500.

<sup>29</sup> Officials from 21 states as well as more than 50 business groups have sued the DOL to challenge this rule, hoping to block the regulation from taking effect. The two lawsuits were consolidated under *Nevada et al. v. U.S. Dep’t. of Labor et al.*, Case No. 4:16-cv-731-ALM, in the U.S. District Court for the Eastern District of Texas. For more information and a list of the states that have joined in the lawsuit, see [States and Business Groups Sue U.S. Department of Labor Seeking to Block New Overtime Rule](#), *The Nat’l Law Review* (Sept. 23, 2016).

<sup>30</sup> TEXAS ASS’N OF BROADCASTERS, [TAB Joins Effort to Fight New Overtime Rules](#) (Oct. 18, 2016).

<sup>31</sup> *Id.* The text of Senator Alexander’s proposed legislation can be found [here](#).

<sup>32</sup> H.R. 6094, 114th Cong. (2016), [available here](#).

<sup>33</sup> S. 3464, 114th Cong. (2016), [available here](#).

<sup>34</sup> Office of Mgmt & Budget, Exec. Office Of The President, Statement of Administration Policy: H.R. 6094—Regulatory Relief for Small Business, Schools, and Nonprofits Act (2016), [available here](#).

## Drone Journalism: Cleared for Take-off

Alicia Calzada



Alicia Calzada

Now that the FAA has cleared drone journalism for take-off, reporters and photographers throughout the country are positioning themselves to take advantage of an entirely new storytelling tool, using unmanned aerial systems (UAS or drones) for newsgathering. Prior to the FAA’s enactment of rules for commercial drone use this summer, the agency had taken the position that all commercial use of drones was banned—and it considered journalism a commercial use. But while technology brings progress, it always brings questions and concerns, and drones are no exception.

There are three main considerations when engaged in drone journalism: FAA rules, state and local rules that target drone use, and other laws that may impact drone use.

First, the FAA has not given an unconditional clearance. Drone journalists must obtain a Remote Pilot Certificate. Most journalists will do this by passing

an “aeronautical knowledge test”<sup>1</sup> at an FAA-approved testing center,<sup>2</sup> although those who already have a pilot’s license can take an online training course.

Once certified, journalists still face limits on when and where they can fly drones.

- Drones can only be operated in the daytime. This includes 30 minutes before the sun rises and 30 minutes after the sun sets (a.k.a. civil twilight).
- They may not be operated “over” people who are not involved in flying the UAS. Notably, the rule does not limit how close the UAS can get to people, so long as the UAS is not “over” people.
- The aircraft must remain in the visual line of sight of the operator, called the remote pilot in command. There is an option that allows the use of a visual observer to maintain visual sight of the craft. In other words, even if you have a “first person view camera” which allows you to see the view of the drone while you fly it, you must be able to see the aircraft with your own eyes (glasses to assist your vision are allowed).
- The drone cannot be flown faster than 100 mph, and cannot fly higher than 400 feet above the ground.
- Flying is limited in certain areas and prohibited in other sensitive areas. Some locations, including within certain distances of airports, require advanced authorization. The FAA has created an app to assist operators in determining restrictions in their area.

The FAA has specifically noted that the news media can request a waiver of these sorts of limitations but “will need to provide sufficient mitigations to ensure public safety.”<sup>3</sup>

Journalists also need to keep in mind that some states have enacted laws that restrict drone use. Many states, including Texas, California, and Florida, have passed

drone laws aimed at protecting privacy and other interests,<sup>4</sup> which may apply to journalistic activities<sup>5</sup>. In 2015, 45 states considered bills related to drones, so with every legislative session, there is potential for new drone laws to be passed.<sup>6</sup> Municipalities are also getting in the game, enacting ordinances that apply in those locations.<sup>7</sup> Some of these state and local laws might ultimately be pre-empted by FAA rules, or otherwise held to be unconstitutional, but violating them with the thought or hope that they will later be found unconstitutional is a legal risk.

Drone operators also need to be mindful that existing laws such as those regulating invasion of privacy and wiretapping apply both on the ground and in the air. The concept of invasion of privacy traces back to the invention and popularization of the camera—so it is only natural that the ability to put wings on a camera has upped the ante for those who are concerned about privacy.

Journalists operate under a code of ethics, and should be careful not to deviate from that code under the lure and pizzazz of a new tool. Drone journalism has enormous potential to add depth and understanding to reporting, without the expense and high risk of helicopters. With FAA guidelines now settled, this industry should begin to take off in earnest.

<sup>1</sup> The FAA has provided [study materials](#) for the Remote Pilot Knowledge Test.

<sup>2</sup> A list of testing centers can be found [here](#).

<sup>3</sup> See [Unmanned Aircraft Systems \(UAS\) Frequently Asked Questions](#), Federal Aviation Administration.

<sup>4</sup> There is also a federal law that makes it illegal to operate an unmanned aircraft in a manner that interferes with wildfire suppression, law enforcement and emergency response efforts. See 49 U.S.C. §46320.

<sup>5</sup> The Texas law bans drone use to capture an image of “an individual or real property with the intent to conduct surveillance” and publishing that image. See Tex. Gov’t Code §423.001 et seq. Florida’s law similarly targets surveillance. See Fla. Stat. §934.50(3)(b). The definition of “surveillance” arguably encompasses many journalistic activities.

<sup>6</sup> [State Unmanned Aircraft Systems \(UAS\) 2015 Legislation](#).

<sup>7</sup> *Domesticating the Drone: Local Regulation*, Institute for National Security and Counterterrorism, available [here](#).

UPCOMING SPEECHES

**Thomas J. Williams**  
**Open Government Seminars**  
[Texas Attorney General's Office and Freedom of Information Foundation of Texas](#)



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