

Port Administration & Legal Issues Seminar

ELECTING THE CORRECT EXEMPTION CHOICES UNDER THE FAIR LABOR STANDARDS ACT

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FLSA SUITS: EMPLOYERS' BANE

- Suits alleging misclassification from FLSA's overtime requirements continue to proliferate
- Suits often filed as collective actions, state law class actions, or as "hybrids" alleging both
 - Notice to hundreds or thousands of employees
 - May include state law claims (larger classes)
- Potential individual liability for officers and managers: "any person acting directly or indirectly in the interest of the employer in relation to any employee"; "person" includes "individual" 29 USC 203

THE NUMBERS DON'T LIE

- Over last 20 years, volume of FLSA suits has grown nearly five-fold:
 - 1993: 1457 suits
 - 2012 (through March 31): 7064 suits
- In that same period, volume of FLSA collective actions has grown nearly twenty-five-fold:
 - 1993: 92 collective actions
 - 2011 (through December 31): 2290

WHITE COLLAR EXEMPTIONS

- “White Collar” Exemptions: Not subject to minimum wage or overtime requirements of FLSA
- Categories of exemption are reflective of office or non-manual labor jobs:
 - Outside Sales
 - Executive (Managerial)
 - Administrative
 - Professional
 - Computer Professional

FACTS COMMON TO EXEMPTIONS

- Pay on a “salary basis”—FIXED minimum of \$455 per week (does not apply to outside sales)
- Key inquiry is what is the “primary duty”—the “principal, main, or most important duty”
 - Exception for “highly compensated” employees (those making at least \$100,000 per year)—need only satisfy one duties element for executive, administrative, professional (does not apply to outside sales)
- Exemptions are **affirmative** defenses

PRIMARY DUTY FACTORS

- Relative importance of exempt duties compared to other types of duties
- Amount of time spent performing exempt work (not a bright line)
 - Remember “concurrent duties” rule
- Relative freedom from direct supervision
- Relationship between exempt employee’s salary and hourly wages of non-exempt workers

OUTSIDE SALES

- Primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities with payment by client
 - Can be promotion work if part of individual's own sales efforts; not general marketing
 - Includes “consignment for sale,” sweeping in pharmaceutical reps, who can't “sell” drugs

and

- The employee must be customarily and regularly engaged away from the employer's place or places of business
 - Selling from cubicle or home office won't cut it

EXECUTIVE

- Primary duty is management of an enterprise **OR** a “customarily recognized department or subdivision”
- Customarily and regularly directs the work of 2 or more employees
- Authority to hire, fire, promote, other change of status **OR** whose suggestions as to same are “given particular weight”

WHAT “MANAGEMENT” MEANS

Non-exhaustive list:

- Interviewing, selecting, and training
- Setting pay and work schedules
- Planning and directing work
- Maintaining sales or production records
- Handling complaints
- Disciplining employees (see also hire/fire requirement)
- Determining materials and equipment to be used or purchased
- Dealing with safety and security issues

EXECUTIVE CONTINUED

- Enterprise, subdivision or department: a unit with permanent status and function, not just occasional collection of employees
- 2 or more employees: at least 80 hours of employees per week; can be part-timers; manager does not always have to be present

EXECUTIVE CONTINUED

- Customarily and regularly: not occasional or isolated, but not constant; every workweek
- Hire/Fire: part of the employee's job duties to make recommendations; can be subject to higher level review and override; need not make ultimate decision

ADMINISTRATIVE

- Primary duty must be the performance of **office or non-manual work** directly related to the **management or general business operations** of the **employer** or the employer's **customers**; and
- Primary duty *includes* the exercise of **discretion and independent judgment** with respect to **matters of significance**

ADMINISTRATIVE FUNCTIONS

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and health

ADMINISTRATIVE FUNCTIONS CONT. . . .

- Personnel management
- Human resources
- Employee benefits
- Labor relations
- Public relations
- Government relations
- Computer network
- Internet and database administration
- Legal and regulatory compliance
- And similar activities . . . !

DIRECTLY RELATED TO MANAGEMENT

- Directly related to management or general operations: assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment
 - Can be the business of the employer's customers (e.g., financial advisors)
- Production vs. administrative dichotomy
 - Not bright line, but does have utility

DISCRETION AND INDEPENDENT JUDGMENT

Nonexhaustive list of factors that suggest discretion and independent judgment:

- Authority to formulate, affect, interpret, or implement management policies or operating practices;
- Carries out major assignments in conducting the operations of the business
- Performs work that affects business operations to a substantial degree, even if work is related to a particular business segment;
- Authority to commit the employer in matters that have significant financial impact
- Authority to waive or deviate from established policies and procedures without prior approval;

DISCRETION AND INDEPENDENT JUDGMENT

Continued . . .

- Authority to negotiate and bind company on significant matters;
- Provision of consultation or expert advice to management;
- Involvement in planning long- or short-term business objectives
- Investigation and resolution of matters of significance on behalf of management;
- Representation of the company in handling complaints, arbitrating disputes or resolving grievances

DISCRETION AND INDEPENDENT JUDGMENT (CONT....)

- Just because decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.
- But, must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

MATTERS OF SIGNIFICANCE

- Level of importance or consequence of the work performed
 - Prospect of financial loss if the employee does job improperly does not make it a matter of significance (e.g., messenger who loses large sums of money)
 - Also, fact that employee's error might cause serious damage to expensive equipment does not mean it is a matter of significance

DOL EXAMPLES OF ADMINISTRATIVE EMPLOYEES

- Team leader for collective bargaining negotiations
- Human resources manager (might also be an executive)
- Project manager—purchasing or selling a business or property, leading a team implementing productivity changes, etc.
- Purchasing agents with significant authority

SOME EXAMPLES OF TROUBLE SPOTS

- Inspectors: typically not exempt, even if highly technical and requires years of experience or even certification
 - Not comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered
 - Rather, usually applying techniques from a manual
- Accounting department personnel: reviewing ledger entries for accuracy, tabulating information, preparing reports—all non-exempt. However, audit of books and calculation of costs can be exempt

SOME EXAMPLES OF TROUBLE SPOTS

- Lower-level HR employees (e.g., personnel clerks): reviewing applications and rejecting them because they do not meet criteria. Usually not good enough. Not setting criteria, or evaluating which candidate to hire from pool
- Purchasing agents who do not choose among vendors or negotiate prices, but rather place orders based on shortages in inventory—not exempt

ADMINISTRATIVE EXEMPTION: WRAP UP

- Highly fact specific
- Broadest exemption in terms of positions covered
- Hardest one to apply
- One most often misunderstood:
 - Applied to employees in office environment or to highly technical jobs
 - Employees are higher level than a receptionist or basic secretary, or, if in the field, do not do manual labor

LEARNED PROFESSIONAL EXEMPTION

- Can be paid on a “fee” basis, rather than just a salary basis
- 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*;
- The advanced knowledge must be in a field of science or learning; and
- **The advanced knowledge** must be *customarily* acquired by a **prolonged course of specialized intellectual instruction**

WORK REQUIRING ADVANCED KNOWLEDGE

- Cannot be obtained at the high school level
- Usually involves analyzing, interpreting, or making deductions from varying facts or circumstances
- Case-by-case approach

WORK REQUIRING ADVANCED KNOWLEDGE

Examples of Yes--

- Sales engineers who collected data, verified industry and market standards, and developed engineering specifications
- Construction superintendent with BS in civil engineering and construction plus class A builders' license

WORK REQUIRING ADVANCED KNOWLEDGE

Examples of No--

- Respiratory Therapists, despite possession of associate's degree and high level of skill
- Helicopter Pilot (“merely highly trained technicians”);
 - But, yes for airline pilot with commercial license and instrument rating, given “extensive knowledge of aerodynamics, airplane regulations, airplane operations, instrument procedures, aeronautical charts and weather forecasting”

DISCRETION AND JUDGMENT

- Not discretion and “independent” judgment, so not as stringent as administrative exemption
 - Not mechanical or routine duties
 - Need to be making some independent judgments (e.g., a pilot deciding if weather is safe to fly, a construction superintendent making adjustments to design plans, etc.)
- BUT, must be “consistent” exercise, where administrative test is that primary duty “includes” exercise, without a requirement that it be exercised regularly or consistently

FIELD OF SCIENCE OR LEARNING

- **Obvious ones:** law, medicine, accounting, engineering, hard sciences (chemistry, biology, pharmacy)
- **Not obvious:** pilots. DOL says no, because aviation not a “field of science or learning,” but Fifth Circuit said yes. Paul v. Petroleum Equip. Tools Co., 708 F.2d 168 (5th Cir. 1983).
- **No:** electrician occupation, ultrasound technologist, avionics technicians, most health care technical occupations (dietitian, X-ray techs, paramedics, medical coders)

CUSTOMARILY ACQUIRED BY A PROLONGED COURSE OF SPECIALIZED INSTRUCTION

- Customarily acquired—standard prerequisite for entrance in field
 - CAN be acquired through work experience and instruction, but not if MOST employees in field get knowledge via experience rather than instruction
- Example: Product design specialist for oil drilling rigs did not meet requirement, despite need for 12 years of relevant experience; no educational prerequisite and no one in job had a college degree. Young v. Cooper Cameron Corp., 586 F.3d 201 (2d Cir. 2009)

COMPUTER PROFESSIONAL

- High standard
- Systems analysts, programmers, software engineers, and the like
- NOT help desk employees
- NOT even a “systems engineer,” who identified computer solutions for client—did not design, create, or modify systems or programs. BUT, could be administrative.