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The Fair Labor Standards Act Revised White-Collar Exemptions: One Year Later-Lessons Learned

Presented By:

Camille A. Olson

William P. Schurgin

SEYFARTH SHAW LLP
ATTORNEYS

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What We'll Learn Today

1. Status of the new regulations
2. Overview of the new FLSA exempt status landscape
    1. Executive, Administrative, Professional, (Outside Sales, Computer Employees, Highly Compensated Employees)
    2. Common Mistakes
3. Top 15 issues we see with regard to Wage/Hour Audits

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Supreme Court to Examine "Donning and Doffing" Cases

- Current split in the federal circuits. Court will look at two cases that addressed whether meat-processing plants must pay their slaughterhouse workers for the time it takes to change into protective clothing and walk to their work stations
- Court granted *certiorari*
  - *IBP, Inc. v. Alvarex* (9th Cir), time was compensable
  - *Tum v. Barber Foods* (1st Cir), employees should not be compensated
- Supreme Court will decide the walking & waiting question

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- New regulations arrive
- Federal political obstacles are now all but dead
- BUT. . . beware state law
- And even under new federal regulations, exempt status is still the exception, not the rule

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Exempt Status Trap No. 1

Assuming That Job Descriptions Establish Exempt Status

- Job descriptions can rarely help you
- But they sure can hurt you
  - Is that *really* the primary duty?

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Exempt Status Trap No. 1

"Primary Duty" Considerations:

1. Relative importance of exempt duties as compared with other types of duties;
2. Amount of time spent performing exempt work;
3. The employee's relative freedom from direct supervision;
4. Relationship of employee's salary to wages paid other employees performing the nonexempt work.

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Exempt Status Trap No. 2

Part-Time Employees and the $23,600 Salary Level Test

- Exempt status salary floor has been raised from $155/250 to $455 per week ($23,600) per year
- Some states are higher
- Part-timers?
  - monitor their hours
  - or raise to $455 per week

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Exempt Status Trap No. 3

Too Many Masters – Supervision and the Executive Exemption

Executive exemption requires three elements that must be met

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Exempt Status Trap No. 3

***First executive exemption element*:**

Primary duty must be managing the enterprise, or a customarily recognized department or subdivision

Exempt Status Trap No. 3

"Management" includes, but is not limited to:

- interviewing & selecting employees
- training employees
- setting and adjusting rates of pay and hours of work
- directing work of employees
- maintaining production or sales records for use in supervision or control
- determining techniques and types of materials to be used
- controlling or determining flow of merchandise and supplies
- providing for safety and security of employees
- planning and controlling the budget
- monitoring and implementing legal compliance measures

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Exempt Status Trap No. 3

***Second executive exemption element*:**

Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent

Too many masters?

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Exempt Status Trap No. 4

Hire or Fire: Real Power or Job Description Fantasy?

Third executive exemption element:

Authority to hire or fire, or suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status given particular weight

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Exempt Status Trap No. 4

“Particular weight”:

- Whether making suggestions and recommendations is part of employee’s duties;
- How frequently they are made;
- How frequently they are relied upon.

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Exempt Status Trap No. 5

Failing to Appreciate Discretion and Independent Judgment

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Exempt Status Trap No. 5

First element of administrative exemption:

Primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer, or the employer's customers

Exempt Status Trap No. 5

This refers to the *type of work* the employee performs:

Work must be directly related to assisting with the running or servicing of the business

Does not include working on a manufacturing production line **or selling a product** in a retail or service establishment

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Exempt Status Trap No. 5

Work directly related to management or general business operations includes:

- tax
- finance
- accounting
- budgeting
- auditing
- insurance
- quality control
- purchasing
- procurement
- advertising
- marketing
- research
- safety and health
- personnel management
- human resources
- employee benefits
- labor relations
- public relations
- government relations
- computer network, internet and database administration
- legal and regulatory compliance

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Exempt Status Trap No. 5

Second Element:

Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Major Change From 2003 Proposal (Would Have Deleted Element Two and Replaced With "position of responsibility" requirement)

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Exempt Status Trap No. 5

“The comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.”

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Exempt Status Trap No. 6

Analysts, Coordinators, Specialists, and Associates – Job Titles that Sound Impressive But Say Little

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Exempt Status Trap No. 6

“Discretion and independent judgment with respect to matters of significance”

vs.

“High level of skill or training” or “work of substantial importance”

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Exempt Status Trap No. 7

Executive Assistants – Internal Politics Versus FLSA Reality

- Do they assist the executive in his or her *executive* functions?
- Has authority of substantial importance been delegated to them?

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Exempt Status Trap No. 8

Requiring A College Degree – Enough to Be A Learned Professional?

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Exempt Status Trap No. 8

Four types each with own duties test:

- Learned professional
- Creative or artistic professional
- Teacher
- Computer professional

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Exempt Status Trap No. 8

Professional Exemption – Learned

Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment

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Exempt Status Trap No. 8

The advanced knowledge must:

- Be in a field of science or learning and
- Must be customarily acquired by a prolonged course of specialized intellectual instruction

(But: Combination of intellectual instruction and work experience can substitute)

Exempt Status Trap No. 8

Lessons:

- 2-year degree insufficient
- More than 4-year degree usually sufficient
- The 4-Year gray area
  - must be specialized
  - but even finance and accounting may not be enough

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Exempt Status Trap No. 9

Help desk personnel and computer techies

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Exempt Status Trap No. 9

My IT people are exempt because:

- my computer had the “blue screen of death” and they somehow fixed it
- they know what TCP/IP, LAN, WAN, BIOS, SSL, CSS, and FTP actually mean
- they have really cool communications gadgets and get to try out all the “toys” first
- I really have no idea what the IT team does, but I know it’s highly technical and important

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Exempt Status Trap No. 9

- For exempt status purposes, employees in computer-related jobs can be analyzed under:
  - The **computer employee** exemption
  - The **administrative** exemption
  - The **executive** exemption

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Exempt Status Trap No. 9

- Application
  - Computer systems analysts, computer programmers, software engineers, and other similarly skilled workers
  - Employee must work in the *computer field*

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Exempt Status Trap No. 9

- 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
  - Any combination of the above duties, the performance of which requires the same level of skills

Exempt Status Trap No. 9

- Work that requires highly-specialized knowledge of computers and software, by itself, is **not** enough to satisfy the computer-employee exemption
- Look for the following:
  - Employees who design, code, or test computer programs
  - Sophisticated, high-level computer programming skills ordinarily gained through a disciplined program of study (e.g. C++, Perl, Java)
  - 4-yr computer-related degree (e.g. computer science, computer engineering, or information systems)

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Exempt Status Trap No. 9

- Examples of non-exempt work:
  - Help-desk and other support personnel who diagnose and resolve end-user computing issues
  - System administrators and others who “keep things running” and perform routine maintenance on systems, including servers, applications, and networks
  - IT professionals who maintain user accounts, grant permissions, or perform backups
  - IT professionals who install patches, update virus definitions, install and/or configure hardware or software, or “compile” software
  - Database administrators who are involved principally in a maintenance or support role, as opposed to design and development

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Exempt Status Trap No. 9

- Examples of exempt work:
  - IT professionals who design, code, or test software and applications, including sophisticated databases and web-enabled applications
  - IT professionals who define system, network, or application architecture
  - IT professionals with 4-yr computer-related degrees that
    - Consult with users to determine software/hardware requirements
    - Create technical documentation

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Exempt Status Trap No. 9

- Examples of exempt work:
  - IT professionals, such as system or network administrators, who develop overall IT strategy or make procurement decisions regarding computer-related products
  - Employees responsible for the overall strategy, design, and content of a website(s)
  - IT professionals whose primary duty is project management (e.g. allocating resources, leading project team, managing budget, etc.)
    - "Planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific, or engineering problems"

Exempt Status Trap No. 10

Inside sales employees – Practice versus FLSA reality

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Exempt Status Trap No. 10

- Outside sales
  - 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; *and*
  - The employee must be customarily and regularly engaged away from the employer's place of places of business

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Exempt Status Trap No. 10

- Administrative exempt:
  - Engaged in sales? NO

    or
  - Sales promotion? YES

Exempt Status Trap No. 11

Ignoring State Law Requirements

- Follow the old short or long test?
- And then there is California . . .

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Exempt Status Trap No. 12

When in doubt???

Remember whose burden exempt status is

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Exempt Status Trap No. 12

<u>Bothell v. Phase Metrics, Inc.,</u> 299 F.3d 1120 (9th Cir. 2002):

"The FLSA requires that employers ordinarily pay their employees time and one-half for work exceeding forty hours per week. The Act provides an exemption from overtime for persons 'employed in a bona fide executive, administrative, or professional capacity.' An 'employer who claims an exemption from the FLSA has the burden of showing that the exemption applies.' Because the FLSA 'is to be liberally construed to apply to the furthest reaches consistent with Congressional direction . . . FLSA exemptions are to be narrowly construed against . . . employers and are to be withheld except as to persons plainly and unmistakenly within their terms and spirit.'. . ."

"The criteria provided by regulations are absolute and the employer must prove that any particular employee meets every requirement before the employee will be deprived of the protection of the Act." (Citations omitted).

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Exempt Status Trap No. 13

Status quo and the "Status" of being exempt

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Exempt Status Trap No. 14

Salary basis: Failure to consider

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Exempt Status Trap No. 14

Salary basis test generally requires

- Employee receives predetermined amount of compensation each pay period
- Compensation cannot be reduced because of quality or quantity of work
- Employee be paid full salary for any week in which the employee performs any work

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Exempt Status Trap No. 14

New regulations did not substantially change salary basis except in two respects

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Exempt Status Trap No. 14

1. Full-day suspensions of exempt employees for violations of written workplace conduct rules permissible
   - Sexual harassment
   - Violation of law
   - Workplace violence/safety
   - Drug and alcohol

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Exempt Status Trap No. 14

1. Inadvertent impermissible deductions: safe harbor for written policies prohibiting improper deductions
   - Clearly communicated policy prohibiting improper deductions
   - Complaint mechanism
   - Reimburses employees for any improper deductions
   - Makes a good faith commitment to comply in the future

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Exempt Status Trap No. 15

No proper training of managers

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DOL Opinion Letters

- DOL issues opinion letters as a way to provide guidance on Department rules. Opinion letters are a better alternative than regulatory change.
- Courts will give greater deference to opinion letters.
- Now available online at: www.dol.gov/esa/whd/opinion/flsa/htm

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Paralegals

- DOL focuses on the fact that advanced degrees are not an absolute requirement for entry into the field of work
- Paralegals are not exempt under the FLSA's professional exception, and must be paid overtime.
- Exemption available only if a paralegal has advanced degrees in other fields and applies specifics to paralegal work

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Personal Time Off

- An exempt employee with PTO may have time deducted in full or partial day increments without jeopardizing exempt status
- Deductions from salary are made on a full-day basis when an employee is absent for personal reasons other than sickness or disability *if* “in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability”

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CONCLUSION

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