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Workforce Stra

Exempt v. Nonexempt Employees: Keeping Compliant With the Fair Labor Standards Act

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Essential information.
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Workforce Strategies

Exempt v. Nonexempt Employees: Keeping Compliant With the Fair Labor Standards Act

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WORKFORCE STRATEGIES

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INTRODUCTION: AMBIGUITY AND NONCOMPLIANCE

The federal Fair Labor Standards Act guarantees all covered employees a minimum level of compensation, although how that minimum level is calculated depends on the sort of work an individual employee performs.

Under the FLSA, nonprofessional employees must be paid an hourly minimum wage plus a premium for any hours worked over 40 in a single week, while professional ("white-collar") employees must be paid a minimum weekly salary not subject to variation based on actual hours worked. Because professional employees are not covered by FLSA's hourly minimum wage and overtime requirements, they are generally referred to as "exempt" employees, while nonprofessional hourly employees are referred to as "nonexempt." (But bear in mind that "exempt" does not mean exempt from the law, but just from certain parts of it.) Employers who incorrectly treat nonexempt employees as exempt are liable for any premium (overtime) compensation not paid and for associated interest and penalties.

The Department of Labor has developed criteria employers must apply when determining whether an employee is exempt or nonexempt, but these criteria can be ambiguous and subjective, which has resulted in a steady stream of lawsuits, a situation not much improved, perhaps even made worse, by DOL's issuance in August 2004 of updated and "clarified" regulations.

"We are seeing a huge increase in wage and hour litigation, particularly in [worker] classification areas," Laura Innes, partner with Simpson, Garrity & Innes in San Francisco, told BNA.

One reason for the upward spiral in litigation is that several aspects of the tests used to determine whether an employee qualifies for one of the exemptions to the minimum wage and overtime requirements of the FLSA are subjective. For employees to be exempt, for example, they must generally exercise "discretion and independent judgment," but just what this means in actual practice is not always clear.

"The tests still contain substantial ambiguity," according to Mark Wiletsky, an attorney in the Boulder, Colo., office of Holland & Hart.

Despite DOL's attempts to update the classification criteria, even FLSA's new rules are "not an easy fit" for most employers because FLSA, drafted in 1938, was designed to protect blue-collar workers in a manufacturing economy but is now being applied to a service economy populated by highly paid office workers using advanced technology, Wiletsky said. In other words, DOL is "trying to apply a Depression Era law in 2008."

DOL is "trying to apply a Depression Era law in 2008."

In part because of this ambiguity in the criteria employers must apply to classify employees as exempt or nonexempt, noncompliance is also widespread, Wiletsky said.

While many employers make honest mistakes in their attempts to apply the law, however, noncompliance is not always unintentional.

"Maybe it's not ambiguity" that encourages noncompliance, Steven G. Zeiff, a plaintiffs' attorney with Rudy, Exelrod & Zeiff in San Francisco, said. "Sometimes companies see they could save millions of dollars if they don't pay overtime."

"Everybody could be doing it wrong."

Wiletsky also pointed to an "everybody's doing it this way" mentality in many sectors of the economy and warned that "everybody could be doing it wrong."

In any case, employers are faced with a complex system of exemptions and are well advised to examine their compliance with the FLSA before lawsuits are filed by employees who feel they've been misclassified (and underpaid) or the Department of Labor announces it is coming for an audit.

RECENT ENFORCEMENT TRENDS

White-collar (professional) employees are exempt from FLSA's minimum wage and overtime pay provisions if certain requirements are met. To be eligible for the exemption, white-collar employees generally must:

- qualify as either executive, administrative, professional, highly skilled in a computer-related occupation, or engaged in outside sales;
- in the case of executive, administrative, or professional personnel, be paid on a salary basis;
- meet the job-duty criteria for one of the defined FLSA exemptions; and
- meet any minimum earnings requirements.

The revised FLSA regulations released on Aug. 14, 2004, were an attempt to simplify the tests used to determine whether a worker qualifies for exemption from the law's requirement that employees be paid an overtime premium for all hours worked in excess of 40 per week.

Among the most significant changes were requirements that:

- all employees earning less than $455 per week or $23,660 per year be classified as nonexempt and
- all employees paid at least $100,000 annually who perform office or nonmanual work be considered exempt if they "customarily and regularly" perform executive, administrative, or professional duties.

These "duties tests," which are the heart of the ambiguity, are spelled out in a simpler fashion in the new rules than under the old regulations.

Nevertheless, the new regulations and especially the duties tests were met with "a lot of skepticism, which has proven to be well-placed," Mark Wiletsky said, adding that there "continues to be widespread noncompliance."

There "continues to be widespread noncompliance."

"Not that employers are intentionally trying to circumvent the law, but the law is ambiguous and often counterintuitive," Wiletsky said. "It's very difficult for an employer. There is very little clear guidance on which they can confidently rely."

And it is not just individual employers that fall victim to the regulations' ambiguity. Entire industries have been found to be noncompliant, Wiletsky said, and entire classes of employees—including retail managers, mortgage brokers, and insurance claims adjusters—have been found in administrative rulings and court decisions to have been misclassified.

The Labor Department's 'Bread and Butter'

Compounding the problem for employers, the U.S. Department of Labor has made FLSA enforcement a top priority. In fiscal 2007, the department's Wage

and Hour Division collected more than $163 million for overtime violations and assessed $3.9 million in civil penalties under the FLSA. This represented the bulk of the total $220.6 million in employees' back wages collected for violations of all the laws DOL enforces, leading Paul DeCamp, administrator of the Wage and Hour Division, to call FLSA enforcement the division's "bread and butter" in an interview with BNA.

The $180.7 million in total FLSA recoveries includes nearly $16 million collected for about 12,000 employees as a result of violations of the 2004 Labor Department final rule defining the white-collar employee exemptions to overtime pay, the division said, an increase over the $13.2 million collected for approximately the same number of employees in fiscal 2006.

According to WHD, the most frequent FLSA violation involved employers classifying workers as exempt administrative employees even though the employees' primary duty was not performing, as required under the regulations, "office or non-manual work directly related to the management or general business operations" of the employer (see page 13).

Compliance issues are apt to "pop up" in particular industries.

DeCamp noted that compliance issues are apt to "pop up" in particular industries. If the division finds that one employer has made "mistakes" in classifying employees, DeCamp told BNA, others in the same industry sector are likely to be wrestling with the same issue.

DOL Opinions Granted Greater Judicial Deference

The Department of Labor in the past year or so has been issuing opinion letters to clarify some of the nuances of the white-collar exemptions. While courts have not always given deference to DOL, recent department efforts to improve opinion letters have resulted in increasing acceptance of DOL guidance as being owed controlling deference by courts. The Supreme Court's affirmation of DOL guidance in *Long Island Care at Home v. Coke* (127 S. Ct. 2339 (2007)), for example, was a significant moment for the Labor Department because it meant courts and practitioners could rely on department interpretations, according to Paul L. Frieden of DOL's solicitor's office, who spoke at a meeting of the American Bar Association's Labor and Employment Section last November.

Frieden, who heads appellate litigation for the department, said that the justices' finding that DOL guidance deserved deference reflected the efforts the department has made in recent years to improve the advice and guidance it gives to the courts and the public.

Alexander Passantino of DOL's Wage and Hour Division told the same meeting that the department encourages the public to request opinion letters, although he acknowledged that the lengthy review process before a letter is issued can mean delayed responses. Passantino encouraged attorneys to provide DOL with as much information as possible when filing the opinion letter request and noted that those requests that identify an issue that has broad interest will be the ones most likely to garner a letter.

Supreme Court Defers to DOL in Home Worker Case

In an affirmation of the Labor Department's regulatory process, a unanimous U.S. Supreme Court ruled that an exemption to the Fair Labor Standards Act involving in-home health care providers also applied to workers employed by third parties (*Long Island Care at Home v. Coke,* U.S., No. 06-593, 6/11/07).

All nine justices sided with Long Island Care at Home in finding that the Labor Department's interpretation of the companionship exemption (29 C.F.R. § 522.109(a)) was owed deference by the court and therefore DOL's interpretation that third-party employers were included in the exemption from paying in-home health care providers overtime should have been followed by the U.S. Court of Appeals for the Second Circuit.

"Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination," Justice Stephen Breyer said for the court.

The Second Circuit had questioned the deference owed DOL's regulations in finding that the companionship services exemption for home health care providers should not apply to employees of third-party employers because the intention of the regulation was to exempt companions, not individual caregivers employed to assist with housekeeping and the daily activities of living.

The deference paid DOL opinion letters depends on the court in which they are used, however, and such guidance really only applies to the employer to which the letter is issued.

Opinion letters can be "helpful," but are not "the be all and end all."

Such letters can be "helpful," according to Wiletsky, "but they are not the be all and end all. An employer ought to be cautious."

CONSIDERATIONS AND CONSEQUENCES

When it comes to the Fair Labor Standards Act, an employer faces a federal agency intent on enforcing a complex law and has a set of ambiguous rules to keep clear of trouble, not a comfortable situation to be in.

In such an environment, even well-meaning and conscientious employers can run afoul of the law, the attorneys interviewed by BNA agreed. And if mistakes in classification are made, "consequences can be severe," Mark Wiletsky said.

Wiletsky pointed out, for example, that an FLSA misclassification may:

- apply to many employees;
- involve back pay for two years, three if the violation is found to be willful; and
- be subject to liquidated damages and attorneys' fees.

To make matters worse for employers, "there's a very low burden to put together a collective action under FLSA," which could involve potentially hundreds or even thousands of employees, Wiletsky said.

For all these reasons, plaintiffs' attorney Steven Zeiff said, employers should "carefully look to see if they are following the strict rules of the tests."

"Pay them overtime. The exposure is not worth it."

"If [employees] are spending a large amount of time not doing managerial duties, pay them overtime," Zeiff advised. "The exposure is not worth it."

Recent settlements of misclassification cases have been enormous. Wiletsky cited a series of settlements in the financial industry related to misclassifying stock salespersons as exempt administrative employees, which include a $98 million settlement with Smith Barney, a $37 million settlement with Merrill Lynch, an $89 million deal with UBS, and a $42.5 million deal with Morgan Stanley.

As previously noted, there are five white-collar exemptions to the FLSA's minimum wage and overtime requirements:

- executive employees,
- administrative employees,
- computer professionals,
- outside sales persons, and
- learned professionals.

Each of these exemptions poses its own unique problems for employers.

The Executive Exemption

"Executive" employees, for FLSA's purposes, are corporate managers with direct supervisory responsibility (see the box on page 12). The key consideration

Wage and Hour Litigation Takes Aim at Duties' Test

Three years after the new Fair Labor Standards Act white-collar exemption regulations were implemented, a panel of attorneys said that the changes have opened the door to new areas of wage and hour litigation that were not predicted when the rules were launched.

Speaking at the American Bar Association's Labor and Employment Law Section meeting last November, the attorneys said predictions that the new FLSA rule would reduce litigation and result in people losing overtime have not come to pass.

Instead, "a sleeping giant was awakened by these regulations," said management attorney William J. Kilberg of Gibson Dunn & Crutcher in Washington, D.C. Kilberg said that while claims involving the FLSA's salary-basis test have declined, litigation under the act's duties' test has gone way up.

The increased emphasis on the duties' test has occurred because the new regulations clarified that the white-collar exemption analysis should look at an employee's duties and not merely the job title, plaintiffs' attorney Steven G. Zeiff said.

"Courts are all over the place when it comes to the duties' test," said Zeiff, a partner with Rudy, Exelrod & Zeiff in San Francisco. "But the new regulations recognized job title alone doesn't answer the question for employers. A fancy title doesn't mean the exemption will stick."

This analysis can cut both ways, however, Kilberg and Zeiff emphasized. While the rule's focus on duties has aided plaintiffs' attorneys in some situations, there is still uncertainty on how the duties will be examined under the administrative exemption, which is usually applied to white-collar employees who do not manage others.

Zeiff, who has litigated some of the most high-profile administrative exemption cases dealing with insurance claims adjusters, said that it is clear the administrative exemption—as opposed to the executive and professional exemptions—involves true administrative work and is not meant to be a general white-collar exemption.

"The exemption applies to administrative functions at a high level," Zeiff said, adding that it was "not meant to cover hordes of employees."

in applying the executive exemption is whether an employee's "primary duty" is in fact management. While on its face this may seem a straightforward question, the ambiguity of the term "primary" has led to an explosion of lawsuits, especially among retail managers who have argued that they spend the majority of

their time performing nonmanagerial tasks and therefore do not qualify for the exemption.

Some courts have attempted to ascertain in these cases the importance of the managerial aspects of the duties (rather than just how much time is spent performing "managerial" compared to "nonmanagerial" duties) in determining whether the employee is exempt.

The Executive Exemption

To qualify for the executive exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than $455 per week.
- The employee's primary duty must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise.
- The employee must customarily and regularly direct the work of at least two other full-time employees or their equivalent.
- The employee must have the authority to hire or fire other employees or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

Source: U.S. Department of Labor

For example, the Sixth Circuit in *Thomas v. Speedway SuperAmerica*, 812 WH Cases 2d 1729 (6th Cir. 2007), found that the manager of a convenience store and gas station was an executive employee even though she spent significant amounts of time doing nonexempt work (stocking merchandise, sweeping floors, cleaning bathrooms, operating the register, and performing routine clerical duties), because she also performed many management functions, including supervision and selection of employees, preparing the weekly work schedule, handling employee complaints, performing evaluations of employees, and handling terminations. In addition, the employee had everyday discretion in how she carried out her job.

Other courts have looked at the requirement for managing subordinates in making their determinations.

For example, a class action against RadioShack, which involved an $8.8 million settlement with company managers (*Perez v. RadioShack Corp.*, N.D. Ill., No. 02-884, final settlement 11/15/07), received significant attention in September 2005 when Judge Rebecca R. Pallmeyer of the Northern District of Illinois ruled that RadioShack managers who were not spending 80 percent of their time supervising employees failed to meet the FLSA's executive exemption and were therefore due overtime pay.

This decision garnered notoriety because Pallmeyer rejected arguments offered by dueling experts on the issue who had worked at the Labor Department. Instead, she backed a bright-line rule stating that anyone who fails to meet the 80-percent threshold is entitled to overtime.

Other jurisdictions look at the time spent on general managerial duties, not simply supervision, in determining exemption. Zeiff noted that in California, for example, it is "more of a stop-watch test," with 51 percent managerial duties tipping the balance in favor of exemption.

"That's why I like California's law," Zeiff said. "It's more of a bright line. You just add up the time" spent on various tasks.

Even the application of such an apparently straightforward "bright-line" test is not free of ambiguity, however, since the key question remains of what activities are to be counted in calculating time spent engaged in "management."

"Even after the new regulations," Zeiff said, "courts are still grappling with what's a primary duty."

The Administrative Exemption

The administrative exemption is perhaps the most problematic of the white-collar exemptions because of the ambiguities inherent in the third part of the test, Innes said, since the phrase "exercise of discretion and independent judgment with respect to matters of significance" is susceptible to a variety of subjective interpretations (see box this page).

The administrative exemption is perhaps the most problematic of the white-collar exemptions.

The Administrative Exemption

To qualify for the administrative exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than $455 per week.
- The employee's primary duty must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.
- The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Source: U.S. Department of Labor

In one of the most significant cases involving the administrative exemption, thousands of claims adjusters for Farmers Insurance won judgments from courts in California and Oregon that ruled the adjusters on smaller claims did not exercise sufficient discretion and independent judgment to qualify for the exemption.

"It was appropriate for the court to find that these routine, standardized activities were production" as opposed to administration, Zeiff, an attorney for the Califor-

Millions Awarded for Employee Misclassification in *Bell v. Farmers*

Courts in California and Oregon awarded millions of dollars in overtime pay and liquidated damages to thousands of insurance claims adjusters in 2004 and 2005.

Approximately 945 claims adjusters working for Farmers Insurance Exchange in six states were owed more than $48.5 million in overtime pay and liquidated damages under the FLSA and various state laws, a federal judge in Portland, Ore., ruled May 2, 2005 (*In re: Farmers Ins. Exch. Claims Representatives' Overtime Pay Litig.*, D. Or., MDL No. 33-1439, *final judgment* 5/2/05).

The judgment by the U.S. District Court for the District of Oregon covered employees in Colorado, Illinois, Michigan, New Mexico, Oregon, and Washington. Additionally, the court had earlier issued a separate $4 million judgment covering approximately 94 employees in Minnesota, making the total judgment in the collective and class action lawsuits approximately $52.5 million. The multidistrict litigation combined collective and class action lawsuits filed in the seven states.

The court decided in November 2003 that claims representatives who assess physical damage to motor vehicles and property claims adjusters who handle claims for less than $3,000 are entitled to overtime pay. However, adjusters who handle claims for more than $3,000 are exempt from overtime pay as administrative employees who exercise independent judgment and discretion, the court ruled.

That judgment followed a $90 million overtime judgment against the company in *Bell v. Farmers Ins. Exchange* covering approximately 2,400 insurance adjusters working in California between 1993 and June 2001. The California Court of Appeal in February 2004 upheld all but $1.2 million of the judgment (9 Cal. Rptr. 3d 544, 9 WH Cases 2d 726), and the California Supreme Court later declined to review the case.

nia plaintiffs in *Bell v. Farmers*, told BNA. "That's the fundamental principle from Bell."

This focus on the administrative versus production dichotomy has generated a great deal of litigation and analysis, Zeiff said, and he acknowledged that some other federal courts have been moving away from that dichotomy and "have been more deferential to the insurance industry."

In a Jan. 4, 2008, decision, for example, the U.S. Court of Appeals for the Seventh Circuit ruled that damage appraisers who estimated and settled property damage claims for clients of an Illinois insurance company were administrative

employees and therefore not entitled to overtime pay under the Fair Labor Standards Act (*Roe-Midgett v. CC Servs. Inc.*, 7th Cir., No. 06-3195, 1/4/08).

Affirming a lower court's ruling in favor of CC Services Inc., the court said that Paula Roe-Midgett's work as a material damage appraiser was FLSA-exempt activity that directly related to the operations of CCS and was not simply nonexempt "production" on behalf of the firm's insurance company clients.

"California is more employee-friendly and the courts are more willing to narrowly construe" the administrative tests, Zeiff said.

The Computer Professional Exemption

State and federal wage and hour law provides an overtime exemption for individuals employed as computer professionals. This category, however, is very restrictive, and far fewer employees qualify for the exemption than employers may believe, Laura Innes said.

Furthermore, many employers and even regulators "are not at all keeping up with the language and lingo of IT folks," according to Cynthia O'Neill, a partner in the San Francisco office of Liebert Cassidy Whitmore. "Certainly no one who's crawling around with a screwdriver" installing computer equipment would qualify for the computer professional exemption, she said.

No one "crawling around with a screwdriver" installing computer equipment would qualify for exemption.

In California, which leads the nation in both case law and statutory activity in this area, Innes said, employees may be exempt as computer professionals if they spend more than half their work time in duties that are intellectual or creative, require the exercise of discretion and independent judgment, and consist of one or more of the following:

- applying systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs, including prototypes, based on and related to user or system design specifications; or
- documenting, testing, creating, or modifying computer programs related to the design of software or hardware for computer operating systems.

To qualify for the exemption, employees must also:

- be highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering; and
- be paid at least the minimum compensation set annually by the state (currently, $49.77 per hour or an annual salary of $103,521.60).

Recent settlements underscore the limited application of the exemption, Innes said.

The Computer Professional Exemption

To qualify for the computer professional exemption under federal law, employees must be compensated on a salary basis at a rate of not less than $455 per week or $27.63 per hour. In addition, their primary duty must consist of:

- the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- a combination of these duties, the performance of which requires the same level of skills.

Source: U.S. Department of Labor

Innes noted, for example, that IBM recently agreed to pay $65 million to employees whose primary duty was to install, maintain, and support computer software and hardware for IBM and its customers and who had been mistakenly classified as exempt. Similarly, Siebel Systems Inc. has agreed to pay up to $27 million to employees titled "software engineers" who claimed they were misclassified as exempt in violation of California law, and Electronic Arts settled separate class action lawsuits with entry-level graphic artists and entry-level computer programmers wrongly classified as exempt for $15.6 million and $14.9 million, respectively, Innes said.

DOL's recently issued opinion letter regarding the exemption status of an employer's Information Technology Support Specialists illustrates the logic used to determine whether a computer professional qualifies for exemption under the FLSA. The position at issue was formerly named the Help Desk Support Specialist and was responsible for the diagnosis of computer-related problems as requested by employees and contractors.

To make that diagnosis, the IT Support Specialist would conduct problem analysis and research, troubleshoot, and resolve complex problems either in person or by using remote-control software. The position required only a high school diploma or GED, although an associate degree was preferred.

DOL concluded that the IT Support Specialist position would not qualify for the computer professional exemption under federal law. The agency explained that maintaining a computer system and testing by various systematic routines to see that a particular piece of computer equipment or computer application is working

properly according to the specifications designed by others are examples of nonexempt work, since they do not involve the duties required for the exemption (see box page 16).

The Outside Sales Exemption

The outside sales exemption applies to sales employees who are not based in a retail store or other set place of employment, and even this relatively straightforward test has led to litigation.

Outside Sales Exemption

To qualify for the outside sales exemption, an employee must meet both of the following tests:

- The employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Source: U.S. Department of Labor

For example, a pharmaceutical sales representative for Roche Laboratories was ruled an "outside salesperson" under California law and therefore not entitled to overtime despite the fact she did not directly sell a product (*Menes v. Roche Labs. Inc.*, C.D. Cal., No. 07-00702, 1/7/08).

Ruling in favor of the employer in the state wage law claim, the U.S. District Court for the Central District of California said that even though the employee did not directly sell a product, the work of a pharmaceutical sales representative had all the characteristics of outside sales and therefore was covered by the exemption under Section 1171 of the California Labor Code, specifically:

- the job was advertised as a sales position and the employee was recruited based on sales experience,
- the job entailed specialized sales training,
- compensation was based on commissions,
- the job required independently soliciting new business, and
- the employee received little or no direct supervision in carrying out daily work tasks and was called a salesperson.

The court held that while pharmaceutical sales representatives do not get a commission in the standard manner based on a single sale, they do receive bonuses based on sales success as determined by the "market share growth" in the assigned region, which is based in turn on the total amount of products sold in the

territory, and this "clearly qualifies [a representative] as an exempt outside salesperson."

The Professional Exemption

For FLSA's purposes, the term "professional" refers to individuals whose position has recognized status and is based on the acquisition of professional knowledge through a prolonged course of instruction and study.

Exempt professional employees are of two types:

- "Learned" professionals must perform nonmanual work of an advanced type in a field of science or learning customarily acquired by a prolonged course of study, that is primarily intellectual in character, and that requires the exercise of discretion and independent judgment.
- "Creative" professionals must perform work that requires "invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor."

Learned professionals include teachers, accountants, attorneys, scientists, and the like. Creative professionals include artists, writers, and performers.

The Learned Professional Exemption

To qualify for the learned professional exemption, employees must meet all of the following tests:

- The employee must be compensated on a salary basis at a rate not less than $455 per week.
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and that includes work requiring the consistent exercise of discretion and judgment.
- The advanced knowledge must be in a field of science or learning.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

According to O'Neill, the learned professional exemption is a source of "major confusion" for employers.

The learned professional exemption is a source of "major confusion" for employers.

Part of the problem is that many professionals, such as urban planners or engineers, "can come up to their professional position from a variety of ways," ranging from doctorate degrees from elite colleges to a series of courses at the community college level, O'Neill said.

Therefore, the exemption's emphasis on advanced degrees "knocks out a lot of people," such as nurses whose training "is often at the community college level," O'Neill told BNA.

Under the Fair Labor Standards Act . . .

An Embryologist May Be a Learned Professional . . .

An embryologist falls under the FLSA's "learned professional" exemption and therefore is not entitled to overtime pay, the U.S. District Court for the District of Delaware ruled.

In dismissing the overtime claims against Reproductive Associates of Delaware, the court concluded that Lynn Sansoucie qualified under FLSA regulations for the learned professional exemption. The court noted that Sansoucie's salary exceeded the minimum salary of $455 per week required for exemption, her work required advanced knowledge in a field of science or learning, and she had acquired that knowledge through a prolonged course of specialized intellectual instruction (*Sansoucie v. Reproduction Assoc. of Del. P.A.*, D. Del. No. 04-861, 5/4/05).

. . . But a Paralegal May Not

Without a specialized education that correlates to specialized job responsibilities, paralegals and legal assistants are not exempt from overtime under the FLSA, the Labor Department's Wage and Hour Division explained.

While many paralegals hold academic degrees from four-year institutions, "it does not follow that they can qualify for the learned professional exemption," DOL explained. "Most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution." Merely having a college degree does not satisfy the requirements for an exemption, however. Even a paralegal with a master's degree in business administration who has passed an accounting certification examination is not exempt if the employee does not perform tasks specifically related to business or accounting, DOL said.

The learned professional exemption is available, DOL said, "when a paralegal, who possesses an advanced specialized degree in other professional fields, applies advanced knowledge in that field to the performance of his or her primary duty" (Wage and Hour Opinion Letter, FLSA2005-54, 12/16/05).

SURVIVING A WAGE-HOUR AUDIT

To ensure compliance with FLSA and the other laws it administers, DOL conducts numerous employer audits throughout the United States. While the prospect of a wage-hour audit may strike fear in the hearts of employers—"The initial reaction when the DOL comes knocking is obviously one of concern," Wiletsky said—careful planning and a rigorous self-examination can turn an audit into a positive experience, employment attorneys told BNA.

The attorneys interviewed by BNA agreed that companies notified of a pending DOL FLSA audit should:

- *Cooperate*: A company that does not cooperate "can get subpoenaed and then they go over you with a fine-toothed comb," Laura Innes said.
- *Get an attorney*: "The semantics are critical," Innes said. Counsel can help narrow the scope of the investigation and limit the number of documents that must be turned over to DOL investigators.
- *Make Lemonade*: "View it as an opportunity," Wiletsky said, to get your house in order before a costly lawsuit. "If there has been a mistake made, it's far better to resolve it with the government agency than in a court case."

DOL typically audits the last one to three months of payroll activity, Wiletsky said. Investigators usually review both job descriptions and timesheets and "also interview employees to find what they are actually doing on a day-to-day basis," whether those activities constitute exempt or nonexempt duties, and whether they are being compensated on the correct basis.

"The scope depends on whether it's a routine audit or is in response to a complaint," Wiletsky said. Often the investigator will ask for a fairly broad range of documents. This is where counsel can assist in narrowing the scope by removing privileged documents or identifying areas where misclassifications are unlikely, such as among minimum-wage employees.

Conducting a Self-Audit

Among the most important steps an employer can take to prepare for a possible DOL audit is to conduct an FLSA audit of itself, Wiletsky said.

FLSA lawsuits offer employees a low-risk means to recover staggering judgments.

An FLSA self-audit can ensure compliance with federal wage and hour laws and give an employer peace of mind about its ability to defend itself against potential wage-hour lawsuits, according to Liebert Cassidy Whitmore, a California employment law firm.

"FLSA lawsuits are popular because they offer employees a low-risk means to recover staggering judgments," which may be amplified by liquidated damages, the law firm said on its Web site (http://www.lcwlegal.com).

Conducting a self-audit may also provide a defense against liquidated damages, the firm's Web site said, for "those employers who can prove that they had a good faith belief that their pay practices complied with FLSA requirements."

Who Should Self-Audit?

Employers that are good candidates for FLSA self-audits are those that:

- cannot recall when they last audited their FLSA compliance;
- have not completed FLSA audits for the last two to three years;
- utilize decentralized time-keeping systems that vary from department to department;
- have employees earning significant amounts of overtime or compensatory time off;
- have decided that many employees qualify for the white-collar exemptions from the FLSA overtime requirements; or
- do not keep records of employee work and overtime.

Source: Liebert Cassidy Whitmore

According to Liebert Cassidy Whitmore, in addition to preparing for a DOL investigation, such a self-audit can be conducted:

- to prepare for labor negotiations;
- during revisions to personnel rules;
- after changes in federal, state or local law;
- following employee classification changes; or
- in response to grievances or complaints.

When conducting an FLSA self-audit, "the typical way to create order out of chaos is to start with the exempt individuals," according to Cynthia O'Neill, whose firm specializes in employment law audits of public entities. The employer should pull these individuals' job descriptions to see if they match the new white-collar exemption tests.

"We know we cannot rely on the job description alone."

"We know we cannot rely on the job description alone," O'Neill warned. "The regulations are clear on that, but you can *start* with the job descriptions."

Once the list of exempt employees and the matching job descriptions have been collected, a review will show that "there are going to be some absolutely no-doubt positions" that are exempt, such as corporate officers, O'Neill said. "But that leaves me with a stack of what I call the 'wobblers.' "

For these individuals, "there's no substitute for having at least a half an hour conversation with the individual," O'Neill said.

Top 10 Misconceptions in Classifying Employees

Employers make assumptions about employee classification that have no actual connection to the FLSA or its regulations. For an employee to be exempt from overtime, he or she must meet both the salary and the duties tests. If these criteria are not met, the employee is not exempt. The following are common misconceptions that can get employers into trouble:

1. Salaried employees are exempt from overtime.
2. Employees paid on a commission basis are exempt from overtime.
3. An employee is "primarily engaged" in the task that is most important.
4. If an employee supervises other employees, he is exempt.
5. A salary is a straightforward concept.
6. Exempt employees can determine their own schedules.
7. Administrative employees are engaged in administrative tasks.
8. IT employees are exempt computer professionals.
9. Highly technical work is professional.
10. Fancy position descriptions and titles will establish a white-collar exemption.

Source: Laura Innes, partner, Simpson, Garrity & Innes, San Francisco

She suggests the interviewer should just "let them talk," without attempting to direct their communication. "Most people love talking about their jobs."

In any audit of exemption status, individuals may well "react in a nonlinear and nonrational" way, O'Neill said. Some individuals do not want their exempt status changed and others "are beyond their expertise and not rational about their duties."

For the interviewer, "the key is just remain calm," O'Neill said.

After these conversations, O'Neill estimated she gets a "clear read" for only about 10 percent of the employees, and then she goes to those employees' supervisors for a further investigation of the employee's actual duties and division of tasks.

If the self-audit turns up misclassifications of individuals or even of groups of employees, "don't hide from it," O'Neill advised. "Get it out there."

A good-faith admission of misclassification and immediate rectification may forestall litigation and DOL enforcement action, she said.

CONCLUSION

The trend is clear: more litigation of exempt versus nonexempt classifications is inevitable, the attorneys consulted by BNA agreed.

For employers, the important thing is to get classifications right and to keep up with the case law.

"The lovely thing about wage and hour [cases] as opposed to, say, sex discrimination [cases], it's clean and straightforward," Laura Innes said. Analyzing an FLSA case is a simple matter of determining "what were they doing and when did they do it."

Employers must also accept that subjectivity and ambiguity are here to stay. "The fact of the matter is the regulations by their very nature can't cover every employment situation out there," Mark Wiletsky said.

Subjectivity and ambiguity are here to stay.

Since every court will judge every lawsuit individually, employers should examine every employee's classification individually to determine whether they truly are performing exempt or nonexempt duties, Cynthia O'Neill said.