Exempt or Not Exempt Under the Administrative Exemption of the FLSA . . . That Is the Question

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I. Introduction

Each year, employers nationwide claim that their employees, who hold a variety of honorific titles and perform a diverse number of duties, are exempt under the administrative exemption of the Fair Labor Standards Act[1] (Act or FLSA). Frequently, employers investigated by the Wage and Hour Division of the Department of Labor (DOL) are unable to meet the stringent requirements of the FLSA, which results in costly liability to their companies. One court aptly described the undesirable position of employers today:

> In the end, deciding whether an employee is exempt must be a voyage through fact-bound waters. Although there are a great many stars of law to navigate by, the course turns on the facts of an employee's job duties. Unfortunately for defendant, its position that plaintiffs are exempt is caught between the devil of contrary facts and a deep blue sea of detailed regulations.[2]

This article will analyze the "deep blue sea of detailed regulations"[3] in addition to other sources of interpretation to define the parameters of the administrative exemption. Additionally, this article will provide guidance to employers and their counsel in establishing that their employees fulfill the requirements of the administrative exemption. Two other exemptions, the executive and the professional, will be discussed briefly to provide background.

II. Sources of Interpretation

The FLSA provides that:

> No employer shall employ any of his employees who in any workweek is engaged in commerce or in production of goods for commerce for a

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1. 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993).
2. Harris v. District of Columbia, 741 F. Supp. 254, 259 (D.C. 1990).
3. *Id.*

> workweek longer than forty hours . . . unless such . . . employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[4]

However, section 13(a)(1) of the FLSA exempts from the above requirement those employees "employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined . . . by . . . the Secretary."[5] The Secretary has in turn delegated this power of definition to the Administrator of the Wage and Hour Division of the Department of Labor.[6] The Wage and Hour Division of the Department of Labor, created pursuant to section 4 of the FLSA, has primary responsibility for enforcing and administering the Act.

To interpret the meaning of the broad statutory phrase "employed in a bona fide executive, administrative, or professional capacity," an employer must consider the statute, accompanying regulations, interpretations, opinion letters, pamphlets, the field operations handbook and the case law that together define the parameters of the exemption. However, it is important to note that each of these sources of interpretation is afforded varying weights by courts of law.

The Wage and Hour Administrator has promulgated both "regulations" and "interpretations" to define the parameters of the exemptions.[7] Although these terms are often used interchangeably, an important distinction must be made. The regulations are entitled to great weight and have been held to carry the full force of law.[8] In fact, regulations are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[9] Before regulations are promulgated pursuant to the Administrative Procedures Act[10] (APA), a general notice of proposed rule making is published in the Federal Register. After notice is published, interested parties are given an opportunity to comment on the proposed regulation through submission of written data, views or arguments, with or without opportunity for oral presentation.[11] Interpretations and general statements of policy are not covered by the APA.[12] Interpretations, which are statements providing clarification of the statutory language and insight into what the Admin-

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4. 29 U.S.C. § 207(a)(2) (1988 & Supp. V 1993).
5. 29 U.S.C. § 213(a)(1) (1988).
6. 29 U.S.C. § 204(a) (1988); 29 C.F.R. § 541(a) (1994).
7. *See* 29 C.F.R. § 541.0-541.52 (general regulations); 29 C.F.R. § 541.99-541.602 (interpretations) (1994).
8. Skidmore v. Swift & Co., 323 U.S. 134 (1974); Lang v. Midwest Advanced Computer Serv., Inc., 506 F. Supp. 595 (E.D. Mich. 1981).
9. Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).
10. 5 U.S.C. §§ 551-559 (1994).
11. 29 U.S.C. § 553(c) (1988).
12. 29 U.S.C. § 553(b)(3)(A) (1988).

istrator of the statute means, do not have the force of law but are entitled to deference.[13] Courts differ, however, on the amount of deference given to the interpretations.[14]

In addition to the regulations and interpretations issued by the DOL, parties often seek the assistance of the DOL to determine if a particular employee is covered by an exemption. In response to an employer's request, the DOL may issue an opinion letter which is solely binding on the parties. Courts will give some weight to opinion letters, and to the extent that an opinion letter shares a common ground with the facts of a particular case, a court will afford full deference to it.[15]

Two additional resources issued by the DOL provide valuable insight to employers. First, pamphlets issued periodically by the DOL provide general information on the exemptions.[16] Although the information contained therein may not be considered in the same light as official statements of position contained in interpretative bulletins or other such releases formally adopted and published in the Federal Register, the pamphlets often provide information that is not discussed in the regulations or interpretations. Second, the Field Operations Handbook, published by the DOL, is written for the DOL's investigators to guide them in their investigations.[17] As a result, the handbook may also assist employers in preparing for a DOL investigation. Finally, an employer must consider the DOL administrative case law and, more importantly, the state and federal case law in making its determination as to whether a particular employee is exempt from FLSA coverage.

III. Statutory Requirements of the Executive, Professional, Administrative, and Combination Exemptions

The statutory exemptions are narrowly construed,[18] and the burden is on the employer to show that a particular individual qualifies for an exemption from the FLSA.[19] The determination of whether an employee is exempt under the executive, professional or administrative exemption is largely a question of fact.[20] The exempt or nonexempt status of an employee is "determined on the basis of whether his duties, responsibilities, and salary meet all the requirements of the appropriate section

13. 29 C.F.R. § 775.1 (1994).
14. Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).
15. Reich v. Gateway Press, Inc., 13 F.3d 685, 693, n.9 (3d Cir. 1994).
16. Wage & Hour Div., U.S. Dept. of Labor, WH Publication 1363, *Executive, Administrative, Professional and Outside Sales Exemptions Under the Fair Labor Standards Act* (1983).
17. Wage & Hour Div., U.S. Dept. of Labor, Field Operations Handbook.
18. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).
19. *Id.*
20. *See* Walling v. Gen. Indus. Co., 330 U.S. 545, 550 (1947).

of the regulations . . ."[21] Thus, it is necessary to scrutinize the categories set forth below to determine if an employee is exempt.

A. *Executive Exemption Requirements*

The term "employee employed in a bona fide executive . . . capacity" in section 13(a)(1) of the Act is defined by the regulations as an employee:

> (a) whose primary duty is managing the enterprise in which he is employed or of a customarily recognized department thereof; and
> (b) who customarily and regularly directs the work of two or more other employees; and
> (c) "who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;" and
> (d) "who customarily and regularly exercises discretionary powers;" and
> (e) who does not devote more than twenty percent of his time, or forty percent in the case of retail and service establishments, not directly related to the duties in paragraphs (a) through (d); and
> (f) "who is compensated . . . on a salary basis at a rate of not less than $155 per week . . . exclusive of board, lodging or other facilities . . . shall be deemed to meet all the requirements of the section."[22]

The above is commonly referred to as the "long test." Paragraph (e) does not apply in the case of "an employee who is in sole-charge of an independent establishment or a physically separated branch establishment" or who owns at least eighty percent of the enterprise in which the employee is employed.[23] If the employee is compensated on a salary basis at a rate of not less than $250 per week exclusive of board, lodging or other facilities, the "short test" is applied. In such an application, the employer must only satisfy (a) and (b) above.[24]

B. *Professional Exemption Requirements*

Few employers are able to fulfill the stringent requirements of the professional exemption because its coverage is limited. The term "employee employed in a bona fide . . . professional capacity" in section 13(a)(1) of the Act is defined by the regulations as any employee:

> (a) whose primary duty consists of:
> (1) work requiring knowledge of an advanced type of science or learning acquired by a prolonged course of specialized intellectual instruction and study, or

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21. 29 C.F.R. § 541.201(b)(2) (1994).
22. 29 C.F.R. § 541.1 (1994).
23. 29 C.F.R. § 541.113 (1994); *see also* White Collar Employees/Sole Charge Exception, 99 Wage & Hour Opinion Letter 1047 (1970) (installation supervisors do not satisfy sole charge exception); 99 Wage & Hour Opinion Letter 1067, (1971) (sole charge exception not extended to manager of leased department stores); 99 Wage & Hour Opinion Letter 1228 (1976) (resident manager does not meet sole-charge exception).
24. *See* 29 C.F.R. § 541.1(f) (1994) (outlining short test of bona fide Administrative employee status).

(2) work that is original and creative "in a recognized field of artistic endeavor," or

(3) "teaching, tutoring, instructing, or lecturing . . . as a teacher in a school system or educational establishment," or

(4) "work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering;" and

(b) "whose work requires the consistent exercise of discretion and judgment;" and

(c) "whose work is predominantly intellectual and varied in character;" and

(d) who does not devote more than twenty percent of his time in activities "which are not an essential part of and necessarily incidental to the work described in paragraphs (a) through (c);" and

(e) who is compensated on a salary basis not less than $170 per week exclusive of board, lodging and other facilities.[25]

Employees compensated at a rate not less than $250 per week exclusive of board, lodging or other facilities are required to satisfy the "short test" only. The "short" test only requires that the employee's primary duty consist of work described in (a)(1), (3) or (4), which includes work requiring invention, imagination or talent in a recognized field of artistic endeavor. The salary requirements do not apply to individuals who hold valid law or medical licenses (or are engaged in internships or residency programs).

C. *Administrative Exemption Requirements*

Typically, employers are unable to meet the requirements of the executive exemption because their employees do not supervise two or more employees and/or do not have the authority to hire or fire. However, these employees typically assume managerial duties. Thus, although all the exemptions are construed narrowly, the administrative exemption provides the greatest opportunity for employers to claim an exemption.

The term "employee employed in a bona fide . . . administrative capacity" in section 13(a)(1) of the Act is defined by the regulations as any employee:

(a) whose primary duty consists of either:

(1) "the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers," or

(2) "the performance of functions in the administration of a school system, or educational establishment . . .;" and

(b) "who customarily and regularly exercises discretion and independent judgment;" and

(c) (1) "who regularly and directly assists a proprietor, or . . . bona fide executive or administrative employee," or

25. 29 C.F.R. § 541.3 (1994). Note that there is also a provision for an employee to be paid hourly under specific circumstances. *Id.*

(2) who performs work along "specialized or technical lines requiring special training, expertise, or knowledge," or
(3) "who executes under only general supervision special assignments and tasks;" and
(d) who does not devote more than twenty percent of his time, or forty percent in the case of retail or service establishments not directly related to the duties in paragraphs (a) through (c); and
(e) who is compensated on a salary basis at a rate of not less than $155 per week exclusive of board, lodging or other facilities, shall be deemed to meet all the requirements of this section.[26]

Similar to the executive exemption, employees compensated on a salary basis at a rate of not less than $250 per week exclusive of board, lodging or other facilities are required to satisfy only the "short test." The short test is less onerous, requiring that the employee's primary duty consist of work described in (a), which includes work requiring the exercise of discretion and independent judgment.[27] A detailed discussion of the executive and professional exemptions is beyond the scope of this article.

D. *Combination Exemption Requirements*

A combination of two exemptions allows employees to maintain their exempt status even though they are unable to satisfy every element of a particular exemption. The regulations permit "the tacking of exempt work under one section of the regulations . . . to exempt work under another section of those regulations."[28] Employees whose primary duties are neither management nor administrative may qualify for a combination exemption based upon their administrative and management responsibilities. However, in combination exemptions, "the employee must meet the stricter of the requirements on salary and non-exempt work."[29] Consequently, employees qualify for a combination exemption only if they satisfy the long test, including the stricter salary and non-exempt work requirements.[30] Typically, employees who supervise two or more employees and who thereby may qualify for the executive exemption also perform substantial administrative duties. Their supervisory duties permit them to satisfy the administrative exemption if their primary duties are found to be a combination of exempt work under either the administrative or executive exemptions.[31] Thus,

26. 29 C.F.R. § 541.2 (1994).
27. 29 C.F.R. § 541.2(e)(2) (1994); *see also* Shillinglaw v. Sys. Works, Inc., 1 Wage & Hour Cas. 2d (BNA) 1362 (N.D. Ga. 1993) (No requirement under the short test to perform a certain percentage of primary work which is discretionary).
28. 29 C.F.R. § 541.600(a) (1994).
29. *Id.*
30. *See* Shockley v. City of Newport News, 997 F.2d 18 (4th Cir. 1993).
31. *Id.* (remanded to consider if patrol lieutenants and crime analysis sergeants qualified); Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990) (producers do not qualify for combination exemption); Clayton v. Oregon, 1990 WL 32088 (D. Or. 1990) (patrol sergeants qualified for combination exemption).

an office manager who both supervises two or more employees part of the time and performs a substantial amount of administrative work may qualify for the combination exemption if the office manager meets the stricter salary and non-exempt work requirements.

E. *Salary Test Requirements*

Except for physicians and attorneys, an employee must be paid on a salary basis to qualify for any of the three exemptions described above. An employee is considered to be paid on a salary basis if the employee under the employment agreement regularly receives a predetermined amount consisting of all or part of the employee's compensation each pay period.[32] This predetermined amount cannot be subject to reduction based on the quality or quantity of work performed.[33] The employee must receive a full salary regardless of the number of days or hours worked. However, if an employee does no work for a full work week, the employer need not pay the employee for that workweek.[34]

No deductions may be made from an employee's salary if an employee is ready, willing and able to work, but there is no work available.[35] If under certain circumstances an employer does make deductions for absences, the employee may still qualify as a salaried employee.[36] For example, an employer may make deductions if the employee is absent for personal reasons for a day or more, other than for sickness or accident, and the employee's salaried status will not be affected.[37] Deductions may also be made because of sickness or disability pursuant to a bona fide plan, policy or practice of providing compensation for loss of salary because of sickness or disability.[38] No deduction may be made if the employee is absent because of jury duty or to testify as a witness, or if the employee is on temporary military leave.[39] Lastly, an employer may make deductions for penalties imposed in good faith

32. 29 C.F.R. § 541.118(a) (1994); *see also* 99 Wage & Hour Opinion Letter 1330 (1988) (employee paid in accordance with pay plan satisfied salary basis test).

33. *Id.*

34. 29 C.F.R. § 541.118(a) (1994); *see also* 99 Wage & Hour Opinion Letter 1081 (1992) (deduction for holidays not permitted).

35. 29 C.F.R. § 541.118(a)(1) (1994). *But see* 99 Wage & Hour Opinion Letter 1049 (1970) (29 C.F.R. 541.118 does not preclude a bona fide reduction in force if it is not designed to circumvent the salary basis requirement.).

36. 29 C.F.R. § 541.118(a)(2) (1994). *See* Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994) (deductions from employee's paid leave banks for absences less than one day do not defeat exemption if he regularly receives predetermined amounts not subject to reduction because of quality or quantity of work performed); Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

37. 29 C.F.R. § 541.118(a)(2) (1994); *see also* 99 Wage & Hour Opinion Letter 1013 (1970).

38. 29 C.F.R. § 541.118(a)(3) (1994).

39. 29 C.F.R. § 541.118(a)(4) (1994).

for infractions of safety rules of major significance.[40] A further discussion of the subtleties of the salary test requirements is beyond the scope of this article. Nevertheless, employers should pay close attention to the salary test. Many public and private employers have been assessed substantial sums in unpaid overtime for employees that met the duties test and where the employer had irregularities in their pay system.[41]

IV. Defining the Administrative Exemption

Typically, employees perform a variety of diverse functions and hold a variety of job titles. Neither an employer's job description nor an employee's job title determines whether a particular employee is exempt under the Act.[42] An exemption is based on the actual duties, responsibilities and the salary earned by the particular employee.[43]

As a practical matter, employers who pay employees in excess of $250 per week are likely to come within the administrative exemption. Accordingly, most employers will only need to satisfy requirements of the "short test." Under the "short test," the employer must prove that the employee's primary duty is "directly related to management policies or general business operations of his employer" and that the work includes "the exercise of discretion and independent judgment" as defined below.[44]

A. *Primary Duty Is Directly Related to the Employer's Management Policies or General Business Operations*

The administrative exemption is intended to be restricted to "white-collar" employees only.[45] An employee qualifies for the administrative exemption only if the employee's primary duty is office or nonmanual work directly related to the employer's management policies or the general business operations of the employer.[46] Some manual work will not jeopardize an employee's eligibility under the administrative exemption unless the employee performs so much manual work that the employee cannot be classified as a "white collar employee."[47] Thus, an employee who spends the majority of time using tools, instruments, machinery, or other equipment, or performing repetitive operations

40. 29 C.F.R. § 541.118(a)(5) (1994); *see also* Klein v. Rush-Presbyterian-St. Luke's Medical Ctr. 30 Wage & Hour Cas. (BNA) 1325 (N.D. Ill. 1991).

41. *See* Brock v. Claridge Hotel and Casino, 846 F.2d 180 (3d Cir. 1988), *cert. denied*, 488 U.S. 925 (1988); Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990).

42. 29 C.F.R. § 541.201(b)(2) (1994); Wage & Hour Publication 1363; Brock v. Nat'l Health Corp., 667 F. Supp. 557 (M.D. Tenn. 1987).

43. 29 C.F.R. § 541.201(b)(2) (1994); Martin v. Penn Line Serv., Inc., 416 F. Supp. 1387 (W.D. Pa. 1976).

44. 29 C.F.R. § 541.2(a)(1) (1994); 29 C.F.R. § 541.2(e)(2) (1994).

45. 29 C.F.R. § 541.203(a) (1994).

46. 29 C.F.R. § 541.206(a) (1994).

47. 29 C.F.R. § 541.203(b) (1994).

with his or her hands, will not qualify under the administrative exemption.[48] An office employee, on the other hand, is considered a "white collar" worker *per se* and therefore will not lose the exemption even if engaged in nonmanual work.[49]

To determine if an employee is "primarily" engaged in office or nonmanual work, the interpretations suggest that the fifty percent rule is a good rule of thumb. Under the rule, an employee who spends more than fifty percent of his time performing managerial duties is considered to have management as a primary duty.[50] However, the interpretations indicate that time alone is not dispositive.[51]

> Time alone, however, is not the sole test, and in situations where the employee does not spend over fifty percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.[52]

Activities contemplated by the interpretations as being "directly related to management policies or general business operations" of the employer are those related to the "administrative operations" as distinguished from "production" or "sales work."[53] The administrative ex-

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48. *Id., see also* Saver v. Hyatt Corp., 407 So.2d 228 (Fla. App. 1981) (assistant chief engineer who spent 75% of his time working with tools was not exempt); Donovan v. United Video, Inc., 725 F.2d 577 (10th Cir. 1989) (microwave engineers were not exempt when their primary duty was to perform maintenance inspections requiring a great deal of manual work); Christenberry v. Rental Tools, Inc., 655 F. Supp. 374 (E.D. La. 1987), *aff'd*, 851 F.2d 1419 (5th Cir. 1988) (damages and inventory clerk/relief dispatcher was not exempt); Donovan v. Rockwell Tires & Fuel, 26 Wage & Hour Cas. (BNA) 726 (M.D. N.C. 1982) (working foreman was not exempt); 99 Wage & Hour Opinion Letter 1144 (1973) (painting crew chief non-exempt since primary duty was painting even though he functioned as a supervisor).

49. 29 C.F.R. § 541.203(b) (1994).

50. 29 C.F.R. § 541.103 (1994). *See* Shockley v. City of Newport News, 997 F.2d 18 (4th Cir. 1993) (media relations sergeant did not satisfy the 50% test).

51. *See, e.g.*, Reich v. Wyoming, 993 F.2d 739, 742 (10th Cir. 1993); Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141, 1145 (3d Cir. 1983); Marshall v. Union Tel. Co., 621 F.2d 1246, 1252 (3d. Cir. 1980).

52. 29 C.F.R. § 541.103 (1994).

53. 29 C.F.R. § 541.205(a) (1994). *See, e.g.*, Ahern v. New York, 807 F. Supp. 919 (N.D.N.Y. 1992) (police investigators performed production work), *aff'd*, 3 F.3d 581 (2nd Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994); Roney v. United States, 790 F. Supp. 23 (D.C. 1992) (Deputy U.S. Marshall was subject to detailed directions from his superiors which qualified as production work); Dalheim v. KDFW-TV, 706 F. Supp. 493 (N.D. Tex. 1988) (producers, directors, and assignment clerks did not qualify under administrative exemption because their duties did not primarily relate to the administrative operations), *aff'd*, 918 F.2d 1220 (5th Cir. 1990).

emption is limited to employees who participate in the formulation of policies for the business, make decisions that affect business policy or whose responsibility it is to execute or carry out business policies.[54] The difference between "administrative" and "production" work is best illustrated by example. An inside salesperson whose primary duty is to produce sales of the company's products is performing "production work."[55] Similarly, an insurance claim investigator who produces information for the company's clients is simply gathering that product in addition to performing "production" work.[56] On the other hand, a detail person who creates plans to sell the company's products and markets the product for the greatest degree of use is performing "administrative work."[57] Servicing a business, therefore, qualifies as "administrative work."[58] Thus, there is a fine distinction between producing sales of a product and promoting sales of a product.

The administrative exemption is limited to persons who perform work of "substantial importance to management."[59] The interpretations recognize that "[i]t is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business."[60] However, the interpretations do provide some guidelines in making this determination. Discretion and independent judgment must be "real and substantial, that is, they must be exercised with respect to matters of consequence."[61] Therefore, an employee who has the ability to incur substantial liability for the company by error in judgment would qualify. For example, a cashier at a bank performs work at a responsible level to qualify as performing work of substantial importance.[62] On the other hand, bank tellers, bookkeepers, secretaries and clerical employees who hold "run-of-the-mine [sic]" positions are not performing work directly related to management policies or business operations.[63] Employees who normally formulate or participate in the formulation of

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54. 29 C.F.R. § 541.205(c) (1994).

55. Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 903 (3d Cir. 1991).

56. Gusdonovich v. Business Info. Co., 705 F. Supp. 262, 264-265 (W.D. Pa. 1985).

57. *See* Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 902 (3d Cir. 1991) (interpreting 29 C.F.R. § 541.205(b)).

58. *Id.*

59. 29 C.F.R. § 541.207(c)(1) (1994).

60. *Id.*

61. 29 C.F.R. § 541.207(d)(1) (1994).

62. *But see* Shockley v. City of Newport News, 997 F.2d 18 (4th Cir. 1993) (Police media relations sergeants were not exempt where half their time was spent answering phones and taking tips. Developing news broadcasts were not significant relative to other duties.); Freeman v. Nat'l Broadcasting Co., 846 F. Supp. 1109 (S.D.N.Y. 1993) (Television network employees who were primarily newswriters and producers were not exempt. The employer did not demonstrate that the employees' productive function affected business operations to a substantial degree.).

63. *See* Lang v. Midwest Advanced Computer Servs., Inc., 506 F. Supp. 595 (E.D. Mich. 1981) (customer service representative who acted at the explicit direction of superiors was not exercising independent discretion and judgment).

policy or exercise authority "in substantial respects, financial or otherwise," qualify as making "real decisions in significant matters."[64] Examples include personnel administration, labor relations, research, planning, or assisting a management official in carrying out the executive or administrative functions of that official.[65]

B. *Exercise of Discretion and Independent Judgment*

The second element employers must satisfy to fulfill the requirements of the administrative exemption is the exercise of discretion and independent judgment. Many employers fail to understand that the phrase "discretion and independent judgment" has very specific definitions in the interpretations. Thus, care must be exercised in this area. The meaning of "discretion and independent judgment" is explained in the interpretations:

> (a) In general, 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. The term as used . . . moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.[66]

Employers typically confuse the exercise of discretion from the use of skill in applying techniques that have been taught to the employee.[67] As explained in the interpretations:

> Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of Sec. 541.2.[68]

The mere fact that an employee uses knowledge and experience does not change the character of the work performed. The interpretations provide:

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64. 29 C.F.R. § 541.207(d)(2) (1994).

65. 29 C.F.R. § 541.207(b) (1994). *See* 99 Wage & Hour Opinion Letter 1028 (1970) (senior employer consultants responsible for assisting department heads were exempt).

66. 29 C.F.R. § 541.207(a) (1994). *See* Connell v. Delaware Aircraft Indus., 55 A.2d 637, 642 (Del. 1947).

67. *See* 99 Wage & Hour Opinion Letter 1213-1215 (1975) (postmaster applying skill not exempt); McComb v. New York and New Brunswick Auto Express, Inc., 95 F. Supp. 636, 642 (D.N.J. 1950); Kelly v. Ford, Bacon & Davis, Inc., 162 F.2d 555, 556 (3d Cir. 1947) (duties that included checking routine procedures were not exempt).

68. 29 C.F.R. § 541.207(c)(1) (1994); *see also* Wage & Hour Div., U.S. Dep't of Labor, Field Operations Handbook (individuals involved in program implementation, debugging, coding, updating computer programs are nondiscretionary in nature and therefore non-exempt).

> The substitution of the employee's memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment. . . .[69]

Finally, an employee is eligible for the administrative exemption even though he or she does not make final decisions. Even if an employee's decisions are subject to review and are ultimately revised, the employee may still be exercising discretion and independent judgment necessary to fulfill the requirements of the exemption.[70]

V. Parameters of the Administrative Exemption

Although there is no bright line test to determine if an exemption is met, a number of sources provide useful examples in making this determination.

A. *Examples of Positions that Are Exempt or Non-Exempt*

Although job titles are not determinative, the interpretations categorize the following positions as exempt:[71]

1. Assistant to a Proprietor, Executive, or Administrative employee, which include:[72] Executive Assistant to president,[73] Confidential Assistant, Executive Secretary, Assistant to General Manager, Administrative Assistant,[74] Assistant Manager,[75] and Assistant Buyer.
2. Staff Employees, which include:[76] tax experts, insurance experts, sales research experts, wage-rate analysts, investment consultants, foreign exchange consultants, statisticians,[77] credit managers,[78] purchasing agents, buyers, safety directors,[79] personnel directors, and labor relations directors.[80]

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69. 29 C.F.R. § 541.207(c)(3) (1994).
70. 29 C.F.R. § 541.207(e)(1) (1994).
71. While these guidelines were last revised in 1972, recent cases still support the categorized positions.
72. 29 C.F.R. § 541.201(a)(1) (1994).
73. *See, e.g.,* Wirtz v. Spectrafoam Corp., 52 Lab. Cas. 31,703 (S.D. Cal. 1965); Pennelle v. Dobkin Electrical Supply Co., 36 Lab.Cas. 65,122 (N.D. Ill. 1958); *see also,* Wage & Hour Div., U.S. Dep't. of Labor, Field Operations Handbook (executive secretaries who perform the following duties are deemed exempt: conduct interviews and meetings, make decisions as to which correspondence requires a reply, prepares a reply for the executive's signature).
74. *See, e.g.,* Valentine v. Bank of Albuquerque, 697 P.2d 489 (N.M. 1985).
75. *Compare* McKeever v. J. E. Stowers & Co., 29 Wage & Hour Cas. (BNA) 603 (W.D. Mo. 1989) (computer operations manager was exempt); Cobb v. Finest Foods, Inc., 582 F. Supp. 818 (E.D. La. 1984) (cafeteria manager was exempt) *with* Donovan v. Great Lakes Rec. Co., 26 Wage & Hour Cas. (BNA) 515 (D.C. Mich. 1983) (bowling center assistant managers were not exempt); *and* Marshall v. Fabric World, Inc., 23 Wage & Hour Cas. (BNA) 414 (M.D. Ala. 1977) (assistant managers at retail store were not exempt).
76. 29 C.F.R. § 541.201(a)(2) (1994).
77. *But see* 29 C.F.R. § 541.205(c)(3) (1994) (if the statistician simply tabulates numbers, he is not exempt).
78. *See, e.g.,* Hills v. W. Paper Co., 825 F. Supp. 936 (D. Kan. 1993).
79. *See, e.g.,* White v. All Am. Cable & Radio, 656 F. Supp. 1168 (D. P.R. 1987).
80. *See, e.g.,* Hazel v. Michigan State Employees Ass'n, 826 F. Supp. 1096 (W.D. Mich. 1993).

3. Persons who perform special assignments:[81] lease buyers, field representatives of utility companies,[82] location managers of motion picture companies, district gaugers for oil[83] special organization planners, customers' brokers (in stock exchange firms), account executives (in advertising firms), and contact or promotion persons.

The interpretations identify the following positions that do not qualify for the administrative exemption: bank teller,[84] messenger/runner,[85] and inspector.[86]

Pamphlets issued by the DOL are an additional source to consider in determining whether an exemption is met. However, as noted in Part II of this article, pamphlets are not considered in the same light as official statements of position contained in Interpretative Bulletins and other such releases formally adopted and published in the Federal Register. Wage and Hour Publication 1363 provides the following examples of employees who are not exempt:[87] time study personnel,[88] private secretaries,[89] and receiving and shipping clerks.[90]

B. *Examples of Job Duties that Are Exempt or Non-Exempt*

Additionally, the interpretations identify the following job duties as exempt:

1. Servicing a Business[91]
   - advising management
   - plan, negotiate, and represent the company[92]
   - purchasing, promoting sales[93]
   - business research and control

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81. 29 C.F.R. § 541.201(a)(3) (1994).

82. See Wage & Hour Div., U.S. Dep't. of Labor, Field Operations Handbook (field representatives who advise customers on use and acquisition of products are exempt).

83. *See* Wage & Hour Div., U.S. Dep't of Labor, Field Operations Handbook (a field employee engaged in furnishing well logging and core analysis service to oil well drilling is exempt).

84. 29 C.F.R. § 541.205(c)(1) (1994).

85. 29 C.F.R. § 541.205(c)(2) (1994).

86. 29 C.F.R. § 541.205(c)(2). *See, e.g.,* Harris v. D.C., 741 F. Supp. 254 (D.C. 1990). *But see* Dymond v. Postal Service, 670 F.2d 93 (8th Cir. 1982) (postal service inspectors were exempt).

87. Wage & Hour Div., U.S. Dep't of Labor, WH Publication 1363, Executive, Administrative, Professional and Outside Sales Exemptions Under the Fair Labor Standards Act (1983).

88. *See, e.g.,* Walling v. Armour & Co., 13 Lab. Cas. 63,883 (D. Kan. 1947); Hopkins v. Gen. Elec. Co., 18 Lab. Cas. 65,805 (D. Mass. 1950); Wells v. Radio Corp. of Am., 14 Lab. Cas. 65,546 (S.D.N.Y. 1948).

89. *See, e.g.,* The Osler Inst., Inc. v. Inglert, 558 N.E.2d 901 (Ind. Ct. App. 1990); Kinney v. Grieder Machine Tool and Die Co., 10 Lab. Cas. 62, 879 (N.D. Ohio 1945); *see also* Wage & Hour Div., U.S. Dep't of Labor, Field Operations Handbook.

90. *See* Wage & Hour Div., U.S. Dep't of Labor, Field Operations Handbook (employees who inspect and check inventories of materials and supplies are not exempt).

91. 29 C.F.R. § 541.205(b) (1994).

92. *See also* 99 Wage & Hour Opinion Letter 1235 (1976) (area representative responsible for firm operations was exempt).

93. Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa 1982) (detail person was exempt).

2. Analysis
   - analyze data, draw conclusions[94]
   - determine financial, merchandising or other financial policy
   - determine or effect personnel policies
   - execute major assignments[95]
   - make recommendations[96]
3. Duties directly related to Management[97]
   - makes and administers credit policy of his employer[98]
   - establishing credit limits for customers[99]
   - authorizing shipment of orders on credit
   - checking status of checking accounts to determine if credit limit is exceeded
   - removing credit reports from files for analysis and writing letters giving credit data to agencies and employers.[100]
   - opening mail to determine how to respond

The interpretations indicate that the following job duties are non-exempt:

- routine clerical duties[101]
- making deliveries[102]
- operating expensive equipment[103]
- tabulating data[104]

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94. *See, e.g.,* Massaro v. N.Y. Times, Inc., 28 Wage & Hour Cas. (BNA) 1449 (S.D.N.Y. 1988) (systems analyst for newspaper was exempt where he was hired to design and develop an advanced computerized information system); Shockley v. City of Newport News, 997 F.2d 18 (4th Cir. 1993) (police ethics and standards lieutenant was exempt where she spent her time accumulating, analyzing data and making recommendations).

95. *See, e.g.,* Donovan v. Reno Builders Exch., Inc., 26 Wage & Hour Cas. (BNA) 1234 (D. Nev. 1984) (publication editor responsible for editing and publishing trade journal was exempt). *But see* Wage & Hour Div., U.S. Dep't of Labor, Field Operations Handbook (Analyzing news presentations qualifies as administrative function. Announcing and routine editing are non-exempt).

96. *See, e.g.,* McKeever v. J.E. Stowers & Co., 29 Wage & Hour Cas. (BNA) 603 (W.D. Mo. 1989); Dennis v. Tomahawk Servs., Inc., 767 P.2d 346 (Mont. 1989) (truck dispatcher who determined whether to issue recommended fines, monitored employees' days off, recommended driver reprimands, hiring, firing and performed evaluations was exempt).

97. *See, e.g.,* Smith v. City of Jackson, Miss., 954 F.2d 296 (5th Cir. 1992) (Chiefs and Battalion Clerks for fire departments who engaged in managerial and supervisory activities of checking stations, compiling and reviewing firefighting plans were directly related to firefighting operations).

98. *See, e.g.,* Hills v. W. Paper Co., 825 F. Supp. 936 (D. Kan. 1993) (credit manager's duties, including approving release of orders on credit hold, were directly related to employer's management policies).

99. *See, e.g.,* Hippen v. First Nat'l Bank, 30 Wage & Hour Cas. (BNA) 1402 (D. Kan. 1977) (authority to approve loans up to $50,000).

100. *Id.*

101. 29 C.F.R. § 541.205(c)(2) (1994). *See, e.g.,* Barber v. Marjon Corp., 791 P.2d 1992 (Colo. Ct. App. 1989); Kelly v. Ford, Bacon & Davis, Inc., 162 F.2d 555 (3d Cir. 1947); Purdy v. Aero-Expediters, Inc., 55 Lab. Cas. 31,907 (E.D.N.Y. 1967).

102. 29 C.F.R. § 541.205(c)(2) (1994).

103. 29 C.F.R. § 541.205(c)(2) (1994). *See, e.g.,* Berg v. Newman, 982 F.2d 500 (Fed. Cir. 1992) (electronic technicians who maintained and repaired air traffic control equipment were not exempt).

104. 29 C.F.R. § 541.205(c)(3) (1994). *See, e.g.,* Brock v. National Health Corp., 667 F. Supp. 557 (M.D. Tenn. 1987).

- applying knowledge in following prescribed procedures or whether specified standards are met[105]
- decisions normally made by clerical and similar type of employees[106]
- bookkeeping work[107]
- preparing payroll and sending out monthly statements of account[108]
- opening mail and leaving it unread for superior[109]
- repetitive operations with hands[110]
- operating tools and machinery[111]

Small businesses frequently seek to exempt their office managers or office administrators. The regulations recognize that "office managers who do not supervise two or more employees would not meet the requirements of the executive exemption, *but may* possibly qualify for the administrative exemption."[112] Although an office manager may perform duties in which discretion and independent judgment are exercised, if the office manager performs too much non-exempt work such as bookkeeping, preparing payrolls, etc., the exemption may be lost.[113]

In *Nelson v. Master Vaccine, Inc.*,[114] the employer characterized the office manager as "second in command," claiming that she managed the office with a great deal of discretion. The employer showed that she had the authority to sign company checks, schedule her own hours, make recommendations on hiring other employees, grant other employees time off, and order supplies.[115] Although she exercised considerable managerial discretion, the employer could not satisfy the requirement that her primary duty was office work directly related to the employer's management policies or general business operations.[116] Testimony at trial revealed that she spent fifty percent of her time handling inventory and another twenty percent handling clerical matters.[117]

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105. 29 C.F.R. § 541.207(c)(1) (1994); *see also* Gustafson v. Nichols, 24 Wage & Hour Cas. (BNA) 1182 (E.D.N.C. 1979) (pharmacist filling prescriptions was not exempt); Wage & Hour Div., U.S. Dep't of Labor, Field Operations Handbook (display advertising installer following prescribed procedures is not exempt).

106. 29 C.F.R. § 541.207(d)(2) (1994); Alabama A & M Univ. v. King, 643 So. 2d 1366 (Ala. Civ. App. 1994) (university dormitory counselors not exempt).

107. 29 C.F.R. § 541.208(c); Brock v. Nat'l Health Corp., 667 F. Supp. 557 (M.D. Tenn. 1987); *see also* Lane v. M's Pub, Inc., 435 F. Supp. 917 (D. Neb. 1977); Donovan v. Reno Builders Exch., Inc., 26 Wage & Hour Cas. (BNA) 1234 (D. Nev. 1984); 99 Wage & Hour Opinion Letter 1159-1160 (1974) (accountant not exempt as job description provided limited information, performed bookkeeping duties).

108. 29 C.F.R. § 54.208(f) (1994).

109. 29 C.F.R. § 541.208(d) (1994).

110. 29 C.F.R. § 541.203(b) (1994).

111. *Id.*

112. 29 C.F.R. § 541.208(f) (1994). *See, e.g.,* Johnson v. J. S. Hoffman Co., 16 Lab. Cas. 64919 (N.D. Ill. 1948); Shoop v. Sycamore Preserve Works Corp., 16 Lab. Cas. 65,168 (N.D. Ill. 1949); Wirtz v. Chris Berg, Inc., 47 Lab.Cas. 31,456 (W.D. Wash. 1963); Mitchell v. Puerto Rico Dehydrating & Feed Corp., 388 Lab. Cas. 65,024 (D.P.R. 1959).

113. *Id.*; *see also* Istok v. Anderson, 12 Lab. Cas. 63,502 (N.D. Ill. 1946) (substantial amount of routine work).

114. 382 N.W.2d 261 (Minn. Ct. App. 1986).

115. *Id.* at 263.

116. *Id.* at 264.

117. *Id.* at 263.

Likewise, in *Osler Institute, Inc. v. Inglert*,[118] an employee who was responsible for assimilating program materials for her employer who produced medical education seminars did not meet the requirements of the exemption.[119] Although she participated in the development of a health plan for the employer, the majority of her time was spent answering phones, opening mail, unloading trucks, and placing calls with physicians so that her boss could recruit them.[120] Thus, it is important for employers to carefully scrutinize the actual job duties and scope of authority.

A jury of the U.S. District Court for the Northern District of Texas recently returned a verdict in favor of a Dallas law firm concluding that the firm's paralegals were ineligible for overtime pay under the FLSA.[121] Rejecting the DOL's request for $40,000 in back pay, the jury found that the paralegals were covered by the administrative exemption.[122] The paralegals in this firm were highly compensated and were opposed to DOL's interpretation as the firm would not need to retain as many paralegals if the DOL prevailed in its lawsuit. Paralegals were paid between $30,000 and $50,000 a year and worked between forty and forty-five hours per week.[123] The DOL argued that the paralegals engaged in the unauthorized practice of law. Although the paralegals performed administrative duties such as preparing articles of incorporation, the firm successfully argued that the paralegals were always supervised by an attorney and never signed any documents filed in court.[124]

The attorney who defended Page and Addison maintained that the DOL had a policy of considering all paralegals nonexempt, ignoring its own regulations that job titles are not determinative.[125] It was argued that "the regulations conflict and are convoluted.[126] The regulations explicitly exempt an executive secretary that opens mail and schedules appointments on the one hand, but in another section conclude that an individual is nonexempt because the individual is not exercising sufficient independent discretion and judgment."[127] Denying that the department maintained a policy that paralegals were nonexempt, the Director of Public Affairs for the Labor Department's Solicitor's office

118. 558 N.E.2d 901 (Ind. Ct. App. 1990).
119. *Id.* at 903.
120. *Id.*
121. Jury Finds Paralegals at Dallas Firm Exempt from FLSA Overtime Requirements, BNA Empl. Policy & Law Daily, March 22, 1994, at d10 (citing Reich v. Page & Addison, D.C. N. Texas, No. 3:91-CV-2655-P, March 10, 1994).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Jury Finds Paralegals at Dallas Firm Exempt From FLSA Overtime Requirements, BNA Empl. Policy & Law Daily, March 22, 1994, at d10 (citing Reich v. Page & Addison, D.C. N. Texas, No. 3:91-CV-2655-P, March 10, 1994).
127. *Id.*

explained that the DOL will need to re-evaluate its position and consider each case on a fact-specific basis.[128] The DOL initially appealed the decision, but recently dismissed the appeal without prejudice.

VI. Minimizing Liability for Violating the Overtime Laws

Civil enforcement actions under the FLSA are governed by a two or three year statute of limitations period. Actions to enforce non-willful violations must be commenced within two years after the cause of action accrues. The limitation period for willful violations is three years.[129]

To prove that an employer willfully violated the FLSA, the DOL must prove that an employer knew or acted with reckless disregard in determining whether its conduct was prohibited by the FLSA.[130] A three-year time period has been applied where the employer had actual notice of the Act's requirements.[131] A two-year time period has been applied where an employer discussed its decision with an attorney or a representative of the State Employment Commission.[132]

Under 29 U.S.C. § 216(b) (1994), employers are liable to employees for unpaid overtime compensation, liquidated damages, attorneys' fees and costs of suit.[133] The Act provides that an employer may not be held liable if the employer relied in good faith on a written ruling of the Wage and Hour Administrator, even where that ruling was subsequently held to be invalid.[134] In addition, an employer may have liquidated damages reduced if it shows the actions taken were in good faith and it had reasonable grounds for believing it was not violating the Act.[135]

One court stated that "[u]nder the Act, liquidated damages are compensatory, not punitive in nature. Congress provided for liquidated damages to compensate employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due."[136] Despite the mandatory language of the Act, Congress has given courts the dis-

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128. *Id.*

129. 29 U.S.C. § 255(a) (1994).

130. McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988).

131. *See* Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991) (employer's president had actual knowledge of Act's requirement); Ford v. Sharp, 758 F.2d 1018 (5th Cir. 1985) (employer was an attorney and never investigated).

132. *See* Mireles v. Frio Foods, Inc., 899 F.2d 1407 (5th Cir. 1990) (employer discussed requirements with State Employment Commission representative); Cox v. Brookshire Grocery Co., 919 F.2d 354 (5th Cir. 1990) (employer discussed reclassification of employee with counsel).

133. 29 U.S.C. § 216(b) (1994). No interest may be obtained on back-pay or overtime. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945). However, such courts have held that interest may be awarded on back-pay claims whenever liquidated damages are denied. Donovan v. Sovereign Sec., Ltd., 726 F.2d 55 (2nd Cir. 1984). Some courts hold that it is an abuse of discretion not to award pre- and post-judgment interest. *See* Secretary of Labor v. Daylight Dairy Prod., Inc., 779 F.2d 784 (1st Cir. 1985); Brock v. Richardson, 812 F.2d 121 (3d Cir. 1987) (presumes interest is awarded).

134. 29 U.S.C. § 259(a) (1994).

135. 29 U.S.C. § 260 (1994).

136. Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982).

cretion to restrict liquidated damages. However, "[d]ouble damages are the norm, single damages the exception . . ."[137] Section 11 of the Portal-to-Portal Act provides:

> In any action commenced prior to or after the date of the enactment of this Act [May 14, 1947], to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. Sec. 201 *et seq.*], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. Sec. 201 *et seq.*], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act [29 U.S.C. Sec. 216].[138]

Employers have the burden of proving good faith and reasonable grounds before a court may exercise "sound discretion" to deny or limit damages.[139]

> [The Portal-to-Portal Act] provides that the district court has discretion to award no liquidated damages, or to award an amount of liquidated damages less than the amount provided by section 216(b) of the FLSA, *if and only if,* the employer shows that he acted in good faith and that he had reasonable grounds for believing that he was not violating the Act.[140]

Good faith requires the employer to show that it subjectively acted with the honest intention to ascertain what the Act requires and to act in accordance with it.[141] In order for an employer to be entitled to discretionary relief from the mandatory liquidated damage provision, it must show that it took affirmative steps to ascertain the FLSA's requirements.[142] A showing that an employer did not intentionally violate the Act falls short of satisfying the good faith requirement.[143] Furthermore, well-established and widely accepted industry practice is not grounds for the reasonable good faith requirement.[144] Moreover, "[t]he fact that an employer has broken the law for a long time without complaints from employees does not demonstrate the requisite good faith

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137. Walton v. United Consumers Club, Inc., 786 F.2d 303, 310 (7th Cir. 1986).

138. 29 U.S.C. § 260 (1994) (emphasis added).

139. Walton v. United Consumers Club, Inc., 786 F.2d 303, 310 (3d Cir. 1982).

140. Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982) (emphasis added).

141. Kinney v. Dist. of Columbia, 994 F.2d 6 (D.C. Cir. 1993); Lee v. Coahoma County, Miss., 937 F.2d 220 (5th Cir. 1991) (relied on advice of counsel); Atlanta Professional Fire Fighters Union v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991) (relied on administrative opinion); Bratt v. County of L.A., 912 F.2d 1066 (9th Cir. 1990), *cert. denied,* 498 U.S. 1086 (1991) (relied on county study, no regulations to the contrary).

142. Martin v. Albrecht, 802 F. Supp. 1311 (W.D. Pa. 1992).

143. Williams Tri-County Growers, Inc., 747 F.2d 121, 129 (3d Cir. 1984); Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464 (5th Cir. 1979).

144. Martin v. Cooper Elec. Supply Co., 940 F.2d 896 (3d Cir. 1991); Brock v. Wilamowsky, 833 F.2d 11 (2d Cir. 1987).

required by the statute."[145] "Ignorance alone will not exonerate the employer under the objective reasonableness test."[146] Thus, employers must make sure that they analyze each and every position they claim qualifies for an exemption.

In addition to back-pay and liquidated damages, civil money penalties may be assessed by the DOL for repeated or willful violations of the minimum wage and overtime laws.[147] A willful violation results where the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the requirements of the FLSA.[148] Civil money penalties are applicable only for repeated violations, i.e., where it can be proven that the employer previously violated section 6 or 7 of the FLSA.[149] A violation may be repeated even if the prior violation occurred at a different location of a multi-establishment employer. There is no time period after which a previous violation may no longer be considered. A conciliation is not a basis for a repeated violation.[150]

An employer's conduct is deemed "knowing" if the employer was previously advised by an official representative of the Wage & Hour Division that the employer's conduct in question was unlawful.[151] An employer's conduct is in "reckless disregard" if the employer should have inquired further into whether its conduct was in compliance with the FLSA and the employer failed to make adequate inquiry.[152] Section 16(e) sets a maximum of $1,000 for each violation.[153] The amount and appropriateness of a penalty is determined by the seriousness of the violations and the size of the employer's business.[154] Additionally, the following factors may be considered:[155]

1. whether the employer had made good faith efforts to comply;
2. previous history of violations, including whether the employer is subject to injunctions;
3. the employer's commitment to further compliance;
4. the time between the violations and whether there is any pattern to the violations; and
5. the number of employees affected.

Civil money penalties are a recent addition to the Act and there have been no reported cases testing the application of the DOL's regulations.

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145. Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3d Cir. 1984).
146. *Id.* at 129; *see also* Brock v. Shirk, 833 F.2d 1326 (9th Cir. 1987) (employer, a repeat offender, failed to demonstrate honest intention to meet Act's requirements), *vacated,* 488 U.S. 806 (1988).
147. 29 U.S.C. § 216(e) (1988); 29 C.F.R. § 578.3 (1994).
148. 29 C.F.R. § 578.3(c) (1994); McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988).
149. *See* Wage & Hour Div., U.S. Dep't of Labor, Field Operations Handbook.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. 29 C.F.R. § 578 (1994).

VII. Guidelines for Employers to Meet the Requirements of the Administrative Exemption

It is absolutely essential for employers to take affirmative action to ascertain the requirements of the FLSA and to ensure that there is authority to support the employer's belief that a particular employee satisfies the requirements of the administrative exemption. Employers are encouraged to consider the following guidelines in making the determination as to whether a particular employee qualifies for the administrative exemption:

1. Do not base an exemption solely on job titles, job descriptions or the employer's belief of the duties that the employee is performing. Only the actual duties of the employee are relevant in making a determination.
2. In smaller companies, meet with the employee and allow the employee the opportunity to verbalize the duties that the employee is actually performing and the time spent on each duty.
3. To reduce the possibility that the employee will claim overtime at a later time, complete the U.S. Department of Labor Form ETF-2, which is reproduced at the end of this article.[156] The form provides a step-by-step procedure for employers to determine whether specific employees are exempt under the Act. It is important that each employee acknowledges that the duties listed on the form correctly depict his or her actual duties. In the event the Wage & Hour Division commences an investigation, this form will provide proof that the employee is exempt, as well as evidence that the employer has taken affirmative steps to ascertain the requirements of the Act to prevent a court from awarding liquidated damages in the event a suit is filed. The completed form should be placed in each employee's personnel file and should be updated periodically.

VIII. Conclusion

Employers must take affirmative action in determining that their salaried employees are truly exempt under the FLSA. If an employer carefully reviews all of the interpretations regarding procedures to document the employer's actions, the employer will protect itself from costly liability.

156. The exemption testing form ETF-2 was produced as part of a total quality management team project by Ms. Sharon Brunson, Mr. Phil Flood, and Mr. Dan Ford, examiners in the Las Vegas Field Station of the United States Department of Labor, Wage & Hour Division. The form has been approved by the United States Department of Labor, Region 9, and is in use in that region. Employers may request copies of ETF forms 1, 3, and 4 covering the professional, executive, and computer programmer exemptions by writing to the United States Department of Labor, Wage & Hour Division at 1050 East Flamingo Road, Suite 321, Las Vegas, Nevada 89119. The authors appreciate Mr. Ford's cooperation in making form ETF-2 a part of this article.

U.S. Department of Labor Employment Standards Administration
Wage and Hour Division
1050 E. Flamingo Rd., Ste. 321
Las Vegas, NV 89119
(702) 699-5581
FAX (702) 699-5489

13(a)1 ADMINISTRATIVE EXEMPTION

The administratively exempt employee:

1) performs work of a non-manual or office variety which is directly related to the management policies or general business operations of the employer or the employer's customers; and

2) customarily and regularly exercises discretion and independent judgment; and

3) is an executive or administrative assistant, i.e. the assistant to the owner or a bona fide exempt executive employee. (Normally such employees are found in large firms or establishments where the official assisted has such wide responsibilities that the employee in question is using judgment and discretion, and is not a secretary with a glorified title); or

4) is a staff employee, as opposed to a line employee, i.e. someone who is a functional head, e.g. a credit manager, who may only supervise a secretary, or an estimator in construction, or a specialist, e.g. a tax or real estate or insurance expert; or

5) performs special assignments, either inside or outside the employer's place of business.

Use these definitions is making the determinations:

SALARY - A salary is a guaranteed amount which an employee receives each payday. Except for a very limited number of reasons described in the Regulations, the salary cannot be reduced by the employer in any pay period. Even if the employee works less than a full week's worth of hours, or if the employee's department produces less than normal, a deduction from the salary cannot be made. The salary is a guarantee, exclusive of board lodging or other facilities.

PRIMARY DUTY - The administratively exempt employee performs work of a non-manual or office variety. The work is directly related to establishing or maintaining management policies. Providing advice and counsel to owners or managers on actions to be taken is also administrative work. As a working norm, if the employees spend more than 50% of their time in this type of work, the primary duty test is met.

DISCRETION AND INDEPENDENT JUDGMENT: The administratively exempt employee customarily and regularly exercises discretion and independent judgment. The employee has regular and recurring responsibility to compare and evaluate courses of action, and to act, or make a decision, after considering the various possibilities. The employee acts free of direction or supervision in matters of consequence. Decisions of small matters, or taking necessary action by following predetermined policies or check lists, are not sufficient.

_____ _____

(TYPE EMPLOYEE'S NAME) (JOB TITLE)

1. Is the employee guaranteed a salary of at least $250 per week, $500 bi-weekly, or $541.67 semi-monthly?

No _____ Yes _____ Salary Amount $ _____ per _____.

2. Does the employee's primary duty consist of the performance of office or non-manual work directly related to management policies and actions as described on the reverse of this form AND does this work include the exercise of discretion and independent judgment?

No _____ Yes _____ Please specify the employee's primary duty below AND give examples of the regular and recurring use of discretion and independent judgment.

IF BOTH QUESTIONS ABOVE ARE ANSWERED "YES", AND YOU HAVE PROVIDED THE ADDITIONAL INFORMATION REQUESTED, THE EMPLOYEE MAY BE CONSIDERED TO BE AN EXEMPT ADMINISTRATIVE EMPLOYEE. Please read the notice below and sign and date this form in the space provided.

NOTICE: This report is authorized by Section 11 of the Fair Labor Standards Act. (29 USC 201, et seq.) Penalties are provided for false reports.

We certify that the information contained in this report is true and correct, to the best of our knowledge and ability.

_____ _____

Employer's signature Employee's signature

_____ _____

Title date Title date