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A Closer Look At FLSA's Computer Professional Exemption

The Fair Labor Standards Act requires the payment of overtime to all employees unless their work fits within one of the statute's exemptions. The burden of proof for establishing that an FLSA exemption applies to a particular position rests with the employer, and the exemptions are narrowly construed against employers seeking to assert them. This analysis addresses whether the FLSA computer professional exemption and/or the administrative employee exemption apply to information technology/computer staff.[1]

The Computer Professional Exemption

The U.S. Department of Labor regulations at 29 C.F.R. §541.400(b) require that in order for an employee to qualify as an exempt computer professional, the employee's "primary duty" must consist of the performance of any of the following duties, or any combination thereof, the performance of which requires the same level of skills:

1. The application of systems analysis techniques and procedures including consulting with users, to determine hardware, software or system functional specifications;

2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or

[1] The so-called "white collar" exemptions also include executive and professional employees and outside sales persons who are paid on a commission basis. We did not analyze the applicability of those exemptions, as they seem unlikely to apply here.

3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

The courts narrowly construe the computer professional exemption. Specifically, the courts generally require that to fall within the computer professional exemption an employee's primary duty "must require 'theoretical and practical application or highly-specialized knowledge in computer systems analysis, programming and software engineering' not merely 'highly-specialized knowledge of computers and software.'" Jackson v. McKesson Health Solutions LLC, 10 WH Cases 2d (BNA) 374 (D. Mass. 2004). Significantly, writing computer code has been held to be "critical to the analysis of this exemption." Cruz v. Lawson Software Inc., 764 F.Supp. 2d 1050, 1064 (D. Minn. 2011).

Further, on the compensation side, in order to satisfy the exemption the employee must be paid at least $455 per week on a salary basis[2] or on an hourly basis at a rate not less than $27.63 an hour. Unlike other exemptions, there is no requirement that the employee be paid a weekly salary.

Administrative, professional and computer employees may also be paid on a "fee basis." If the employee is paid an agreed sum for a single job, regardless of the time required for its completion, the employee will be considered to be paid on a "fee basis." A fee payment is generally paid for a unique job, rather than for a series of jobs repeated a number of times. To determine whether the fee payment meets the minimum salary level requirement, the test is to consider the time worked on the job and determine whether the payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours.

Case law provides guidance on how to determine whether an employee is exempt under the computer professional exemption. In Allen v. Enabling Technologies Corp., 2016 U.S. Dist. LEXIS 106005 (D. Md., Aug. 11, 2016), the district court denied summary judgment because there were genuine issues of material fact as to whether the FLSA exemption applied to the plaintiffs. The issue turned on what constituted each plaintiff's primary duty, or the "'principle, main, major or most important duty that the employee performs.' 29 C.F.R. § 541.700(a)." Id. at *17. Specifically, the court found that "[p]laintiffs have submitted evidence showing that their primary duties were equivalent to those of help-desk employees, exempt [sic] from the FLSA's overtime provisions, while Defendant has submitted evidence showing that Plaintiffs performed high-level work as contemplated by the computer professional exemptions." Id. at *23-24. The court held that it could not determine whether the employees were exempt, or not, without findings of fact as to the type of work that constituted their primary duties.

In Ortega v. Bel Fuse Inc., 2016 U.S. Dist. LEXIS 52867 (S.D. Fla., Apr. 20, 2016), which also analyzed the computer professional exemption, the court did grant summary judgment for the defendant upon determining that the facts were clear regarding the plaintiff's responsibilities. The plaintiff, Ortega, "holds multiple certificates in network administration and computer development; held the title of IT Manager and/or Network Administrator/Engineer II for a global corporation that employs more than 5,000 people around the world; and had duties consisting of analyzing, troubleshooting, and testing Bel Fuse's systems networks; and developing a back-up test database, creating a back-up software system and system upgrades." Id. at *36-37. He also admitted that "[n]o one had to instruct [him] on how to test the system and network to make sure they were running properly." Id. at *38. Thus, the court concluded that he fell within the computer professional exemption of the FLSA.

Summary judgment was also granted in Grills v. Hewlett-Packard Co., 88 F. Supp. 3d 822 (N.D. Ohio 2015), where the plaintiff was deemed to be exempt from overtime "because he is a skilled computer professional whose primary duty involves analyzing, testing, documenting, and modifying computer networking systems." Id. at 826; see also Benedict v. Hewlett-Packard Co., 2016 U.S. Dist. LEXIS 91139, *28-32 (N.D. Cal. July 13, 2016). "Acknowledging that there were no 'canned answers' to the problems presented, [plaintiff] had to be creative, analyze the issue, determine what tests needed to be run, and recommend a solution. Customers sought him out due to the high level of skill and expertise." Id. The

[2] The Department of Labor's most recent proposed changes to the regulations defining the FLSA's thresholds for exemption would increase the salary basis requirement from $455 per week to $970 per week. That change is presently enjoined by a federal court order. However, some states already require a higher salary threshold.

plaintiff "had obtained multiple technical certifications reflecting his high level of competence." Id. at 827. Significantly, "plaintiff testified that he does not perform duties such as manually installing hardware and cables for networks, installing hardware on workstations, configuring desktops, manually checking cables, or manually going to a customer site and replacing hardware." Id. Courts have found that "lower level" duties such as those weigh against a finding that an employee is exempt. See id. at 828. The Grills court also noted that computer professionals who were able to resolve a technical matter during a phone call are less likely to be exempt; the plaintiff Grills "took weeks, or longer, to resolve issues." Id. at 829.

The Administrative Employee Exemption

The application of any FLSA exemption is highly fact-specific; however, an information technology/computer staff employee may fit within the "administrative" exemption, whether or not the employee meets the "computer professional" exemption. The analysis always starts with the DOL regulations defining and explaining the general requirements for application of the exemption. Accordingly, the DOL regulations at 29 C.F.R. § 200(a) set out the general requirements to be met for an employee to qualify as an exempt "administrative" employee" as follows:

1. The employee must be compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities;[3]

2. The employee's primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers;

- The term "primary duty" refers to "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). The amount of time an employee spends on any given task is not determinative of whether that task is the employee's "primary duty." Rather, "an employee's primary duty is that which is of principal importance to the employer, rather than collateral tasks which may take up more than fifty percent of his or her time." Id.
- The phrase "directly related to the management or general business operations of the employer or the employer's customers" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to 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. 29 C.F.R. § 541.200(a). This requirement can apply where the employee's primary duty involves acting as an adviser or consultant to the employer's customers. 29 C.F.R. § 541.201(b).

3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

- The requirement that the employee's primary duty necessitates the use of "discretion and independent judgment" in matters of significance generally means that the employee's primary duty involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. 29 C.F.R. § 541.202(a).
- The term "matters of significance" refers to the level of importance or consequence of the work performed. Id.

[3] See note 2.

- Whether an employee "exercises discretion and independent judgment" in matters of significance includes factors such as: (1) whether the employee has authority to formulate, affect, interpret or implement management policies or operating practices; (2) whether the employee carries out major assignments in conducting the operations of the business; (3) whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; (4) whether the employee has authority to commit the employer in matters that have significant financial impact; (5) whether the employee has authority to waive or deviate from established policies and procedures without prior approval; (6) whether the employee has authority to negotiate and bind the company on significant matters; and (7) whether the employee provides consultation or expert advice to management. 29 C.F.R. § 541.202(b).
- Finally, the exercise of "discretion and independent judgment" implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. The term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. 29 C.F.R. § 541.202(c).

On April 20, 2004, the U.S. Department of Labor, Wage and Hour Division, issued the new exempt status rules for "white collar" employees under the Fair Labor Standards Act (29 C.F.R. § 541 et seq.). Prior to the revision, the regulation laid out in former 29 C.F.R. § 541.207 read:

> (a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in subpart A of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

The new language, found in 29 C.F.R. § 541.202(a) reads:

> (a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

The revised regulations modernized the standard to determine whether executive, administrative, professional, outside sales and computer employees are exempt from the overtime requirements of the FLSA. The revision did not, however, change the fact that the administrative exemption regulations establish a two-part inquiry for determining whether an employee is exempt: (1) what type of work is performed by the employee?; and (2) what is the level or nature of the work performed?

The sections use nearly identical wording, and the revision was not intended to change the law. The post-2004 regulation, which excludes duplicative and confusing language included in the pre-2004 statute, provides clarity while maintaining the legal standard. Like 541.207(a), subsection 541.202(a) provides

that discretion and independent judgment must be exercised "with respect to matters of significance." Thus, 29 C.F.R. § 541.207 is still cited even in cases decided after the revision. "The determination of whether an employee exercises discretion and independent judgment is based on an evaluation of the totality of the facts involved in the particular employment situation. 29 C.F.R. Former § 541.207(b)." Federico v. Overland Contr., Inc., 2013 U.S. Dist. LEXIS 144146, *43 (N.D. Cal., Oct. 4, 2013); see also Patel v. Nike Retail Services, 2016 U.S. Dist. LEXIS 45588, *22-23 (N.D. Cal., March 29, 2016) (denying class certification because, among other reasons, the plaintiff "would have us … draw inferences about what every [employee] actually does and how much independence every [employee] actually exercises, while essentially ignoring the declarations from both sides … that indicate a lack of classwide uniformity) (internal quotation omitted).

The regulation explains in subpart (d) that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." 29 C.F.R. Former § 541.207(a) and (d). See Robinson-Smith v. Government Employees Insurance Co., 590 F.3d 886, 895 (D.C. Cir. 2010) (holding that the plaintiff exercised discretion "free from immediate direction or supervision and with respect to matters of significance, making them exempt administrative employees under the FLSA and the applicable DOL regulations"). In order to satisfy this part of the administrative employee exemption analysis, the employee's exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action; unlimited authority and a complete absence of review are not required. 29 C.F.R. Former § 541.207(e).

"Finally, an exempt administrative employee must exercise discretion and independent judgment 'customarily and regularly,' a requirement that is met by the employee who 'normally and recurrently' is called upon to exercise discretion and independent judgment in the day-to-day performance of his duties, but not by only the 'occasional exercise' of discretion or independent judgment. 29 C.F.R. Former § 541.207(g)." Federico at *44.

As noted, application of these regulatory requirements and standards is done on a case-by-case basis. While not uniform, courts have applied the above regulatory requirements and standards to find the "administrative" exemption applicable to information technology/computer staff positions under certain circumstances.

In Cruz v. Lawson Software Inc., 764 F.Supp. 2d 1050, 1064 (D. Minn. 2011), the court analyzed the consultants' duties under the second and third prongs of the "administrative" exemption under the DOL regulations cited above, and concluded that the Lawson consultants came within the exemption. Specifically, in Cruz, the evidence showed that Lawson's consultants consulted with Lawson's customers and assisted in implementing and configuring Lawson software to run the client's business in a more efficient way.

In so doing, the court noted that the consultants were problem solvers similar to employees in other cases who had also been found to be exempt administrative employees because their "primary duty" involved: (1) solving problems with the employer's own computer system; or (2) consulting with the employer's clients regarding the implementation and configuration of the employer's software to modify it to suit the employer's customers' needs. Cruz, at 1066-1067, citing Koppinger v. American Interiors Inc., 295 F. Supp., at 802 ("Plaintiff's work, furthermore, was comprehensive in nature, and ranged from investigating problems, to considering possible solutions and implementing, in plaintiff's opinion, the best solution," and Paul v. One Touch Technologies Corp., at *4-6 (Cal. Ct. App., June 21, 2007) (unpublished) (holding administrative employee exemption applied to an employee who acted as a consultant to the employer's clients regarding development and configuration of software and who "was engaged in testing and configuring the employer's software and modifying it so that it could function in each unique client environment"). Based on this analysis, the Cruz court found that Lawson's consultants' "primary duty" was "directly related to management or general business operations of the employer or the employer's customers," thus satisfying the second prong of the exemption as articulated by 29 C.F.R. §200(a).

The Cruz court further concluded that Lawson's consultants exercised discretion and independent judgment with respect to matters of significance within the meaning of the third prong of the exemption analysis articulated at 29 C.F.R. §541.202(a) because they were problem solvers for Lawson's clients. In this regard, the court noted that although the consultants provided weekly status reports to Lawson project managers on projects to which they were assigned, there was no evidence of day-to-day supervision of their work by the project managers. As a result, the court concluded, they largely solved client's problems without substantive guidance from the Lawson project managers and satisfied the test for exemption.

Beyond Cruz, other courts have concluded that information technology staff satisfied the "administrative" exemption standard. For example, in Carbaugh v. Unisoft International Inc., (S.D. Texas, Nov. 15, 2011) (unpublished), the evidence showed that the employee's responsibilities included installing and tailoring the employer's software to suit the employer's client's needs, trouble shooting problems, training the clients, working with the employer's programmers and coders to provide them with information they needed to produce software that suited the client's needs, verifying that software performed as needed, and consulting with clients for new product ideas and enhancements.[4] The court concluded that the employee's responsibilities met the criteria for the "administrative" exemption and granted the employer's motion for summary judgment on the employee's claim for overtime pay.

Similarly, in Verkuilen v. Mediabank, at *4 (N.D. Ill. May 19, 2010), aff'd. 646. F3d 979 (7th Cir. 2011), the Seventh Circuit upheld a finding that the "administrative" exemption applied where the employee provided service and support to customers who bought her employer's software, agreeing that the employee exercised discretion and independent judgment because "when confronted with client's problem in using [her employer's] software, [the employee determined] the nature of the problem and how to handle it." Finally, the Fifth Circuit held in Morgan v. CMS/Data Corp., Civ. Action No. H-97-0322 (S.D. Texas 1998, aff'd 166 F.3d 341 (5th Cir. 1988) that a project manager whose main job was to oversee the implementation of and conversion to employer's billing software at all offices of her employer's customers was covered under the "administrative" exemption.

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[4] Developing procedures for the operation of an employer's business often meets the "administrative" employee primary duty test. In Renfro v. Indiana Michigan Power Company, 497 F.3d 573, 577 (6th Cir. 2007), the plaintiffs were technical writers who developed procedures for maintaining their employer's nuclear power plant equipment. Although there was a procedural manual to guide them, the manual was not a set of strict requirements governing the contents of the procedures developed. The Renfro writers used their experience and judgment in selecting the best method to maintain the equipment when they developed a procedure and did not perform their work under constant supervision. The Sixth Circuit held that the technical writers were exempt as "administrative" employees.