

# Editors Only.

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## ***When are Journalists Entitled to Overtime Pay?***

*Criteria for determining who's exempt — and who isn't.*

By Patricia Donohue

**M**ost staff reporters put in extra hours — but how many actually *put in* for them? Do you pay your journalists overtime? If you're among those who have made it

policy *not* to compensate for hours exceeding a reporter's scheduled work week, better be certain the law's on your side. "The federal Fair Labor Standards Act (FLSA) provides that employ-

ees covered by the FLSA are usually entitled to overtime compensation when they work extra hours," asserts Lawrence Savell, legal Counsel of the law firm ChadBourne & Parke LLP, in New York City. Savell specializes in products liability and media law defense and counseling. "However," Savell points out, "the FLSA exempts 'executive, administrative and professional employees.'" The issue, he says, is whether reporters are to be considered "artistic" "professionals" (a term of art) under the statute. Under the FLSA, notes Savell, it is the employer who

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## When Are Journalists Entitled to Overtime Pay?

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bears the burden of proving that employees fall within this exemption.

### Cases in Point

Savell cites several cases in which different courts reached varying decisions, based on the particular facts presented in each case. In *Sherwood v. The Washington Post*, 1994, the United States District Court for the District of Columbia ruled that a reporter for the *Washington Post* was not entitled to overtime pay. "It concluded that the reporter, who was required to originate story ideas, maintain a wide network of sources, write engaging, imaginative prose, and produce stories containing thoughtful analysis of complex issues, was an 'artistic' 'professional' exempt from the overtime compensation requirements." But in *Reich v. Newspapers of New England, Inc.*, 1995, the U.S. Court of Appeals for the First Circuit ruled in favor of compensating newspaper reporters for overtime. "It concluded that reporters for a community newspaper whose day-to-day duties consisted primarily of general assignment work, which required intelligence, diligence and accuracy rather than creativity, invention, and imagination, were not 'artistic' 'professionals' exempt from the overtime compensation requirements," he says.

After reviewing these and other related decisions, Savell compiled the following list of qualities to be considered regard-

ing your own stable of journalists to, he says, arguably qualify them as "artistic" "professionals":

### Possible Criteria

—Produce work which *depends primarily on and requires consistent exercise of creativity, invention, imagination and talent* (these are the key criteria, which should be fleshed out in detail, beyond just intelligence, diligence, and accuracy).

—Perform work that is predominately (if not exclusively) *original and creative in character, analytical, interpretative, and highly individualized*.

—Originate story ideas.

—*Develop and maintain a wide network of sources for difficult-to-obtain information.*

—Write *engaging, imaginative prose*.

—Produce stories containing *thoughtful analysis of complex issues*.

—*Make complicated matters simple* to readers.

—Develop *entirely fresh angles* on topics.

—*Editorialize* about and inter-

pret events covered.

—*Consistently exercise discretion and judgment* ("not a robot run by his editors" or a "leg man sent under specific instructions" to cover particular stories).

—"The type of fact-gathering that demands the skill or expertise of an investigative journalist for the *Philadelphia Inquirer* or *Washington Post*, or a bureau chief for the *New York Times*."

—"Editorial writers, columnists, critics, and 'topflight' writers of analytical and interpretive articles."

Essentially, he says, editors need to: "Show that work done is not predominately functional in nature, and is far more than general assignment work, routine fact-gathering, recasting press releases or information taken from a police blotter, preparing skeletal obituaries or real estate transaction reports, reporting about routine community events such as lunch menus and church reports in standard format."

*Patricia Donohue is the assistant editor of Editors Only.* ♦