
Coates' Canons Blog: The FLSA's Administrative Exemption from Overtime Pay, Part 2: Some Examples

By Diane Juffras

Article: <https://canons.sog.unc.edu/the-flsas-administrative-exemption-from-overtime-pay-part-2-some-examples/>

This entry was posted on July 18, 2014 and is filed under Compensation & Benefits, Employment, Fair Labor Standards Act, General Local Government (Miscellaneous)

In previous blog posts, I discussed the executive and administrative exemptions to the Fair Labor Standards Act rule that an employee is entitled to overtime pay after working 40 hours in a week. When an exemption applies, the position is said to be “exempt” and the employee is not entitled to overtime pay even at 60 or 80 hours worked in a week. Whether a position is exempt under the executive duties test or the administrative duties test, it must satisfy the following requirements:

- the position must be paid on a salary basis; and
- the position is must be paid a minimum of \$455 per week.

The executive duties test evaluates whether the position is a management position with significant authority over other employees. The administrative duties test evaluates whether the position is an office position that supports management and has significant decision making authority in areas other than supervision of employees. To satisfy the administrative duties test, a position must meet an additional two requirements. The position must also:

- have a primary duty of office or nonmanual work directly related to management or general business operations of the employer, and
- perform work requiring the exercise of discretion and independent judgment on matters of significance to the employer.

As I noted in my earlier blog post on the administrative duties test, these two requirements are anything but straightforward. In this blog post, I'll continue the discussion of the administrative duties test by taking a close look at some examples.

Background

Under the FLSA, exempt employees may be required to work in excess of their scheduled workweeks without any overtime pay. Nonexempt employees, however, must be paid overtime at a rate of time-and-one-half their regular rate of pay for every hour over 40 worked in a given workweek. The fact that an employee is paid on a salary basis does not by itself make that employee an exempt employee. The position also must meet one of the duties tests. For the administrative duties test, as for the executive duties test, the specific duties and responsibilities of the individual position — not job title or job description — determines whether or not the position is exempt from overtime.

Positions That Are Sometimes Hard to Classify

In the public sector, one of the most frequent issues arising in contested FLSA classifications is whether the position satisfies the requirement that its duties be directly related to management or general business operations, or whether the duties are better characterized as core government or mission work. When the job is one that exists in both the public and private sectors, the issue is most often whether the employee in the position exercises discretion and independent judgment in matters of significant to the employer. To better understand these issues, let's take a look at three positions found in the imaginary city of Paradise, North Carolina: city planner, accountant and management analyst.

The City Planner

City and county planners are one of linchpins of local government. The U.S. Department of Labor Bureau of Labor Statistics' occupational dictionary describes urban and regional planners as positions that "develop plans and programs for the use of land. Their plans help create communities, accommodate population growth, and revitalize physical facilities in towns, cities, counties, and metropolitan areas." In the city of Paradise, the city planner position performs the following duties:

- handles the subdivision process;
- conducts site plan reviews for compliance with setback uses, zoning, landscaping, and parking codes;
- recommends approval or disapproval of plans or site plan modifications;
- administers zoning, subdivision, open space and other planning regulations;
- works with applicants, citizens, and industrial and commercial representatives in preparing development applications; and
- appears before planning boards and governing boards.

Paradise had long classified the non-supervisory positions in its planning departments as exempt. The city's human resources director and attorney have recently concluded that this classification is incorrect and that the positions of City Planner 1, City Planner II and Senior Planner should all be classified as nonexempt and should be paid overtime when they work in excess of 40 hours in a workweek. How did they reach this conclusion?

The first prong of the administrative duties test asks whether the position has a primary duty of office or nonmanual work directly related to management or general business operations of the employer. The duties of city (and county) planners clearly qualify as nonmanual work and take place, for the most part, within an office setting. So far, so good. But the work of local government planners is not related to the management or general business operations of the employing government unit. I discussed the meaning of management here in an earlier blog post on the executive exemption to the Fair Labor Standards Act. Examples of the particular kinds of duties that the U.S. Department of Labor considers to be "management" duties includes:

- interviewing, training, and selecting employees;
- setting and adjusting pay and hours;
- planning, apportioning, directing the work of other employees;
- evaluating the productivity and efficiency of other employees;
- recommending promotions for other employees;
- handling complaints and grievances;
- planning and controlling the budget;
- monitoring compliance with laws regulating the operation of the government unit;
- imposing penalties for violations of workplace rules;
- implementing training programs; and
- handling community complaints about employees and the overall operation of the organization.

The duties of the Paradise planners (and of most local government planners) do not directly relate to any of the items on the Department of Labor's list of management duties.

The planner's duties fall squarely within the boundaries of what I refer to as a local government's mission work. In an earlier blog post, I discussed the distinction between the basic work or mission of an organization and the other kinds of work that is necessary for the organization to be able to do its basic work. The mission work of local government is to provide those services that only local government provides: public safety, roads, utilities and the like. What is the basic or mission work of the Paradise planning department? When asked, the Paradise planning director replies that it is to develop and implement land use plans within the jurisdiction and to develop plans related to the need and placement of community facilities, parks and open spaces, to coordinate land use plans with transportation and transit plans, to work with the jurisdiction's economic development team and to review development proposals, to coordinate rezoning and approve subdivision plans, and sometimes, to facilitate the annexation process.

The work of the Paradise planning department is the basic work of local government, as core a form of mission work as is

law enforcement and firefighting. It is what local government exists to do. As such it is not work related to the management or business operations of city. Rather, the management and business operations of the city exist to facilitate the work of planners, as well as that of police, firefighters, emergency medical crews, sanitation workers, road crews and economic development teams, to name just a few examples of local governments' mission work. The position of city planner does not satisfy the first prong of the administrative duties test. It is, as the Paradise human resources director and attorney conclude, a nonexempt position.

The Accountant

The city of Paradise has a position in its finance department called "accountant," whose FLSA classification has recently been called into question. The primary job duties of the position are several. They are to:

- post and balance the general and subsidiary ledger;
- prepare a variety of financial records, reports and analyses;
- provide technical guidance to technical accounting staff;
- update fixed asset system for additions and deletions, assign asset numbers and reconcile fixed asset detail to fixed asset account group;
- interpret and enforce fiscal policies and practices;
- assist and respond to requests by external auditors;
- supervise the processing and accounting for payroll and related reports such as state and federal withholding reports, balancing and calculating payments by fund category; calculate health insurance payments;
- issue quarterly and annual tax reports and W-2 yearly withholding for employees;
- prepare quarterly fuel tax reports, and prepare oil and gas analyses;
- review and distribute end-of-the-month reports to department heads;
- participate in budget preparation and administration as requested by finance director; and
- serve as acting finance director in the absence of the finance director.

The accountant position clearly satisfies the first prong of the administrative duties test – the work is nonmanual office work that is directly related to management and, perhaps more so, to general business operations. So the Paradise human resources director and attorney must move on to the second prong of the administrative duties test and consider whether the position entails work requiring the exercise of discretion and independent judgment on matters of significance to the city. The accountant position includes both duties that do not require the exercise of discretion and independent judgment and those that do.

The duties that do not appear likely to include the exercise of discretion and independent judgment (although they may require training and skill) are:

- posting and balancing the general and subsidiary ledgers;
- providing technical guidance to technical accounting staff;
- updating fixed asset system for additions and deletions, assigning asset numbers and reconciling fixed asset detail to fixed asset account group;
- supervising the processing and accounting for payroll and related reports such as state and federal withholding reports, balancing and calculating payments by fund category; calculating health insurance payments;
- issuing quarterly and annual tax reports and W-2 yearly withholding for employees;
- preparing quarterly fuel tax reports; and
- reviewing and distributing end-of-the-month reports to department heads.

The duties that seem likely to involve the exercise of discretion and independent judgment are:

- preparing a variety of financial records, reports and analyses;
- interpreting and enforcing fiscal policies and practices;
- assisting and responding to requests by external auditors;
- preparing oil and gas analyses;
- participating in budget preparation and administration as requested by finance director; and
- serving as acting finance director in the absence of the finance director.

The above-listed duties seem likely to involve the exercise of discretion and independent judgment. But how will the human resources director and city attorney know that they do? Their dilemma illustrates well the limited utility of job descriptions in accurately classifying positions as exempt or nonexempt for FLSA purposes. The list of job duties says that the person in this position will prepare “a variety” of financial records, reports and analyses. What this means is anyone’s guess. What it means in the city of Paradise may be different from what it means in Paradise County government. Some records and reports may require the employee to discern important differences in data trends, draw conclusions from data or exercise judgment about whether or not an asset or a practice fits into a given category. Other reports may require only that the employee plug in data to an already existing framework or formula.

In the job duty described as “interpreting and enforcing fiscal policies and practices,” the word “interpret” suggests that the person in the position will be exercising discretion and independent judgment. That might not be the case, however. Not all policies are written in such a way as to allow for interpretation. The human resources director and attorney must ask whether the particular policies with which the accountant will work likely to need interpretation in different sets of circumstances. They must ask whether the use of the word “enforce” means that the person in this position has the authority to override a decision made by a subordinate or to choose among different practices?

To accurately classify this position as exempt or nonexempt in a particular city or county, the human resources director will have to interview the person currently holding this position, his or her supervisor and department head and, possibly, people who previously held this position. The human resources director will have to ask similar kinds of questions about the next two sets of duties, as well: assisting and responding to requests by external auditors and preparing oil and gas analyses. Correctly classifying the position requires an understanding of what these duties entail on a day-to-day basis.

The last two items on the list of the accountant’s primary duties — participating in budget preparation and administration as requested by finance director and serving as acting finance director in the absence of the finance director — *strongly imply* use of discretion or independent judgment in matters of significance to the city. Does that mean that their inclusion in the job description automatically makes this position exempt? No, it does not. Whether or not these duties make the position exempt turns on how frequently they are performed and how important it is that they be performed and be performed by the person in this position.

The human resources director must also consider whether the position makes decisions on matters of significance to the employer. Although it is easy (and correct) to say that “finance” is a matter of significance to the city, that answer is not good enough. The question of whether the particular judgments this employee makes are on matters of significance cannot be determined on the basis of this general list of duties. Once again, the human resources director will have to dig deeper into the meaning of this duty to make the correct call on classification.

Once the human resources director determines that a job duty requires the exercise of discretion and independent judgment on matters of significance to the city, he or she must evaluate whether this duty or a set of duties requiring discretion and independent judgment are important enough in the overall scheme of the job to make that position exempt. When the U.S. Department of Labor revised the regulations setting forth the duties tests for FLSA exemptions in 2004, it eliminated from the analysis any measure of percentage of time spent on a duty or group of duties. Instead, the rules now advise employers to consider only the job’s *primary* duty or duties in classifying it as an executive, administrative or professional position.

The FLSA regulations define the phrase “primary duty” as meaning the “principal, main, major or most important duty that the employee performs.” The regulation goes on to say that while employees who spend more than fifty percent of their time on exempt work are likely to be exempt, there is no minimum time requirement. Employees who spend less than fifty percent of their time on exempt work may still qualify for an exemption. The time spent on exempt duties may be a factor in determining the primary duty, the rule says, but the emphasis should be on “the character of the employee’s job as a whole.”

In determining whether a duty is a primary duty, important factors are:

- the relative importance of the this duties compared with the employee’s other duties;
- the amount of time spent performing this duty or group of duties;
- the employee’s relative freedom from direct supervision in performing this duty; and

-
- the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work, if any, performed by the employee.

Applying this framework to the accountant position, the Paradise human resources director will want to know how important the position's budget responsibilities are – in other words, does this position play an integral role in budget development? How does this position's contributions to budget development compare to those of others in the department? How frequently are this position's budget recommendations adopted?

The human resources director will also want to know how frequently the person in this position is called upon to act as acting finance director and whether the person is actually called upon to exercise the finance director's duties and make decisions when acting in that role. The Paradise human resources director and the city's attorney agree that more work needs to be done. The accountant position cannot be correctly classified as exempt or nonexempt under the FLSA based on the job description alone.

The Management Analyst

The last position that the city is reevaluating is that of "management analyst," a title that suggests exempt status. "Don't let the position title fool you into prejudging its exempt status," the human resources director warns the human resources trainee who is assisting on this project him "Whether or not a position is exempt under the FLSA is solely a function of whether the duties as performed by the incumbent satisfy one of the executive, administrative or professional duties tests." The job duties of the Paradise management analyst position are to:

- find and research grant opportunities and work with departments with the relevant substantive expertise to prepare grant applications;
- gather information for the city's annual report;
- assist with budget analysis;
- recommend outside vendors for the city's recycling program and options for single-stream recycling; prepare contracts for single-stream recycling; maintain Big Company's corporate sponsorship of the recycling program;
- draft reports about various city initiatives for legislators in order to garner support and funding;
- engage in marketing work, such as drafting the content of flyers distributed to citizens with their utility bills;
- coordinate community outreach projects, such as chamber of commerce events and events to encourage citizens to participate in government programs; and
- perform preparatory and clean-up work for meetings, such as cleaning coffee mugs, making coffee, serving food at meetings and cleaning up after meetings.

The human resources director quickly and correctly concludes that the management analyst position qualifies for an exemption under the administrative duties test.

Why does this position clearly qualify for the administrative exemption while there were so many open questions about the accounting position? First, as was the case with both the accountant and the city planner, the management analyst position involves nonmanual office work. Second, all of the position's duties, with the exception of coffee preparation, are clearly related to management and general business operations as all of them are related either to the generating revenue for the city (grantwriting, budget analysis, supporting chamber of commerce economic development, maintaining corporate sponsorships, legislative outreach) or spending it (budget analysis, recommending vendors and preparing contracts). The FLSA regulations expressly recognize the development of marketing projects and materials, such as that done for community outreach events and for flyers, as a type of work directly related to management or general business operations of the employer.

Finally, all but two of the duties appear by their very nature to involve the exercise of discretion and independent judgment in matters of significance to the city. Finding grant opportunities appropriate for a range of departments requires the employee to make judgments about which funding opportunities are most appropriate and most likely to be successful for a variety of different departments, as does determining the substantive content of marketing projects (in contrast, doing the graphic design of marketing material does not involve discretion and independent judgment within the meaning of the FLSA). Even if the person in the management analyst position is not the final decision maker, sifting through possible vendors, identifying the most promising candidates and explaining why they are the best choices are classic examples of the exercise of discretion and independent judgment. So too is the drafting of contract terms. Furthermore, the decision

about whom the city should contract with for recycling is a matter of significance. Similarly, where the purpose of a report is to gain the support of legislators for a city program, the author of the report will necessarily have to exercise good judgment about what to highlight and what to minimize is a necessary part of the job. Persuading legislators of the value of the city's programs is not only generally significant, but sometimes of paramount importance.

"What about the job duty identified as assisting with budget analysis?" asks the human resources trainee. "Excellent question!" says the human resources director. "In general, the use of the term "assist" or "assisting" in a job description should raise a red flag, because it means that the position does not have the responsibility for the task or project in question but is merely working in a subordinate capacity with someone who does. The person "assisting" is therefore unlikely to be exercising discretion and independent judgment on matters of importance to the employer," the human resources director explains. That being said, depending on the circumstances, the position may have significant responsibility for a part of the project.

The use of the word "assist," therefore, is a sign that the human resources director should be asking questions of the employee in that position and his or her supervisors in order to understand that particular job duty correctly. Here, in the case of the management analyst, there appear to be enough other job duties that satisfy the discretion and independent judgment requirement that the classification of the position as exempt is not in doubt. If, however, the primary job duty were assisting in budget analysis, and the other duties were but a small part of the position's responsibilities, the answer might be different.

The trainee pipes up again, noting that making coffee is not an exempt job duty. The trainee is, of course, correct. "Thankfully," says the attorney, "the inclusion of some nonexempt duties, such as those involving the preparation and cleaning up of coffee, does not turn what would otherwise be an exempt position into a nonexempt position." The touchstone of FLSA classification is the concept of the primary duty. If the primary duty of the management analyst position were to be a barista, and the other revenue-generating and business-related duties were secondary, the position would be nonexempt. But that is not the way the position is structured in Paradise (and I dare say not in any other jurisdictions either).

The administrative duties test is, by far, the most challenging and difficulty of the three tests for exempt status. More than either the executive exemption or the professional exemption, the administrative duties test frequently requires a local government's human resources staff to investigate the details of the way in which a job is actually performed in order to understand whether it qualifies for exempt status. That is not to say that the professional duties test, which evaluates whether the position is one that requires an advanced academic degree or other high-level training, does not also have its challenges. I will discuss those in a future post.

Links

- canons.sog.unc.edu/?p=7385
- canons.sog.unc.edu/?p=7464
- canons.sog.unc.edu/?p=7537
- www.law.cornell.edu/cfr/text/29/541.102
- www.law.cornell.edu/cfr/text/29/541.700
- www.law.cornell.edu/cfr/text/29/541.201