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

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Employees in “exempt” positions are not entitled to overtime pay, even if they work sixty hours or more in a single workweek. How does an employer determine whether a position is exempt under the Fair Labor Standards Act? A position is exempt from the FLSA’s overtime rules if it meets three requirements:

1. the position is paid on a salary basis; and
2. the position is paid a minimum of \$455 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 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 decisionmaking authority in areas other than supervision of employees. The professional duties test evaluates whether the position is one that requires an advanced academic degree or other high-level training. In this blog post, I will discuss the test for the executive exemption. I will discuss the administrative and professional exemptions in future posts.

Background

The practical difference between an employee’s classification as exempt or nonexempt is that an exempt employee may be required to work in excess of his or her scheduled workweek without any additional compensation beyond their fixed weekly salary. In contrast, nonexempt employees must always 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. 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 the other two requirements, including one of the duties tests. As the regulations make clear, for each of these categories, it is the specific duties and responsibilities of the individual position — not job title or job description — that determine whether or not the position is exempt from overtime.

The Executive Duties Test

The executive duties test is relatively straightforward. For an employee to be in an exempt executive position, he or she must:

1. have the primary duty of management of the organization or one of its recognized departments or subdivisions; *and*
2. customarily and regularly direct the work of two or more employees; *and*
3. have the authority to hire or fire other employees, or have his or her recommendations as to hiring, firing, promotion or other change of status be given particular weight.

The regulations require that the position meet *all three* requirements to be exempt.

The Primary Duty of Management

Most jobs have multiple duties. What does the term “primary duty” mean in the context of the FLSA overtime exemptions? The U.S. Department of Labor’s FLSA regulations define the phrase “primary duty” as meaning the “principal, main, major or most important duty that the employee performs.” There is no minimum amount of time that an employee must spend performing the primary duty, although the regulation defining primary duty notes that employees who spend more than fifty percent of their time on exempt work are likely to be exempt. Still, employees who spend less than fifty percent of their time on exempt work may still qualify for an exemption. The determining factor is “the character of the employee’s job as a whole.”

In assessing whether a position has a primary duty of management, the regulations direct employers to consider:

1. the relative importance of the employee’s management duties compared with his or her other duties;
2. the amount of time spent performing management work;
3. the employee’s relative freedom from direct supervision; and
4. 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.

The regulations also give examples of the particular kinds of duties that the Department of Labor considers to be “management” duties. The list includes:

- interviewing, training, and selecting employees;
- setting and adjusting pay and hours;
- planning, apportioning, directing the work of other employees;
- evaluating the productivity & efficiency of other employees;
- recommending promotions for other employees;
- handling employee complaints and grievances;
- planning and controlling the budget; monitoring legal compliance;
- imposing penalties for violations of rules;
- implementing training programs; and
- handling community complaints.

Supervising the Work of Two or More Employees

The FLSA regulations require that an employee direct the work of two or more full-time employees “or their equivalent” to qualify for the executive exemption. Thus, supervision of four half-time employees satisfies this requirement. The Department of Labor has said that in this context, it considers a full-time employee to be an employee who works forty hours each week. Where the normal full-time workweek of an individual employer is fewer than forty hours, however – thirty-seven hours, for example –, the Department will consider that to constitute full-time (see 69 Fed.Reg. 22135).

Authority to Hire or Fire

The final requirement for the executive exemption is that the position have actual hiring or firing authority, or at least significant influence over such decisions. The regulations require authority to hire *or* fire, not both. An employee who has authority to make new hires and promotions, but is not a decision-maker with respect to dismissals, may still qualify as an executive employee. Similarly, an employee who has authority to terminate another employee, but who is not involved in hiring decisions, would also qualify for the executive exemption.

Under the North Carolina General Statutes, the only employees who have final hiring and firing authority are city and county managers, the county sheriff and register of deeds, and the directors of county social services and health departments and area mental health authorities (LMEs). In all cases, the persons holding these positions will have management as a primary duty and will have the requisite supervisory authority to qualify for the executive exemption. These positions would therefore be the exception to the rule that it is job duties, not job title, that determines exempt status. These particular positions – and only these – may be considered to qualify for the executive exemption automatically.

Recommendations about Hiring or Firing Given Particular Weight

If a position has a primary duty of management and supervises two or more full-time employees, and does not have legal hiring or firing authority, but *does* have significant influence over hiring or firing, that position will also qualify for the executive exemption. What does “particular weight” mean in this context? In the regulation explaining “particular weight,” the Department of Labor identifies three key factors: 1) whether making such recommendations is actually part of the employee’s job duties; 2) the frequency with which the employee makes these recommendations and/or the frequency with which the employer requests recommendations of the employee; and 3) the frequency with which the employer adopts the employee’s recommendations. Merely making suggestions about hiring, terminations or promotions is not enough. If an employee’s recommendations are not solicited or are not followed very often, the employee will not meet the requirements of the new executive duties test.

Which positions are likely to make recommendations about hiring or firing that are accorded “particular weight?” In many jurisdictions, assistant city and county managers, town administrators, and department and division heads will have such influence. In cities and counties of relatively larger size, it is usually a direct supervisor without final decisionmaking authority who evaluates an employee’s performance or conduct and makes the initial, detailed recommendation to terminate, with the final decision made by the manager or a county department head with statutory authority to hire and fire.

Employees Who Perform Both Exempt Management and Nonexempt Duties: Which Are the Primary Duties?

Many departments and divisions are headed by employees who perform both managerial and nonexempt duties. The regulations provide that employers may still classify such employees as exempt executives provided that their *primary* duty is management. Employees who have both exempt and nonexempt duties should not be confused with “working supervisors” or “working foremen,” whose primary duty consists of the regular work of the department or division, not management, while supervising those who are working alongside them. The regulations expressly state that working supervisors are not to be considered exempt employees.

Consider the example of an electrician whose primary duty is to perform electrical work, but who also directs the work of other electricians working in the same unit or at the same site, orders parts and materials for the job, and receives requests for electrical work. This electrician is nonexempt even though he carries out some management-related duties. Similarly, an otherwise nonexempt electrician who substitutes for an exempt supervisor when the supervisor is absent does not become an exempt executive by virtue of having the occasional responsibility to supervise others.

In contrast, true exempt executives who also perform nonexempt tasks perform their managerial responsibilities on a regular basis. They themselves decide when and for how long to perform managerial duties and when and for how long to perform nonexempt tasks — no supervisor determines this. Exempt executives typically remain responsible for the operations and personnel under their supervision even while they perform nonexempt tasks. Consistent with the definition of primary duty as discussed above, there is no limitation on the amount of time that an executive must spend on nonexempt tasks in order to qualify as exempt.

Case Law on Positions with Exempt Executive and Nonexempt Duties

The majority of the court decisions that address the proper application of the executive exemption to positions with concurrent exempt and nonexempt duties involve the position of store manager. Although “store manager” is a quintessentially private-sector position, the reasoning the courts adopt in these cases is applicable to local government positions.

Consider *Jones v. Virginia Oil Co.*, a Fourth Circuit Court of Appeals case from 2003. In that case, the court held that an assistant manager who spent 75 to 80 percent of her time performing nonexempt work could still be classified as an exempt executive because she could perform many of her management duties at the same time that she performed the nonexempt work. Both Terri Jones, the plaintiff, and her employer agreed that Jones supervised two full-time employees and that she performed both managerial and nonexempt work. At issue was whether her primary duty was management when she spent so much of her time flipping burgers, working the registers, and cleaning the bathrooms and parking lot.

The court reached the conclusion that Jones was exempt after considering the factors set forth by the Department of Labor for determining whether a duty is primary. The court found with respect to the first factor — the relative importance of the managerial tasks — that Jones was responsible for hiring, scheduling, training and disciplining employees, and for checking inventory and ordering supplies, handling customer complaints, counting daily receipts and making bank deposits. These responsibilities, and Jones’ own testimony that she was “in charge of everything,” convinced the court that the success of the store depended on Jones’ performing her managerial tasks.

As for the second factor, the amount of time spent on management, the court noted that while Jones was doing nonexempt tasks she was simultaneously supervising employees, handling customer complaints, dealing with vendors and completing daily paperwork. The court concluded that time, while important, could not be determinative in this case.

With respect to the extent of Jones’ discretion, the court found that this factor also weighed in favor of finding management as her primary duty: Jones had the discretion to hire, supervise and fire employees, to handle customer complaints, and to run the day-to-day operations of the store as she saw fit. Finally, Jones earned significantly more than other employees performing the same nonexempt duties as she.

The court rejected Jones’ claim that she was a “working supervisor” entitled to overtime, holding that “where an individual’s responsibilities extend ‘to the evaluation of . . . subordinates’ and include ‘the exercise of considerable discretion,’ the working foreman exception does not apply.”

The Fourth Circuit reached a similar conclusion in a more recent case, *In re Family Dollar FLSA Litigation*. Plaintiff Irene Grace was the store manager of a Family Dollar chain store. Grace claimed that a full 99 percent of her time was spent on nonexempt duties such as “putting out freight,” working a cash register, “doing schematics” and performing janitorial work. The court, however, was not persuaded that this made her a nonexempt employee, noting that even while Grace performed these nonexempt tasks, she remained the person responsible for running the store and that she performed her managerial duties at the same time. Grace herself had testified that while running the cash register she simultaneously considered the condition of the front of the store and kept an eye out for theft. The success and profitability of the store (and the size of the bonus she received) depended on her decisionmaking and good judgment alone, which she exercised at the same time as she performed nonexempt duties.

The Fourth Circuit also emphasized the fact that her managerial duties were of greater importance than her nonexempt duties given that the district manager visited the store only every two to three weeks. It was Grace who decided how to handle customer or employee complaints, made and revised schedules, arranged the stock display, and decided when to sweep the floor, restock the shelves, or fill out required paperwork. There was no other person making those decisions at the store. Finally, the court noted that Grace was paid significantly more than other store employees in absolute terms and that she had the ability to influence the amount of her own compensation, a component of which was a bonus based on the profitability of the store she managed. For all of these reasons, the Fourth Circuit found that Grace’s position as store manager was exempt from overtime.

How would the Fourth Circuit’s analysis in *Jones* and *Family Dollar* apply to a public sector position with both exempt and nonexempt duties? Consider the following hypothetical:

The city of Paradise, North Carolina, needs to determine whether its chief code enforcement officer is an exempt executive or non-exempt position. The position’s duties include assigning the daily work of five code enforcement officers, supervising and evaluating the officers and other staff of the division, resolving disputes, preparing information in support

of budget requests and administering the division's budget, and reviewing and maintaining enforcement records prepared by other officers. The demands on the code enforcement division are such that it cannot afford to have one position devoted solely to management. Thus, in addition to managing the division, the chief also goes into the field on a daily basis to conduct inspections for compliance with applicable codes and standards, to identify violations and notify property owners of the violations and necessary corrective action, and to conduct follow-up investigations.

The city's human resources director determines that the chief spends only forty percent of his time on management duties, and a full sixty percent of his time doing enforcement work in the field. The *Jones* and *Family Dollar* cases say that the actual time spent on exempt duties is not determinative of exempt status, so the human resources director considers the relative importance of the managerial tasks themselves. The position's exempt duties are much more important than its nonexempt duties: it seems fair to say that without the chief's supervision of the other officers and assignment of their work in accordance with their individual skills and expertise, and without the chief's maintenance of records and budget work, the Paradise code enforcement division could not function effectively. Were the chief not to perform the nonexempt inspection work, the division might perhaps take longer to respond to complaints and might fall behind in its inspections, but it would continue to perform its core functions.

Does the chief exercise discretion in performance of management duties? This is one of the other factors the Fourth Circuit considered in determining whether a store manager was a true executive or merely a working supervisor. The human resources director correctly concludes that the position's scheduling duties, role in hiring, evaluation and firing, preparation of budget requests, and review of enforcement records requires significant exercise of judgment. The final factor also weighs in favor of classifying the chief position as exempt. The chief makes about \$8,500 more than does the highest-paid of the other code enforcement officers.

Numerous positions in local government involve the concurrent performance of both exempt and nonexempt duties, particularly positions in law enforcement above the rank of patrol officer or patrol deputy. I will discuss these, as well as the administrative and professional exemptions, in more detail in later blog posts.

Links

- canons.sog.unc.edu/?p=7385
- www.law.cornell.edu/cfr/text/29/541.2
- www.law.cornell.edu/cfr/text/29/541.100
- www.law.cornell.edu/cfr/text/29/541.700
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