

5 Tips For Grasping The FLSA's Administrative OT Exemption

By Daniela Porat

Law360 (May 3, 2021, 11:26 AM EDT) -- Employers can get tripped up by the seemingly nebulous requirements of the administrative exemption from overtime that's in the Fair Labor Standards Act, but they can ensure their review is concrete with a cautious approach that uses comprehensive questions and solid recordkeeping, attorneys say.

Two key requirements of the Fair Labor Standards Act's administrative exemption are that an employee's so-called "primary duty" must involve office or nonmanual work related to general business operations and the employee must exercise "discretion and independent judgment with respect to matters of significance" as part of their main duty.

Here, Law360 offers five tips employers can use to determine if their employees pass the test.

Ask if an Employee's Judgment has Clout

Instead of just focusing on whether an employee's contributions to a company are important or significant, a common misreading of the requirements, Russell Bruch, a partner at management-side firm Morgan Lewis & Bockius LLP, suggests asking questions like this one: Does the business turn to that individual for recommendations and give them autonomy?

Bruch said while an employee might not have final say on a matter or their recommendation might need to be reviewed by others, a good barometer of whether that person is exempt is if their recommendations are given significant weight.

Bruch offered other examples of questions an employer can pose to probe whether an employee meets the standards of the administrative exemption.

"If things get off track, do they help it get back on track?" he said. "Are they doing more than just raising a flag and saying 'I see a problem' or coming up with potential solutions to the problem?"

These kinds of questions can help narrow the pool of potential exempt employees.

Justin Swartz, partner at worker-side firm Outten & Golden LLP, said it's a red flag when an employer tries to apply the exemption to hundreds of employees.

"... Even the biggest companies don't need hundreds or thousands of people to make the kinds of decisions and exercise the kind of judgment that the administrative exemption requires," he said.

Use Performance Management Systems to Track Obligations

Employers should look to their performance management systems not just for pay or promotions decisions but also to analyze whether an employee is exempt, said Julie Totten, a partner at management-side firm Orrick Herrington & Sutcliffe LLP.

These assessments don't end when a position is created or an employee is hired, she said.

It's a good idea to incorporate self-evaluations in performance reviews because those assessments tend to "shed some light on the level of judgment and discretion, in particular, but also with regard to what duties the person is actually performing," Totten said.

On the flip side, employers should also make sure to document an employee's performance challenges, particularly in instances where an employee is not allocating their time in the way they should be and instead is doing more rote or menial tasks, according to Totten.

In California, for example, if a company can show that its expectation for that particular position was at a much higher level and it documented an employee's lapses, the company might be in a better position to stave off a potential exemption challenge, Totten said.

But Don't Just Weigh Time Spent on Primary Duties

While it's prudent to assess whether an employee meets the primary duty prong of the administrative carveout by checking how much time an employee spends on nonexempt tasks, Totten said it's important to keep in mind that the FLSA standard boils down to whether the employee's most important responsibility is exempt, not necessarily whether they devote the most time to it.

Totten said that it's a good rule of thumb for employers to see if an exempt position could meet a primary duties test where the emphasis is on whether the employee is spending the bulk of their time on those exempt tasks.

But Totten pointed to a "stark example" to show that time isn't everything.

She said employers should think about the 2001 Ninth Circuit decision in *Baldwin v. Trailer Inns Inc.*, on the executive exemption in which a couple was found to meet the primary duty test for that exemption even though they spent only 10% of their time managing an RV park. The importance of their managerial duties to their position trumped the fact that they spent the other 90% of their time on nonexempt responsibilities.

"When I'm auditing or advising, I would like to see more than 10% of one's time spent on exempt duties, but it is kind of important to keep that somewhat extreme example in mind," Totten said.

Treat Salaried Employees Like Salaried Employees

Celena Mayo, an attorney at management-side firm Wilson Elser Moskowitz Edelman & Dicker, said employers have to remember that a salary "remains constant regardless of the quality or quantity of

work performed."

An employer can get into trouble if it docks an employee's pay if the worker, for example, comes in on a Monday but ditches work the rest of the week. "That can defeat the exemption," she said, potentially exposing the employer to a violation of the salary requirements.

Just as salaried employees will not get paid for hours worked over 40 in a given week, employers cannot dock pay for hours worked fewer than 40, Bruch said.

Edwin Sullivan, an attorney in Houston for Oberti Sullivan LLP who has represented both workers and employers, said "when companies start treating salaried employees like hourly employees, that's not a salary."

Exemptions are Just That: Exemptions

Even with these tips, Mayo, the management-side attorney, said the default position should be to pay employees for all hours worked.

Employers "really need to be ruthless when assessing whether an employee falls into one of the exempt categories because the potential liability arising out of failing to do this is really problematic," she said.

Sullivan said employers should remember that "very few people in the United States really have discretion and independent judgment with respect to matters of significance."

"Companies are not set up to give employees a lot of discretion," he said.

When in doubt, Swartz said employers should pay overtime.

"Be conservative and don't try to stretch the exemption or any exemption to cover somebody who it's clearly not intended to cover," he said. "Err on the side of not trying to deny workers' wages."

--Editing by Vincent Sherry.