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## Coates' Canons Blog: The FLSA's Administrative Exemption from Overtime Pay

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Under the Fair Labor Standards Act, a government employee is entitled to overtime pay after working 40 hours in a week, unless an exemption applies. If an exemption applies, the employee is said to be “exempt” and is not entitled to overtime pay even at 60 or 80 hours worked in a week. Positions are *exempt* from the FLSA's overtime rules if they meet three requirements:

1. the position is paid on a salary basis; and
2. the position is paid a minimum of \$684 per week; and
3. the duties of the position satisfy either the executive duties test, the administrative duties test, or the professional duties test.

Each of the duties tests in the third requirement is distinct and independent; a position need only satisfy one of them to be considered exempt. The executive duties test, which I discussed in an earlier blog post, evaluates whether the position is a management position with significant authority over other employees. The administrative duties test, which is the subject of this blog post, evaluates whether the position is an office position that supports management and has significant decisionmaking authority in areas other than supervision of employees. The professional duties test, which I will discuss in a future post, evaluates whether the position is one that requires an advanced academic degree or other high-level training.

### 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. As I discussed in a [previous blog post](#), both exempt and nonexempt employees may be paid on a salary basis, but 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.

### The Administrative Duties Test

To satisfy the administrative duties test, a position must meet two requirements in addition to being paid on a salary basis and earning a minimum of \$455 per week. The position must:

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

These two requirements are anything but straightforward.

### Primary Duty

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Here, as in the executive duties test, “primary duty” means the “principal, main, major or most important duty that the employee performs.” There is no set minimum amount of time that must be spent on administrative tasks for such work to be an employee’s primary duty. The same factors applicable to executive employees — the relative importance of exempt tasks and the time spent on exempt tasks — are used to evaluate whether or not an employee is an exempt administrator.

### ***Work Related to Management or General Business Operations***

The U.S. Department of Labor’s FLSA regulations define this element of the administrative exemption as meaning to “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.” The regulations give the following as examples of work related to “the running or servicing of the business:”

- finance, accounting, or auditing;
- tax;
- purchasing and procurement;
- personnel management, human resources and employee benefits;
- safety and health;
- insurance and quality control;
- public relations, advertising and marketing;
- computer network, internet and database administration; and
- legal and regulatory compliance.

Of course, local government employment encompasses a great deal more nonmanual or office work than just those associated with the fields in this list. What about the position of city or county clerk or the work done in the register of deeds office? City and county planners? Lieutenants and captains in a public safety agency and 911 telecommunicators? Social workers? To understand whether positions like these qualify for the administrative exemption, we must return to the regulations’ definition of administrative exempt work as “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*” (emphasis added). In contrasting administrative duties with production or sales work, the regulations distinguish the basic work or mission of an organization with the other kinds of work necessary to allow it to do its basic work.

Think of production work as the mission work of the department or agency. What is the basic work, or mission, of a fire department, for example? Firefighting and fire prevention. The work done to hire and pay firefighters and to outfit the firefighters and their trucks is not the mission work of local government, but is the management and general business operations work that supports the mission. What is the mission of a public health department? To educate the public and to provide health services. Why does the register of deeds office exist? To record deeds and other documents in the public record. Thus, a firefighter, a public health nurse who staffs a clinic, and an employee of the register of deeds who records mortgages on the land records are each engaged in the production or mission work of their respective employers. None of these positions would qualify for the administrative exemption, even if their job duties required the exercise of discretion and independent judgment in matters of significance, as the positions of firefighter, nurse and assistant register surely do.

Other employees of the fire department, public health department and register of deeds office, whose work supports the fighting of fires, provision of health services and recording of documents, may well qualify for the administrative exemption. For example, the primary duties of a fire battalion chief may not be the fighting of fires — production or mission work — but rather the administrative work that she does in coordination with human resources and purchasing that allows her unit to be scheduled, outfitted, trained and ready to fight fires. If the person in this position exercises discretion and independent judgment on matters of significance, she may be administratively exempt. So too in the case of the office manager who runs the day-to-day operation of the clinic where the public health nurse practices. The assistant register of deeds who implements the policies adopted by the elected register and oversees operations of the office may also qualify as an administrative employee even if another assistant does not.

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### ***Discretion and Independent Judgment***

If a position's primary duties qualify as office work directly related to management or general business operations, that is not the end of the question. To be exempt, the position must involve work that requires discretion and independent judgment in matters of significance. Fundamental to the concept of "discretion and independent judgment" is the question of whether the employee has options from which to make a decision or choice. The DOL's FLSA regulations contain a non-exclusive list of factors to consider in determining whether a position satisfies the criteria for discretion and independent judgment. Many of the factors focus on *the extent of the employee's authority either to take action in the employer's name without prior approval or to take action that may deviate from established policy.* The list includes whether the employee:

- formulates, interprets, or implements management policies or operating practices;
- makes or recommends decisions that have a significant impact on general business operations or finances — this includes work that relates to the operation of a particular segment or department of the organization that nonetheless affects general business operations to a significant degree;
- is involved in planning long- or short-term objectives for the organization;
- handles complaints, arbitrates disputes or resolves grievances;
- represents the organization during important contract negotiations;
- has the authority to commit the employer in matters that have significant financial impact; and
- has the authority to waive or deviate from employer policies and procedures without prior approval.

In addition to these factors set forth in the FLSA regulations, courts have also considered whether a position has

- freedom from direct supervision;
- personnel responsibilities;
- trouble-shooting or problem-solving responsibilities;
- authority to set budgets;
- a degree of public contact; or
- involves advertising and promotion work.

Employers frequently make the mistake of assuming that an employee must have final decisionmaking authority in order for a position to qualify for the administrative exemption. The regulations, however, recognize that many organizations require that significant decisions must receive multiple layers of review or approval. The regulations therefore allow a position to satisfy the discretion and independent judgment requirement even if the employee's decisions or recommendations are subject to reviewed. This is an important allowance for local governments, where, for example, department or division heads may decide which candidate to hire, but final authority for the decision rests with the city or county manager. Similarly, an employee might narrow down the choices of what equipment to purchase to two competing products, with an explanation of the pros and cons of each, but may be required to leave the final choice to a department head or the manager. Where the cost of a purchase is large and the expenditure subject to the pre-audit requirement of the North Carolina General Statutes, the decision to purchase the specific item may be made by an administratively exempt employee even if the purchase must receive final approval from the finance director.

### ***Matters of Significance***

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Unfortunately for employers, the FLSA regulations do not define the term “matters of significance” other than to say what they are not. The fact that poor job performance by an employee could have significant financial consequences for the employer does not, in and of itself, mean that the employee exercises discretion and independent judgment with respect to matters of significance. For example, the primary job duty of an employee working in accounts receivable may be processing incoming checks for deposit into the employer’s account. The employee is supposed to double-check the amount of the check against the amount due. Suppose the employee processes a check bearing the notation “paid in full,” but is distracted and neglects to check the amount due. The check is for substantially less — tens of thousands of dollars less — than the amount actually owed. Despite the fact that the mistake causes the employer to lose thousands of dollars, the employee’s job duties are clerical and routine and do not involve the exercise of discretion and independent judgment in matters of significance. That employee is nonexempt. The potential for such an error cannot form the basis for classifying this position as administratively exempt.

### **Examples of Positions Satisfying the Administrative Duties Test**

The regulations set forth examples of positions that would satisfy both the requirement that work be directly related to management or general business operations and that the work involve discretion and independent judgment. They include a human resources manager who formulates employment policies even though the decision to adopt the policies is made by others. The regulations contrast the position of human resources manager with that of a personnel clerk who collects information about job applicants and rejects those who do not meet basic qualifications, but is not involved in further evaluation of qualifying applicants. DOL offers as another example a purchasing agent who makes major purchases, but is required to consult with top management before finalizing a major purchase. This position may well be exempt. In contrast, an employee who operates an expensive piece of equipment is not performing work involving the exercise of discretion and independent judgment on a matter of significance. Finally, an executive or administrative assistant to a city or county manager may be administratively exempt if the manager has delegated to the assistant the authority to arrange meetings, handle callers and answer correspondence without the need to follow specific instructions or particular procedures.

### **Examples of Positions Not Satisfying the Administrative Duties Test**

The regulations contain specific examples of government employees who will not qualify for the administrative exemption, namely, “inspectors and investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees.” The regulations explain that the work of such employees does not meet the first element of the administrative duties test as it does not relate to management or general business operations. Their work also does not generally require the exercise of discretion and independent judgment, but instead involves the gathering of factual information and the application of established techniques or procedures or standards. The regulations make clear that clerical or secretarial tasks, recording or tabulating data, or doing other kinds of routine work does not qualify as work requiring the exercise of discretion and independent judgment on matters of significance.

### **Positions That Are Hard to Classify**

Whether a position meets the requirements of the administrative duties test is the subject of much litigation. In the local government context, the issue in many contested 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 production or mission work. For positions that exist both in the public and private sectors, the issue more frequently involves whether the employee exercises discretion and independent judgment. In a future blog post, I’ll take a closer look at some examples.

**For more information on this aspect of the FLSA and on all other FLSA issues, see my publication, *A Comprehensive Guide to the Fair Labor Standards Act for Public Employers*.**

## **Links**

- [canons.sog.unc.edu/?p=7464](https://canons.sog.unc.edu/?p=7464)
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