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Understanding the FLSA's Administrative Exemption

While the Bush administration and the Department of Labor attempt to dismantle 65 years of legislation, regulations and jurisprudence governing the Fair Labor Standards Act's "white-collar" exemptions, employers and employees need to understand the exemptions that presently exist. This article focuses on the administrative exemption, undoubtedly the most confusing exemption, as well as offers a brief discussion on some of the administration's proposed regulations.

As with most white-collar exemptions, to successfully claim the administrative exemption an employer must prove the employee meets both the duties test and the salary test. The duties test focuses on the employee's primary duty — what the employee does that is of primary value to the employer.[1]

An administrative employee's primary duty "consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and requires the exercise of discretion and independent judgment."[2]

Management Policies

The first requirement is that the employee's primary duty be "directly related to management policies or general operations of the employer or the employer's customers." 29 C.F.R. §205(a) provides that:

> (a) The phrase ... describes ... activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work. [T]he phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

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An administrative employee need not formulate policies; he need only implement them. See 29 C.F.R. §205(c).

The regulations provide examples of jobs that will likely satisfy the requirement: tax consultant, credit manager, bank cashier, safety director, and administrative assistant to an executive; and some that likely will not: bookkeeper, bank teller, secretary, and clerk. See generally 29 C.F.R. §541.205(c).

Notwithstanding these examples, courts evaluate each case based on its particular facts.

For example, in *Reich v. New York*, 3 F.3d 581 (2d Cir. 1993), cert. denied, 114 S. Ct. 1187 (1994), the court held that investigators employed by the Bureau of Criminal Investigation (BCI) were not administrative employees. Investigators, who held the lowest rank in BCI, investigated crimes, made arrests, interrogated suspects, interviewed witnesses and conducted surveillance. The court found that investigators, who "conduct — or 'produce' — [BCI's] criminal investigations," perform production, not administrative work.

The court noted, however, that the production/administration distinction is only a means of inquiry, the ultimate question remains "the relationship of the [employee] to the management policies or general business operations of" the employer or employer's customers.

In *O'Neill-Marino v. Omni Hotels Mgmt. Corp.*, 2001 U.S. Dist. LEXIS 2138 (S.D.N.Y. 2001), the court found that the director of conference services for defendant's hotel was an administrative employee. Her duties included sales, monitoring clients' needs during conferences, and coordinating conference needs with other departments. She also helped draft a manual of policies and business goals for the conference center. The judge found she performed work of substantial importance to her employer's business, noting that conference services accounted for 10 percent of the hotel's overall business.

In *Webster v. Public School Employees of Wash., Inc.*, 247 F.3d 910, 916 (9th Cir. 2001), plaintiff was a union representative whose primary responsibilities were to negotiate collective bargaining agreements and handle employee grievances. Noting that union members were the union's customers, the court found

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plaintiff's work administrative because "contract negotiation involves advising the bargaining unit on how to conduct its business (in terms of hours, wages, and working conditions)."

Plaintiffs in *Harris v. District of Columbia*, 741 F. Supp. 254 (D.D.C. 1990), were supervisory housing inspectors. The court found they were not administrative employees primarily because of the large amount of clerical work they performed. "[A]n employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business" of his employer or his employer's customers." (quoting 29 C.F.R. §541.205(c)(2).)

Independent Judgment

Even if an employee's primary duty is directly related to management policies or general business operations of his employer or his employer's customers, he must also exercise discretion and independent judgment in order to satisfy the administrative duties test. The regulations provide that 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." 29 C.F.R. §541.207(a).

Simply because an employee's decisions may be reviewed — and even occasionally reversed — does not mean the employee does not exercise discretion and independent judgment. See 29 C.F.R. §541.207(e)(1).

Each case is evaluated on its facts. Plaintiff in *O'Neill-Marino* exercised discretion and independent judgment because she negotiated contracts and prices with clients (even though she negotiated within pre-set limits and her contracts were subject to approval), was the primary contact between the hotel and its clients, and worked mostly without supervision.

In *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997), plaintiffs were insurance company marketing representatives whose primary duty was to "cultivate" a sales force of independent insurance agents. Marketing representatives spent the majority of their time, approximately seven hours per day, on the telephone with current or prospective agents. The court found the representatives exercised discretion and independent judgment in choosing which agents to contact and what business matters to discuss with each agent.

In *Lutz v. Ameritech Corp.*, 2000 U.S. App. LEXIS 3218 *8 (6th Cir. 2000), a field service engineer exercised discretion and independent judgment because he "assesse[d] the needs of clients, develop[ed] installation plans ... coordinate[d] with various departments to arrange installation and ensure[d] that plans are implemented." See also *Demos v. City of Indianapolis*, 302 F.3d 698 (7th Cir. 2002) (city supervisor exercised discretion by "putting out fires for his supervisor" and exercised independent judgment by recommending finance allocations); *Reich v. Avoca Motel Corp.*, 82 F.3d 238 (8th Cir. 1996) (motel managers' decisions as to proper presentation of guest rooms and common areas based on numerous factors constituted discretion and independent judgment).

In contrast, news producers in *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1231 (5th Cir. 1990) did not exercise discretion and independent judgment because their work was merely "application of techniques, procedures, repetitions, experience, and specific standards to the formatting of a newscast."

Similarly, computer network administrators in *Burke v. County of Monroe*, 225 F. Supp. 2d 306, 320 (W.D.N.Y. 2002), did not exercise discretion and independent judgment because they "made no independent decisions on matters of great importance" and "did not decide what software was loaded, or whether to update the software on a particular system. They performed highly skilled work when troubleshooting problems, but this is not evidence of discretion and independent judgment."[3]

An employee who performs office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers and exercises discretion and independent judgment satisfies the current administrative duties test.

Proposed Regulations

One drastic change contained in the Bush administration's proposed regulations is omission of the word "directly" from the requirement that an administrative employee's work be "directly related to management policies." Proposed §541.200.

Another proposed regulation would replace the discretion and independent judgment criteria with a requirement that the employee hold a "position of responsibility," i.e. the employee must "customarily and regularly perform work of substantial importance or ... requiring a high level of skill or training." Proposed §§541.200(3); 541.202.

Probably the most draconian of the proposed regulations is §541.601 "Highly Compensated Employees."[4] Here, an employee who earns at least $65,000 annually, performs office or non-manual work, and has an identifiable administrative (or executive or professional) duty would be exempt. This is a drastic change from the current regulations under which the employee's primary duty must be administrative (or executive or professional).

The Bush administration claims these changes merely clarify the current definitions of exempt employees, but it actually expands them. This will allow employers to classify more employees as exempt than they can under the present regulations — regulations that have existed for decades. Even if the proposed regulations survive the inevitable political and judicial battles, however, courts will likely look to precedent decided under the existing regulations.

(1) An earlier article discussed "primary duty" and the salary test. Reviewing Overtime White-Collar Exemptions, NYLJ, Apr. 19, 2000.

(2) Employees of educational establishments must satisfy a different test. See generally 29 C.F.R. §541.2.

(3) See also 29 C.F.R. §541.207 (c)(7), discussing computer-related duties in detail.

(4) The proposed regulations appear at 68 Fed. Reg. 15566 (Mar. 31, 2003) and can be found at www.dol.gov/esa/regs/fedreg/proposed/2003-033101.htm.