FLSA Employee Exemption Handbook

Human Resources Series | THOMPSON | October 2007 | Vol. 13, No. 2

# Technical Writers Are Exempt Administrators, Circuit Court Rules

Technical writers working for a nuclear power producer are exempt administrators under the Fair Labor Standards Act (FLSA), a federal appeals court has found. The 6th U.S. Circuit Court of Appeals rejected a lower court's finding that the technical writers were nonexempt employees because their primary duty did not involve the use of discretion and independent judgment.

In *Renfro v. Indiana Michigan Power Co.*, a case decided under the pre-2004 exemption regulations, the 6th Circuit held that the plaintiffs' use of a company manual did not preclude their exercise of discretion and independent judgment in performing their primary duty, writing equipment maintenance procedures. "Channeling discretion through a manual on procedure writing does not eliminate the existence of that discretion," the appeals court wrote.

The ruling does not discuss the current U.S. Department of Labor regulations concerning the use of manuals because the case arose before those rules

**See *Technical Writers*, p. 14**

## *Classification Focus*

# Employees Who Test Software May Be Eligible for Exemption

*By Shlomo D. Katz, Esq.*

Software is ubiquitous in the 21st-century office or business setting. Nearly every desktop or laptop computer is equipped with some form of an operating system, and most have a word processor and perhaps other productivity tools such as a spreadsheet program and a presentation-making program. A significant percentage of work computers also run more specialized programs, either custom-made for the employer or, at the very least, customized to the specific employer's needs. Examples of such programs include: document management systems used by government agencies, lawyers, insurance companies and other

**See *Classification Focus*, p. 2**

## Audio Conferences

Visit www.thompsoninteractive.com for a complete list of upcoming HR and employment law audio conferences, including:

- October 24, Planning for Unplanned Absences – Strategies to Lessen Workplace Disruptions

## In This Issue



## Practice Tools



## Contact Us

Customer Service: 800 677-3789
Online: **www.thompson.com**
Editorial: 202 872-4000

## *Classification Focus* (continued from page 1)

paper-intensive employers; inventory and sales programs used by wholesalers and retailers; and military applications of numerous types.

For each of these computer programs or systems, there are workers who create, maintain and use them. In some cases, the Fair Labor Standards Act (FLSA) exempt or nonexempt status of these workers is relatively straightforward. For example, Wage and Hour Opinion Letter FLSA2006-42, dated Oct. 26, 2006, makes clear that first-tier help-desk personnel are unlikely to be exempt (see April 2007 newsletter, p. 14). On the other hand, network administrators may comfortably qualify for a number of different FLSA exemptions (see April 2006 newsletter, p. 3). Likewise, traditional computer programmers are likely to be exempt, presuming they meet either the salary basis test or are paid at least $27.63 for every hour worked, including overtime (see ¶610 of the *Handbook*; 29 C.F.R. §541.400(b)).

### Hard to Pigeonhole

But some jobs are more difficult to pigeonhole. For instance, what is the status of workers who are not themselves computer programmers and who may have little or no understanding of computer programming, but whose primary duty is to test software to ensure that it meets user requirements? One example of such an employee might be a worker in a financial services company whose job is to ensure that a software product designed to calculate the premiums and benefits of an annuity correctly accounts for all conceivable factual scenarios, including, but not limited to, the principal's death or retirement, a missed payment, an accelerated payment, a loan taken against the policy and numerous other factors. Another example of such an employee might be one who simulates various scenarios to perform acceptance testing of software for managing complex building systems including HVAC, electricity and elevators, among others. Assume for purposes of this discussion that the employees at issue are responsible for gathering information from software users about scenarios to be tested, inputting the data necessary to run the tests, and then reporting the results. These employees do not themselves decide what should be tested, nor do they determine the cause of any testing failures. Are such employees exempt from the FLSA?

### What DOL Says

The U.S. Department of Labor (DOL) regulation at 29 C.F.R. §541.400(a) states that certain "[c]omputer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act." The regulation further states that:

> the exemptions apply only to computer employees whose primary duty consists of:
>
> (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
>
> (2) 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;
>
> (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
>
> (4) A combination of the aforementioned duties, the performance of which requires the same level of skills (29 C.F.R. §541.400(b)).

As noted above, this regulation clearly exempts some familiar jobs such as computer programmers. What, however, is meant by "testing … computer systems or programs"?

When Congress first directed the creation of a computer professional exemption in 1990, it left the job of

**See *Classification Focus*, p. 10**


# FLSA Employee Exemption Handbook

CONTRIBUTING EDITORS: **DANIEL B. ABRAHAMS, ESQ.**
**SHLOMO D. KATZ, ESQ.**
EPSTEIN BECKER & GREEN, P.C.
SENIOR MANAGING EDITOR: **MICHAEL CARDMAN**
EDITOR: **MARGARET MILLER**
ASSOCIATE EDITOR: **ELIZABETH BOLTON**
DESKTOP PUBLISHING SPECIALIST: **SHAWNE HICKS**

The *FLSA Employee Exemption Handbook* (USPS 015-866) is published bimonthly by Thompson Publishing Group, Inc., 1725 K St. NW, 7th Floor, Washington, DC 20006. Periodicals postage paid at Washington, D.C., and at additional mailing offices.

**POSTMASTER:** Send address changes to: *FLSA Employee Exemption Handbook*, Thompson Publishing Group, Inc., 5201 W. Kennedy Blvd., Suite 215, Tampa, FL 33609-1823.

This newsletter for the *FLSA Employee Exemption Handbook* includes a loose-leaf update to the *Handbook*. For subscription service, call 800 677-3789. For editorial information, call 202 872-4000. Please allow four to six weeks for all address changes.





THOMPSON
Insight you trust.

FLSA Legal Insider

# Rising Tide of Multidistrict FLSA Cases Is Met by Better-Equipped Employers

*By Brett Bartlett, Esq.*

*Brett Bartlett, Esq., is a partner in the Wage & Hour Litigation Practice Group at Seyfarth Shaw LLP's Atlanta office. He devotes the majority of his practice to representing employers in complex federal and state wage and hour litigation. He also provides preventative counseling and change-management assistance to employers wishing to limit their exposure under the federal Fair Labor Standards Act and state laws requiring employers to pay their employees minimum wages and overtime.*

A recent surge in multidistrict wage and hour litigation has increased the risk for employers with operations in more than one state. While Fair Labor Standards Act (FLSA) lawsuits filed in multiple jurisdictions are on the rise, employers have also seen a rise in the number of "copycat" suits filed by attorneys who monitor court filings for FLSA actions against employers in jurisdictions where they do not practice. Some of these plaintiffs' attorneys then file similar, if not identical, complaints against the employer in their hometown courts, far from where the original suits were filed.

Not long ago, a plaintiffs' attorney might have expected a substantial settlement — and a hefty contingency fee — solely by virtue of filing a collective action under the FLSA. In some jurisdictions, personal injury and real estate lawyers, with no prior interest in employment law, suddenly turned their attention to the FLSA and its attorneys' fees provision (29 U.S.C. §216(b); see ¶734 of the *Handbook*). The "fairly lenient" standard for conditional collective action certification under the FLSA (see June 2007 newsletter, p. 9; see ¶737 of the *Handbook*) ensured an employer's anxious attention to even the weakest complaint asserted by a sole practitioner in a single court. The risks and fees associated with defending a national class far outweighed the cost of settling quickly, even at a relatively exorbitant cost.

### The Evolution of Multidistrict FLSA Litigation

Times have changed. Courts have become more adept at managing complicated litigation filed under the FLSA and similar state laws, and some have acknowledged a need to place greater restrictions on plaintiffs' abilities to seek collective recovery. Defense attorneys subsequently have availed themselves of those restrictions and have frequently succeeded in leveraging nominal settlements or employer-positive results. Employers have become much less likely to settle, and the advantage claimed previously by the plaintiffs' bar has begun to diminish.

However, the sophistication of plaintiffs' attorneys and the complexity of the claims that they raise have increased steadily. So too have their attempts to assert leverage by filing claims in multiple jurisdictions.

**See *Multidistrict,* p. 4**

## *Multidistrict* (continued from page 3)

Fifteen of the 22 currently pending multidistrict-litigation employment cases are wage and hour cases (see *Statistical Analysis of Multidistrict Litigation 2006*, Judicial Panel on Multidistrict Litigation, at www.jpml.uscourts.gov/Statistics/Statistical-Analysis-2006.pdf). Some of the consolidated cases comprise actions filed in just one or two states. Others involve cases filed in numerous states and include hundreds of claims.

As the popularity of wage and hour collective and class actions continues to grow, the likelihood of an employer being sued in multiple jurisdictions over the same issues — and thus the number of wage and hour cases ripe for consolidation under Section 1407 — is also growing.

Employers, their attorneys and the federal courts have responded to the growing challenge of multidistrict litigation in part by availing themselves of the provisions of the federal statute on multidistrict litigation, or MDL, at 28 U.S.C. §1407.

MDL poses both advantages and disadvantages for employers (see box, p. 5).

### Consolidating Pretrial Proceedings

Section 1407 of the U.S. Code provides that, "[W]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings" (28 U.S.C. §1407).

Traditionally, Section 1407 provided a tool to manage particularly complex multidistrict cases involving products liability, mass torts and single accidents with massive numbers of victims. When Section 1407 was enacted in 1968, Congress intended it to facilitate the efficient and consistent pretrial management of cases whose span across many jurisdictions would otherwise cost courts and parties exorbitant amounts of time and expense, and would risk inconsistent results because of the multiple courts involved.

Congress created the Judicial Panel on Multidistrict Litigation to determine which cases should be consolidated pursuant to Section 1407. The Judicial Panel also decides where consolidated cases should be sent for pretrial proceedings. Once the Panel assigns the consolidated cases to a particular district judge, it has no involvement in the proceedings of the cases before the transferee judge. In other words, the Judicial Panel does not supervise or approve settlements, suggest to transferee judges how they should manage the assigned cases, or otherwise tell the transferee judges what to do.

### When Consolidation Is Fitting

Any party to one of the actions, or the Judicial Panel itself, may initiate proceedings under Section 1407 to determine whether a particular group of cases should be transferred to one district judge for consolidated pretrial proceedings. Coordination and transfer of the cases are deemed appropriate under §1407 when:

a) the cases involve common questions of fact;

b) consolidation of the cases would be convenient for the parties and witnesses; and

c) consolidation of the cases would "promote the just and efficient conduct of such actions" (28 U.S.C. §1407).

The presence of differing legal theories in the various cases at issue will not prevent consolidation as long as there are common factual questions. In determining whether the second and third criteria have been met, the Judicial Panel considers factors such as whether multidistrict litigation would eliminate duplicative discovery, prevent inconsistent pretrial rulings, reduce the costs of litigation, and conserve the time and effort of the parties, their counsel, the witnesses and the court (*In re GMAC Ins. Mgmt. Corp. Overtime Pay Litig.*, 342 F. Supp. 2d 1357 (J.P.M.L. Oct. 29, 2004); *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 709 F.Supp. 231 (J.P.M.L. 1989); MANUAL FOR COMPLEX LITIGATION (Fourth) §20.131).

### Where to Consolidate?

In addition to deciding whether the cases should be consolidated as multidistrict litigation, the Judicial Panel must decide which district judge should conduct consolidated pretrial proceedings.

The Judicial Panel may transfer consolidated cases to any judicial district in the United States, regardless of whether a judicial district is involved in any of the cases to be transferred. Nevertheless, the fact that a particular court is already involved in one of the actions being consolidated carries weight in the analysis.

In choosing where to transfer a case, the Judicial Panel *may* consider:

1. where the largest number of related cases is pending;

**See *Multidistrict*, p. 5**

## *Multidistrict* (continued from page 4)

2. which district has made the most progress in the cases before it;
3. where the first case was filed;
4. where the majority of the witnesses and evidence are located;
5. which district provides opportunities for the least cost and inconvenience to the parties, the counsel and the witnesses; and
6. which district has judges with enough time, experience and knowledge in the subject matter at issue to handle the consolidated pretrial proceedings.

**See *Multidistrict*, p. 6**

## The Pros and Cons of Multidistrict Proceedings

*By Brett Bartlett, Esq.*

For employers, there are advantages and disadvantages to having a group of cases consolidated as a multidistrict litigation (MDL) (see story, p. 3). Among the advantages are the following:

- **A single forum reduces expenses:** Employers do not have to defend multiple cases in multiple forums. That is, plaintiffs can no longer exploit the expense, in both time and money, for an employer to defend multiple wage and hour class or collective actions for a favorable settlement.
- **The effect of adverse findings is limited:** Because the cases are consolidated until trial, the employer no longer has to worry about the possibility of an adverse finding in one case being used as grounds for finding against the employer in other courts. For example, if an employer were faced with collective actions in several states in which it was alleged that it had wrongly classified employees as exempt, and in one of those cases the trial court denied the employer's motion for summary judgment on the issue, the plaintiffs in the other cases could argue that the ruling should have the same effect in their cases.
- **Discovery is more efficient:** Another advantage for employers is that discovery may become more efficient and thus cheaper, because the transferee court will consolidate discovery. The transferee court may permit only one master set of requests for production of documents and may order the parties to create a single document depository. By preventing plaintiffs from running up excessive discovery costs, employers may be able to secure more advantageous settlements.
- **The venue can be more favorable:** In addition, depending on which court is assigned the MDL, cases could be transferred to a court that is perceived to be more employer-friendly than the courts in which the individual cases were initiated.
- **The appointment of lead plaintiffs' counsel offers opportunities:** Perhaps most troublesome to plaintiffs' attorneys is the MDL court's ability to appoint lead counsel. Not all of plaintiffs' counsel may have a place at the table once multiple complex wage and hour cases have been consolidated. When more than one plaintiff's firm is involved, it is not uncommon for MDL courts to appoint an executive committee of plaintiffs' counsel. At this point, infighting among the various plaintiffs and their attorneys over who should take the lead in the litigation may become distracting — and could present an opportunity for an employer to assert settlement leverage. Even if they do not leverage a prompt favorable settlement, employers may be well-served by the court's appointment of plaintiffs' lead counsel, because of that action's likely promotion of case-management efficiency and reduction of attorney-fee exposure: communications and negotiations with one plaintiffs' firm are much cheaper than with many.

There are also disadvantages to consolidation of the cases. Among them are:

- **State law claims can give plaintiffs leverage:** Because the transferee court considers only common issues of fact, not law, for MDL assignment, cases with common facts may have a variety of state law claims as well. For example, in addition to FLSA claims, plaintiffs may assert state law claims for failure to pay wages on a timely basis or business expense reimbursement, unlawful deductions from pay, or failure to provide meal and rest breaks. Plaintiffs may persuade the MDL court that their state law claims justify additional discovery and, thereby, maintain the leverage they would have had if the cases remained in multiple forums.
- **The effect of pretrial rulings is multiplied:** Plaintiffs could potentially use favorable pretrial rulings in the entirety of the action, not just in a single case. For instance, if the plaintiffs obtained favorable rulings on the statutes of limitations applicable in their FLSA cases (i.e., three years versus two years), they might successfully argue that the limitations extend to all of the MDL cases. Prior to the MDL, it would have been much more difficult to argue that a ruling on the statute of limitations in a single case should apply in others.

(*In re Cintas Corp. Overtime Pay Arb. Litig.*, 444 F. Supp. 2d 1353 (J.P.M.L. Aug. 18, 2006) (authorizing transfer to the district where the first filed and most advanced action is pending); *In re Wells Fargo Home Mtge. Overtime Pay Litig.*, 435 F. Supp. 2d 1338 (J.P.M.L. June 15, 2006) (transferring cases to the district where the first filed and the greatest number of actions are already pending); *In re Sears, Roebuck & Co. Tools Mktg. & Sales Pracs. Litig.*, 381 F. Supp. 2d 1383, 1384 (J.P.M.L. 2005) (transferring cases to the district where the defendant has its corporate headquarters and many of the defendant's documents and witnesses are located); *In re Elevator & Escalator Antitrust Litig.*, 350 F. Supp. 2d 1351, 1353 (J.P.M.L. 2004) (transferring cases to the Southern District of New York because it had the resources to handle complex litigation); *Altamont Pharm., Inc. v. Abbot Labs.*, Nos. 94 C 6282, 95 C 2015, 95 C 1940, 95 C 246, 2002 U.S. Dist. LEXIS 759, at *8 (N.D. Ill. 2002) (transferring cases against the pharmaceutical industry to the Eastern District of New York because this jurisdiction (a) was where most of the potential witnesses were located, (b) was near an area known as the "pharmaceutical corridor" due to its high concentration of pharmaceutical companies, and (c) was where both the majority of defendants' counsel and co-lead national counsel for the plaintiffs had offices.)

While the Judicial Panel prefers to transfer consolidated cases to judges who have experience with multidistrict litigation, it does not always do so.

### Importance of Transferee Courts

Section 1407 cases are typically consolidated only for pretrial proceedings, and the transferee judge or one of the parties may petition the Judicial Panel to remand the cases back to their original courts for trial; also, the Judicial Panel itself may initiate the remand (see MDL Panel Rule 7.6(c)).

In conducting the consolidated pretrial proceedings, however, the transferee judge can decide discovery motions, class action certification motions, motions to dismiss some or all of the cases, and motions to approve any settlements the parties reach before trial. The transferee judge can also vacate or modify any order issued by the transferor court prior to the transfer (see *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114 (6th Cir. 1981)).

Of the 17,523 cases consolidated and transferred by the Judicial Panel between Oct. 1, 2005, and Sept. 30, 2006, 10,713 were terminated by the transferee court, and only 248 cases were remanded by the Judicial Panel to their original courts for trial (see *Statistical Analysis of Multidistrict Litigation 2006*). (Presumably, the remaining cases were terminated by the parties through settlement and/or voluntary dismissal.)

From the creation of the Judicial Panel in 1968 through Sept. 30, 2006, a total of 245,986 cases were consolidated for pretrial proceedings pursuant to Section 1407 (*Id.*). Of these cases, the transferee judge has terminated 158,396, or approximately 64 percent, of the cases (*Id.*). Because such a high percentage of the consolidated cases are decided by the transferee judge through pretrial motions, the decision by the Judicial Panel as to which judge should conduct the pretrial proceedings is likely to have a significant impact on the outcome of the case.

### Facing Possible Transfer

Historically, once cases have been referred to the MDL panel, it is difficult for either party to prevail on arguments against transfer and coordination.

Since 1968, nearly 98 percent of the 252,270 cases considered for multidistrict litigation have been subjected to Section 1407 proceedings (see *Statistical Analysis of Multidistrict Litigation 2006*). This high probability of transfer calls into question the benefit of arguing against transfer and suggests that parties should concentrate their arguments on the choice of MDL court and on how they will control events subsequent to the transfer order.

Also, defense counsel and employers should be aware that arguments for or against consolidation pursuant to Section 1407 may affect positions later taken regarding class and collective action certification. For instance, arguments in favor of one court over another because of the favored court's capabilities to manage similar complex issues may weaken later attempts to defeat FLSA conditional collective action certification by arguing that varied plaintiffs' FLSA claims are dissimilar, or to defeat Rule 23 class certification (if supplemental claims accompany those under the FLSA) by arguing that varied plaintiffs' FLSA claims are not common. Likewise, the failure to argue against Section 1407 transfer could suggest a weakness in an employer's arguments against collective or class certification.

Arguments in favor of particular courts or judges may be more useful. Factors such as where the first case was filed, where the witnesses and relevant documents reside, and even which district contains airports that are convenient to counsel, have influenced positively the Judicial Panel's decisions on where to transfer cases. When all is said and done, however, the reasons for transfer decisions are sometimes mysterious and difficult to predict.

# In the Courts

## Employee Who Fixed Software Defects Found Exempt

*Court Rules That Software Troubleshooter Who Analyzed Systems Qualifies for Computer Exemption*

A federal court has found a software troubleshooter whose main responsibility was to identify and correct software defects exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) under the computer-employee exemption provisions, because she used her own analysis to correct the defects.

In *Young v. Cerner Corporation*, the U.S. District Court for Western Missouri rejected the plaintiff's argument that, because her primary duty was to fix software defects she was informed of, she was a nonexempt employee. The plaintiff "did more than just follow instructions," wrote the court. "Although she might have been given some direction, ultimately her job was to apply some of her own analysis and judgment in resolving defects."

The U.S. Department of Labor (DOL) established a single exemption test for computer workers (29 C.F.R. §541.400(b); see ¶610 of the *Handbook*) when it promulgated the FLSA's "white collar regulations" in 2004. The new regulations significantly broadened the scope of the exemption (see ¶611 of the *Handbook*).

Under the new regulations, software programmers — that is, those who *write* software — typically will qualify for the exemption; however, it is less certain whether workers who only *troubleshoot* software will qualify.

Some legal observers, including *Handbook* co-author Shlomo D. Katz, believe that even employees who merely develop and execute test plans for software without fixing them could qualify for the exemption under the current regulations (see related story, p. 1).

The *Young* ruling does not go quite that far. Nevertheless, it appears to be the first of its kind, in which an employee who performed troubleshooting duties was found to qualify (see box, below).

**See *Troubleshooter*, p. 8**

### Recent Case Law Involving the Computer-Employee Exemption

Case law has struggled to keep pace with the fast-evolving field of computer employees.

Several rulings concerning the computer-employee exemption from the Fair Labor Standards Act (FLSA) have been issued in the three years since the U.S. Department of Labor (DOL) issued new regulations about it in 2004. Among them are:

- *Bobadilla v. MDRC*, in which a network administrator was found exempt even though he spent most of his time performing "help desk" functions, assisting other employees with routine computer problems. In *Bobadilla*, the court found the employee exempt because he, among other things, identified and fixed an "underutilization" of network resources, and "made actual, analytical decisions about how [the employer's] computer network should function" (see February 2006 newsletter, p. 7).
- *Bergquist v. Fidelity Information Services, Inc.*, in which a computer programmer was found to qualify for the exemption. The *Bergquist* ruling hinged on the compensation requirements of the exemption, rather than the duties requirements (see February 2006 newsletter, p. 6).
- *Downes v. J.P. Morgan Chase & Co.*, in which the court found that the Equal Pay Act does not extend to computer employees.
- *Lucero v. Sountern Micro Systems, Inc.*, an unreported case in which the court dismissed the employer's motion for summary judgment on the grounds that there was a "triable issue of fact" regarding whether the plaintiff qualified for the computer-employee exemption.
- *Jackson v. McKesson Health Solutions LLC*, an unreported case decided under the pre-2004 regulations, in which the employer conceded it would have had a "difficult time prevailing" in applying the computer-employee exemption to one of its computer support specialists, and instead attempted to exempt him under the administrative exemption. In performing basic troubleshooting duties, the employee was "merely ensuring that [a] particular machine is working properly according to the specifications designed and tested by other … employees," the court noted.

However, until the *Young* ruling (see story, above), no court appears to have explicitly addressed the question of whether employees who *test* software will qualify for the exemption.

## *Troubleshooter* (continued from page 7)

### The Facts of the Case

The plaintiff worked as a "Level 6" software engineer for Cerner Corp., a provider of software to healthcare organizations, from September 2004 to October 2005. When the plaintiff failed to perform up to standards after some time at the job, Cerner placed her on a "Performance Improvement Plan," which set out specific objectives for her, including that she improve her skills at resolving design questions and delivering code, and that she rely less on the assistance of others in carrying out her investigations and troubleshooting. When she failed to accomplish the objectives, Cerner extended the plan for 30 days. Meanwhile, at some point during the plaintiff's tenure at Cerner, she applied for a position at another organization. She left Cerner to take the other job in September 2005.

Although Cerner describes its Level 6 software engineer position as "responsible for writing code to meet user interface specifications," the plaintiff maintained that her responsibilities did not include writing code. In addition, she claimed that because her main responsibility was fixing software defects, her position at Cerner is nonexempt.

In April 2006, the plaintiff filed suit against Cerner alleging violations of the FLSA's overtime provisions. Cerner, in turn, filed a motion for summary judgment, seeking to have the case dismissed on the grounds that Young qualified for the computer employee exemption.

### Minimum Pay Requirements

A computer employee can be exempt if he or she meets the duties test and is paid on a salary or fee basis, like an executive, administrative or professional employee. For those employees, the minimum compensation that will satisfy the test is $455 per week (see Tab 200 of the *Handbook*).

Unlike other white-collar workers, computer employees also can be exempt if they are compensated on an hourly basis, so long as their hourly rate is not less than $27.63 an hour (29 C.F.R. §541.400(b)).

As the plaintiff drew an annual salary of $65,000, she met the exemption's salary basis requirement.

### The Duties Test

In addition to fulfilling the pay requirements, a computer employee must have a primary duty (see ¶613 of the *Handbook*) that consists of at least one of the following four criteria:

1) "the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2) 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;
3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4) a combination of the aforementioned duties, the performance of which requires the same level of skills" (29 U.S.C. §213(a)(17) and 29 C.F.R. §541.400; see ¶612 of the *Handbook*).

### The Employee's Job Duties

As noted above, the plaintiff worked as a "Level 6" software engineer for Cerner. Although Cerner describes its Level 6 software engineer position as "responsible for writing code to meet user interface specifications," the plaintiff maintained that her responsibilities did not include writing code. Instead, she claimed her primary duty had been "defect resolution," or merely "fixing" software defects — and thus her position at Cerner is nonexempt.

In considering the employer's motion for summary judgment, the court viewed the facts in the "light most favorable to the nonmoving party" — that is, the plaintiff — and based its decision on the plaintiff's description of her job duties, rather than the employer's.

In correcting defects, the plaintiff used a software product called Informatica, which "extract[s], transform[s] and load[s] data." The plaintiff testified that her defect-resolution responsibilities included "try[ing] to fix" the defect, and if the program — such as Informatica — did not pull the correct data she would "change the statement or whatever it's asking for to pull the correct field." If the program had pulled the correct data but was still not yielding the right response, she would look "within the other transformations within the map," such as a router or filter. When she believed that she had figured out how to fix a defect, she would "fix it at that point in time."

After correcting a defect, the plaintiff would test her solution, using two types of tests — "white box testing" and "black box testing" — to verify that her analysis, design and modification of her solutions met user- and system-design specifications. She carried out white box tests to test the data that had been manipulated to verify it

**See *Troubleshooter*, p. 9**

## *Troubleshooter* (continued from page 8)

was the correct data. Following a white box test, she and her peers would review her modifications to make sure the defect had been fixed correctly, identifying potential problems with the defect resolution. Then the plaintiff performed a black box test, to see how the defect resolution worked when moved into another environment.

Also, at least once, the plaintiff modified a portion of a "ReadMe," which the online encyclopedia *Encarta* defines as "a computer text file that contains information a user may need in order to install or operate a program," and which the court described as "a stored procedure that calls a function."

Part of the modification involved her typing instructions for which function to call, such as "[i]nstructions to call Table A … [or] whatever it may be that it's looking for." The plaintiff's modification of the ReadMe, along with her testing, took almost a month to complete, indicating, wrote the court, that the modification "was not a simple copy and paste solution."

The plaintiff argued that she was a nonexempt employee because, in her job, she "transformed data" and never wrote code. The court pointed out that the plaintiff's definition of "code" covers only source code, a much narrower definition than Cerner's. However, the court wrote, whether the plaintiff had written code is in fact immaterial, since the DOL regulations for computer employees do not mention the writing of code (see 29 C.F.R. §541.400; regarding plaintiffs' need to use more than a job description as evidence for being misclassified as exempt, see *Smith v. Heartland Auto. Servs., Inc.,* 404 F. Supp. 2d 1144, (D.Minn.2005) and *Diaz v. Elec. Boutique of Am., Inc.,* 2005 WL 2654270 (W.D.N.Y. 2005)).

The "essence of [the plaintiff's] job" at Cerner seemed to be "analyz[ing] problems with data retrieval and modif[ying] … aspects of the program or data in order to correct the error," wrote the court.

### The Court's Ruling

The court found that the plaintiff's defect resolution duties involved both "the application of system analysis techniques and procedures to determine software or system functional specifications," as described in 29 C.F.R. §541.400(b)(1), and "the design, analysis, creation, testing and modification of computer systems or programs based on and related to user or system design specifications," as described in 29 C.F.R. §541.400(b)(2). As a result, the court ruled that the plaintiff was exempt as a computer employee from the FLSA's overtime requirements under 29 U.S.C. §213(a)(1) and 29 C.F.R. §541.400. (*Young v. Cerner Corporation*, W.D. Mo., 2007 WL 2463205, Aug. 28, 2007)


**Statement of Ownership, Management and Circulation**

| | | |
|---|---|---|
| 1. Title of Publication: **FLSA Employee Exemption Handbook** | 2. Publication No. 015-866 | 3. Filing Date: October 1, 2007 |

4. Frequency of Issue: Bi-Monthly 5. No. of Issues Published Annually: 6 6. Annual Subscription Price: $369
7. Complete Mailing Address of Known Office of Publication: 1725 K St. NW, Suite 700, Washington, DC 20006
8. Complete Mailing Address of Headquarters or General Business Offices of the Publisher: 1725 K St. NW, Suite 700, Washington, DC 20006
9. Name and Address of Publisher, Editor, Managing Editor:
(a) Thompson Publishing Group, Inc., Phil Gabel, 1725 K St. NW, Suite 700, Washington, DC 20006
(b) Margaret Miller, 1725 K St. NW, Suite 700, Washington, DC 20006
(c) Michael Cardman, 1725 K St. NW, Suite 700, Washington, DC 20006
10. Owner: ACP Thompson Holdings, LLC, 65 East 55th Street, 18th Floor, New York, NY 10022
Avista Capital Partners, LP, 65 East 55th Street, 18th Floor, New York, NY 10022
Avista Capital Partners (Offshore), LP, 65 East 55th Street, 18th Floor, New York, NY 10022
11. Known Bondholders, Mortgagees, and Other Security Holders: None
12. Tax Status *(For completion by nonprofit organizations authorized to mail at special rates)*: None
13. Publication Title: *FLSA Employee Exemption Handbook*
14. Issue Date for Circulation Data Below: August 2007

| 15. **Extent and Nature of Circulation** | **Average No. Copies Each Issue During Preceding 12 Months** | **Actual No. Copies of Single Issue Published Nearest to Filing Date** |
|---|---|---|
| A. Total No. Copies Printed *(Net press run)* | 1477 | 1365 |
| B. Paid and/or Requested Circulation: | | |
| 1. Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541 *(Include advertiser's proof and exchange copies)* | 1384 | 1302 |
| 2. Paid In-County Subscriptions *(Include advertiser's proof and exchange copies)* | 0 | 0 |
| 3. Sales Through Dealers and Carriers, Street Vendors, Counter Sales and Other Non-USPS Paid Distribution | 0 | 0 |
| 4. Other Classes Mailed Through the USPS | 0 | 0 |
| C. Total Paid and/or Requested Circulation *[Sum of 15b (1), (2), (3) and (4)]* | 1384 | 1302 |
| D. Free Distribution by Mail *(Samples, complimentary, and other free)* | | |
| 1. Outside-County as Stated on Form 3541 | 31 | 31 |
| 2. In-County as Stated on Form 3541 | 0 | 0 |
| 3. Other Classes Mailed Through the USPS | 0 | 0 |
| E. Free Distribution Outside the Mail *(Carriers or other means)* | 0 | 0 |
| F. Total Free Distribution *(Sum of 15d and 15e)* | 31 | 31 |
| G. Total Distribution *(Sum of 15c and 15f)* | 1415 | 1333 |
| H. Copies not Distributed | 62 | 32 |
| I. Total *(Sum of 15g and 15h)* | 1477 | 1365 |
| J. Percent Paid and/or Requested Circulation *(15c/15g x 100)* | 98% | 98% |

16. Publication of Statement of Ownership
Publication required. Will be printed in the October 2007 issue of this publication.
17. I certify that the statements made by me above are correct and complete. Michael Cardman, Senior Managing Editor.

defining the exemption to DOL. Subsequently, Congress enacted section 2105(a) of the Small Business Job Protection Act of 1996, which created a new paragraph at 29 U.S.C. §213(a)(17). That statute, with an important exception discussed below, codified DOL's regulation into law. There is no legislative or regulatory history, however, that explains what either Congress or DOL meant by the "testing" component of the computer professional exemption.

By process of elimination, an employer can construct a reasonable argument that certain software-testing positions are exempt under the current version of DOL's exemption regulations.

### A 'Reasonable Argument'

Nevertheless, by process of elimination, an employer can construct a reasonable argument that the jobs described above are exempt under the current version of DOL's exemption regulations. The employees in question are, literally, testing software. It is true that they do not possess the skills usually associated with computer professionals. However, the preamble to DOL's 2004 exemption regulations expressly rejects the notion that "theoretical and practical application of specialized computer systems knowledge" is a prerequisite for exemption (69 Fed. Reg. 22,159 (April 23, 2004)). Indeed, prior to the passage of the Small Business Job Protection Act of 1996, which amended the FLSA, such "theoretical and practical application" had been part of the exemption test. However, Congress apparently rejected that test when it amended the FLSA.

Moreover, DOL explained in the preamble to the 2004 regulations that it had rejected, as inconsistent with the 1996 FLSA Amendments, public comments suggesting that an exempt computer employee must "consistently exercise discretion and judgment." Prior regulations had included such a requirement for computer professionals to be considered exempt. In a Wage and Hour Opinion Letter dated Nov. 5, 1999, DOL interpreted that requirement as applied to a computer employee as follows:

> The exercise of discretion and independent judgment, in general, involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after various possibilities have been considered. The term 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. An employee who merely applies his knowledge in following prescribed procedures ... is not exercising discretion and independent judgment. ...
>
> Based on the information submitted, it appears that most of the work of the [computer employee] involves the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment. In addition, the information submitted does not demonstrate that this employee has the authority to make independent choices, free from immediate direction or supervision, with respect to matters of significance and consequence.

Thus, under the old regulations, that employee was not exempt. However, under the current regulations, the computer employee exemption would seem to be available even to employees who perform purely routine software-testing functions. (Note that help-desk personnel still would not be exempt, as they generally do not perform even routine software testing or other exempt functions *as their primary duty*.)

### Conclusion

In the absence of specific guidance from DOL or the courts, there always will be some risk in applying the exemptions to borderline positions. In such situations, employers are well-advised to document the basis for their exemption determinations. In addition, employers should seriously consider obtaining legal advice regarding those classifications. By doing so, employers may at least be able to demonstrate that they attempted in good faith to ascertain and comply with the requirements of the FLSA. This will increase their chances of avoiding the imposition of liquidated damages in the event they have misclassified their employees (see ¶763 of the *Handbook*).

*Shlomo D. Katz, Esq., is a senior counsel with the law firm Epstein Becker & Green, P.C. He practices wage and hour law and advises clients on employee classification and salary test issues. He has successfully litigated before federal, state and local courts, the Government Accountability Office, and the Boards of Contract Appeals. Mr. Katz also is a co-author of Thompson Publishing Group's four FLSA publications.*

# Worker Not Eligible for 'Combination Exemption'

*Fourth Circuit Clarifies That Employees Must Satisfy Salary Basis Test to Qualify for Exemption*

To qualify for the "combination exemption" from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), an employee must be paid on a salary basis — even though the regulations governing the combination exemption do not explicitly say so — a federal appeals court has ruled.

The creator of a software package who agreed to a $7.00-an-hour wage with his employer in exchange for the employer having marketing rights and an option to buy the software he designed was not eligible for the combination exemption because he was not paid on a salary basis, the 4th U.S. Circuit Court of Appeals ruled in *IntraComm Inc. v. Bajaj*.

Federal regulations (29 C.F.R. §541.708; see ¶630 of the *Handbook*) state that employees who perform "a combination of exempt duties … for executive, administrative, professional, outside sales and computer employees" may qualify for the combination exemption. But the regulations are silent about whether the employees also must satisfy the salary basis test (see box, at right).

The 4th Circuit's decision in *IntraComm* clarifies the law for employers in its jurisdiction — which comprises Maryland, North Carolina, South Carolina, Virginia and West Virginia — by expressly stating that an employee must satisfy the salary basis test to qualify for the combination exemption. According to the court, "Although the combination exemption permits the blending of exempt duties for purposes of defining an employee's primary duty, it does not … relieve employers of their burden to independently establish the other requirements of each exemption whose duties are combined."

### The Facts of the Case

In the spring of 2004, Baback Habibi, a founder of the information technology company IntraComm, Inc., entered into a contract with BAE Systems Information Technology, LLC — then called DigitalNet Government Solutions, LLC — for DigitalNet to exclusively market his software package for a period of time and to acquire the option to buy the software for $1.5 million. The contract also provided for DigitalNet to employ four IntraComm employees, including Habibi.

In the fall of 2004, DigitalNet's outstanding shares were sold to BAE Systems Information, and the company became a BAE company.

**See *Combination*, p. 12**

## The Salary Basis Test

To be eligible for the executive, administrative, professional or — according to a recent ruling from the 4th U.S. Circuit Court of Appeals (see story, above) — combination exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act, employees must be paid on a salary basis.

As described in 29 C.F.R. §541.602 (see ¶210 of the *Handbook*), an employee is considered to be paid on a "salary basis" if he or she regularly receives each pay period a predetermined amount — currently at least $455 per week — constituting all or part of his or her compensation. With a few exceptions (see ¶250 of the *Handbook*), exempt employees may *not* be paid by the hour. An exempt employee's salary cannot be subject to reduction because of variations in the quality or quantity of the work performed. Also, the exempt employee must receive his or her full salary for any week in which he or she performs work, without regard to the number of days or hours worked, unless one of the following exceptions is met:

- the employee is absent from work for one or more full days for personal reasons, other than sickness or disability;
- the employee is absent for one or more full days because of sickness or disability (including work-related accidents) and the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness and disability;
- the employer imposes penalties in good faith for infractions of safety rules of major significance;
- the employer imposes, in good faith, unpaid disciplinary suspensions of one or more full days for infractions of certain workplace conduct rules of general applicability;
- the employee takes leave under the Family and Medical Leave Act; or
- the deduction is made to offset jury fees, witness fees or military pay received by the exempt employee.

Of course, an employee who is absent the entire workweek or performs no work during an entire workweek does not need to be paid for that week. That is not considered making a deduction.

# Exempt Status of Safety Workers and Contractor Liaisons Not Affected by 2004 FLSA Regulations

*Even Under More Lenient Standard, Court Finds Workers Ineligible for Administrative Exemption*

The U.S. Department of Labor's (DOL's) revised white-collar regulations did not change the exempt status of a group of public-agency workers, a federal court recently held.

In *Mohorn v. Tennessee Valley Authority,* the employer argued that the 2004 regulations governing the administrative exemption of the Fair Labor Standards Act (FLSA) had sufficiently relaxed the "discretion and independent judgment" standard (see ¶410 of the *Handbook*) to allow for the exemption of certain positions. But the U.S. District Court for Eastern Tennessee disagreed, granting summary judgment in the plaintiffs' favor.

The case involved Radiological Control Shift Supervisors (RadCon Supervisors) and Modifications Task Supervisors (Task Supervisors) for a nuclear power plant operated by the Tennessee Valley Authority.

In an earlier case, *Beene, et al. v. TVA*, Case No. 3:99-CV-350 (E.D. Tenn. Aug. 12, 2003), the court had found those positions to be nonexempt under the regulations in place prior to Aug. 23, 2004.

The question before the court in *Mohorn* involved whether the revisions to the white-collar regulations, effective Aug. 23, 2004, resulted in RadCon Supervisors

**See *Safety Workers*, p. 13**

## *Combination* (continued from page 11)

During Habibi's employment by BAE, he continued to receive as his only compensation the $7.00 hourly wage. Habibi said that, during this time, he was prevented from reporting hours worked that exceeded 40 hours per week; in addition, he was not paid at all for two weeks of work. In fact, the parties agreed that Habibi had not been paid for a total of about 300 hours of work.

In early 2005, when BAE refused to exercise its option to purchase Habibi's software, he filed suit, alleging, among other claims, that BAE had denied him the minimum wage under the FLSA for the 300 hours (see ¶730 of the *Handbook*).

The U.S. District Court for Eastern Virginia granted partial summary judgment to Habibi on his FLSA claims, finding that because Habibi did not satisfy the salary test, he did not qualify for any of the individual exemptions — and, as a result, he also did not qualify for a combination exemption. The lower court therefore ruled that BAE's failure to pay Habibi minimum wage was a violation of the FLSA.

BAE appealed the ruling, arguing that the district court had erred because the combination exemption did not require that Habibi meet the salary basis test.

### Deferring to DOL

The appeals court found the regulatory language on the combination exemption ambiguous, noting that it "focuses solely on the employee's job duties" and does not explicitly include or exclude any other requirements of the individual exemptions, including the salary basis test (29 C.F.R. §541.708).

Where the regulations are silent or ambiguous, courts should defer to the interpretation of the U.S. Department of Labor (DOL) unless it is "plainly erroneous or inconsistent with the regulation," the appeals court noted, citing the U.S. Supreme Court's ruling in *Auer v. Robbins*, 519 U.S. 452, 1997.

To that end, the appeals court asked DOL to file a "friend of the court" brief explaining its interpretation of the combination exemption. DOL's interpretation held that, when an employee does not meet the primary duty requirements for any individual exemption, the combination exemption may still be applicable if the employee's primary duties encompass a mixture of the primary duties of more than one of the individual exemptions. In addition, however, an employer must show that the other requirements of the individual exemptions — such as the salary basis test — are being met, DOL said.

Therefore, the appeals court found that Habibi was a nonexempt employee. He did not qualify for the outside sales exemption on primary duty grounds. And because he did not meet the salary basis test required for eligibility for the administrative exemption, he did not qualify for the combination exemption, either. The appeals court therefore affirmed the granting of partial summary judgment to Habibi on his FLSA claim that BAE had failed to pay him the minimum wage. (*IntraComm Inc. v. Bajaj*, 4th Cir., No. 06-1516, July 5, 2007)

**Safety Workers** (continued from page 12)

and Task Supervisors being exempt from the FLSA's overtime provisions. The parties agreed that the facts of *Beene* would govern the case; that is, the same exact fact pattern and job duties would simply be evaluated under the revised FLSA standards.

### Job Duties

According to the record in *Beene*, Judge R. Leon Jordan found that RadCon Supervisors performed a primary duty of "measur[ing] radiation levels" for the protection of the plant's employees and the public. To do so, the workers review documentation of routine radiological surveys, ensure such surveys are performed and have the power to prevent someone from entering a contaminated area. RadCon Supervisors could also issue warnings for minor disciplinary violations of RadCon technicians and prepare performance reviews for the review of their managers. However, the RadCon Supervisors are not involved in the hiring, firing or promotion of any employees and do not make budget-related decisions.

Judge Jordan also held that Task Supervisors primarily oversee work performed by contractors according to stipulations set forth in the work orders. Task Supervisors are low-ranking employees, have no supervisory authority, and typically function as points of contact between contractors and TVA.

### The Administrative Exemption

To qualify for the administrative exemption under the current rules, employees must:

1. be paid at least $455 per week on a salary basis (see ¶200 of the *Handbook*);
2. have a primary duty that includes the performance of office or nonmanual work directly related to the management or general business operation of the employer or the employers' customers; and
3. have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance (see ¶410 of the *Handbook*).

The plaintiffs in question each undisputedly met the salary requirements for the exemption.

According to the court, under the old regulations, as interpreted by the 6th U.S. Circuit Court of Appeals, an employee had to "customarily and regularly" exercise discretion and independent judgment to qualify for the administrative exemption. The current standard, however, has been loosened to require only that an employee's duty "include" discretion and independent judgment (29 C.F.R. §541.202).

### The Decision

In rendering his decision in *Beene*, Judge Jordan appeared to have "applied the now-applicable and more lenient standard of the FLSA regulations," the *Mohorn* court ruled.

And, because the parties agreed that the job duties of the employees in question had not changed, "the Court agrees that neither the RadCon nor Task Supervisors have primary duties including the exercise of discretion and independent judgment."

The court agreed with Judge Jordan's findings that the primary duty of RadCon supervisors was document review that was "routine and clerical in nature," that served primarily as "a clerical 'double-checking' function" and did not "involve 'the use of skill in applying well-established techniques, procedures or specific standards.'"

Likewise, Task Managers perform clerical, routine and repetitive work, only monitoring the work of others and passing information between parties, duties that "[do] not strike the Court as involving the exercise of discretion and independent judgment." They "do not have 'authority to make an independent choice, free from immediate direction or supervision.'"

For these reasons, the court concluded that the plaintiffs did not qualify for the administrative exemption under the current regulations.

### Highly Compensated Employees

After finding that the RadCon Supervisors fell short of the administrative exemption, the court considered TVA's back-up argument that they qualified for exemption from the overtime provisions of the FLSA as "highly compensated employees" (29 C.F.R. §541.601; see ¶240 of the *Handbook*). The highly compensated test was added to the regulations in 2004 to streamline the process of exempting employees who make more than $100,000 a year, because their level of compensation serves as a good indicator of their ability to qualify for exemption.

To qualify for the exemption, employees must perform "any one or more of the exempt duties of an executive, administrative or professional employee" and must also perform work directly related to the running or servicing of the business (29 C.F.R. §541.601).

Though the RadCon Supervisors meet the salary requirements, the court held that TVA did not adequately

**See *Safety Workers*, p. 14**

## *Technical Writers* (continued from page 1)

became effective (see box, p. 15). Had the current exemption regulations applied to this case, the court probably would have had an easier time reaching the same result. Thus, the *Renfro* ruling is of interest as an illustration of a fact pattern to which the rule on "use of manuals" may apply in the future (29 C.F.R. §541.704).

### The Administrative Exemption

To qualify for the FLSA's administrative exemption from overtime requirements, employees must meet three main criteria (see ¶410 of the *Handbook*). They must:

1. be paid on a salary basis and make at least $455 a week;
2. have a primary duty that involves "office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers"; and
3. exercise "discretion and independent judgment with respect to matters of significance."

Exemptions from the FLSA overtime provisions are narrowly construed by the courts, and the burden is placed on the employer to prove that employees are exempt according to all three criteria for the "white-collar" exemptions.

The parties agreed that the technical writers met the first criterion for the administrative exemption — the minimum weekly pay. And, while the plaintiffs disputed the U.S. District Court for Western Michigan's finding that they also met the second criterion — that their work had a direct relationship to the management or general business operations of the employer or its customers — the appeals court did not address this claim because the plaintiffs had only stated the argument without developing it (see *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997)). The circuit court thus addressed only the third criterion, whether the plaintiffs' primary duty involved sufficient discretion and independent judgment (29 C.F.R. §541.200; see ¶410 of the *Handbook*).

### The Background of the Case

The plaintiffs worked at one of several nuclear power plants operated by American Electric Power (AEP), in Bridgman, Mich. Technical writers at the plant supported its maintenance department by writing procedures on how to maintain plant equipment. The writers developed new procedures, updated existing procedures and reviewed other plant documents for their effect on established procedures.

Prior to a restructuring and shutdown of the plant, the writers had been paid for overtime via a bonus, even though they had been classified as exempt. After the restructuring, the company no longer paid overtime to the plaintiffs, who then filed suit against AEP.

The district court found that they did not exercise sufficient discretion and independent judgment to qualify as exempt administrators under the FLSA. After a jury trial affirmed the district court's ruling, AEP appealed.

### The Workers' Job Duties

Drafting procedures was the primary duty of the plant's technical writers. Before beginning to draft a procedure, a writer consulted a number of sources, including vendor manuals, technical specifications, industry standards, as well as colleagues in other departments. The writer then chose among different approaches to addressing a maintenance equipment problem and wrote a procedure based on his or her solution.

The technical writers could make changes to existing procedures without their supervisors' approval and, when drafting new procedures, worked without direct supervision. The writers had wide latitude in deciding how to write up their solutions to maintenance procedures, and made decisions about whether new procedures were appropriate or, when employees from other departments approached them with suggestions, whether changes to existing procedures were warranted.

In writing up procedures, writers could consult AEP's manual on procedure-writing. The manual explains the purpose of the different procedures, defines various technical terms, outlines and explains each procedure's structure, prescribes format and style and dictates the sequence of various sections. The manual does not dictate the level of detail a procedure needs — the writer makes that determination.

**See *Technical Writers*, p. 15**

## *Safety Workers* (continued from page 13)

show that the employees performed the work of an exempt employee. Because the RadCon Supervisors were not found to exercise adequate discretion and independent judgment, the court found that their duties did not fit within those suggested by DOL as qualifying administrative tasks. Therefore, the plaintiffs did not qualify for the highly compensated exemption either.

The court granted the plaintiffs' motion for summary judgment and found TVA to be liable for the sum of unpaid overtime compensation and an additional equal amount in liquidated damages. (*Mohorn v. Tennessee Valley Authority*, E.D. Tenn., No. 3:05-CV-518, July 17, 2007)

## *Technical Writers* (continued from page 14)

### The Court's Ruling

The plaintiffs argued that they were nonexempt employees because they merely were following AEP's "rigid procedures for how to craft maintenance procedures," rather than exercising discretion and independent judgment.

As noted, the 6th Circuit did not cite the current regulation on "use of manuals" in its ruling. Rather, the court considered the writers' use of the manual and the other resources based on a standard the court had previously put forward in the case *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394 (6th Cir. 2004).

"To determine whether an employee, constrained by guidelines and procedures, actually exercises any discretion or independent judgment … we consider whether those guidelines and procedures contemplate independent judgment calls or allow for deviations," the ruling states.

Based on that standard, the 6th Circuit found that the technical writers were eligible for the administrative exemption.

Their manual provided only guidelines on how to develop procedures, not substantive solutions to questions arising when a procedure was being developed, the court stated. The manual "outlines various items for the writer to consider when researching and drafting a procedure and recommends certain checks to ensure the feasibility of a procedure once written," the court added. Each writer then decided whether to perform the checks, based on his or her experience. "Neither the technical writers' manual nor the daily realities of their work environment eliminates their use of considerable discretion or independent judgment," said the court. The court also pointed out that one writer's approach to creating a procedure could differ from another writer's, and both approaches would comprise equally effective solutions.

The above analysis of the technical writers' primary job duty led the 6th Circuit to rule that the writers were exempt administrators. The court reversed the district court's ruling and remanded the case to the lower court with the instruction to grant summary judgment in favor of AEP. (*Renfro v. Indiana Michigan Power Co., d/b/a American Electric Power*, 6th Cir., 2007 WL 2048953, July 18, 2007)

## DOL Regulations State That Use of Manuals Does Not Preclude Administrative Exemption

In *Renfro v. Indiana Michigan Power Co.*, the plaintiffs argued that they did not qualify for the executive exemption because they were following "rigid procedures" dictated by a manual (see story, p. 1).

U.S. Department of Labor (DOL) regulations at 29 C.F.R. §541.704 — which were not applicable to the *Renfro* case because that case arose before the current regulations went into effect — address the problem faced by the 6th Circuit in *Renfro*. Those regulations state:

> The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.
>
> (See ¶541 of the *Handbook*.)

DOL explains in the preamble to its 2004 exemption rule revisions that 29 C.F.R. §541.704 is intended "to avoid the absurd result" reached in *Hashop v. Rockwell Space Operations Co.,* 867 F. Supp. 1287 (S.D. Tex. 1994). (See 69 Fed. Reg. 22,188-89.) The plaintiffs in the *Hashop* case were instructors who trained space shuttle ground control personnel during simulated missions. The plaintiffs were responsible for assisting in development of the script for the simulated missions, running the simulation and debriefing mission control on whether the trainees handled simulated anomalies correctly. The plaintiffs had college degrees in electrical engineering, mathematics or physics. Nonetheless, the court found that the plaintiffs were not exempt because the appropriate responses to simulated space shuttle malfunctions were contained in a manual. Although DOL notes that *Hashop* has not been followed by other courts, 29 C.F.R. §541.704 is intended to ensure that no other court reaches a similar result.

# Conference Report

## Employers Must 'Be Careful and Be Sure' When Classifying Independent Contractors, Say Experts

As if it weren't difficult enough to keep track of federal requirements for independent contractors under the Fair Labor Standards Act (FLSA), employers also must keep in mind individual states' requirements, too, according to experts.

The distinction between employees and independent contractors is an important one for employers to make correctly, David Balter, industrial relations counsel for the California Labor Commissioner's Office, said at the Interstate Labor Standards Association (ILSA) national meeting held in Sacramento in late August.

Where a bona fide independent contractor relationship exists, the employer is not generally liable for FLSA compliance for those employees (see ¶111 of the *Handbook*). In California, as under the FLSA, independent contractor relationships cannot be set up simply to avoid the provisions of federal or state labor law. Labeling an employee as an independent contractor is not enough to guarantee that status.

### Burden Falls on Employers

Similarly, employers cannot simply take potential contractors at their word, said other experts contacted after the conference.

"Perhaps the biggest mistake I see is employers relying on an individual's representation that he is an independent contractor. The fact that an individual might hold himself out as one, file his taxes based on 1099s, be incorporated, etc. is not determinative" of his employment status, cautioned Caroline Brown, an associate with Fisher & Phillips, LLP, and a member of the *Handbook*'s editorial advisory board. The liability for proper classification never leaves the employer, added Burton J. Fishman, of counsel with Fortney & Scott, LLC, and also a member of the *Handbook*'s advisory board.

While some states require independent contractors to register with their state department of labor, Balter informed attendees at the ILSA conference that a "piece of paper" is not sufficient. The determination of independent contractor status can only be determined on a case-by-case basis, through a fact-specific inquiry, he said.

To complicate the matter, courts and states have used a variety of tests to determine whether workers are indeed independent contractors and different definitions and tests for classifying independent contractors exist under different areas of law, such as wage and hour administration, unemployment insurance and tax code. So, as Robert Boonin, a shareholder with Butzel Long and member of the *Handbook*'s advisory board, noted, under some state laws, individuals can be independent contractors under wage and hour law, but still be employees under other laws.

**See *Contractors*, p. 17**

### DOL's Factors for Determining Independent Contractor Status

The U.S. Department of Labor (DOL) lists several important factors for employers to consider when determining whether individuals are employees or independent contractors for the purposes of the Fair Labor Standards Act (see story, above; ¶111 of the *Handbook*). A similar, but more detailed test is available in DOL's *Field Operations Handbook* (*FOH*) (*FOH* §§10b05 – 10b07).

The factors to use when considering the totality of the circumstances in the employment relationship are:

- the extent to which services rendered are an integral part of the employer's business;
- the permanency of the relationship;
- the amount of the worker's individual investment in facilities and equipment;
- the opportunities for the worker to experience profit and loss; and
- the degree of initiative, judgment, or foresight exercised by the individual who performs the services.

## *Contractors* (continued from page 16)

Courts everywhere generally look at the totality of the circumstances and the "economic reality" of the employment relationship. Both Fishman and Boonin noted that the factors the U.S. Department of Labor (DOL) sets forth for determining independent contractor status are good guides for employers (see box, p. 16). But Boonin cautioned employers to "be careful and be sure" when classifying independent contractors.

Brown counseled that employers should first ask themselves, "whether the situation is more akin to outsourcing work versus hiring temporary labor. … If the former, then the employer should further evaluate the relationship under the factors considered by the U.S. Department of Labor and many courts." They must "do more than give lip service to the criteria," Fishman added. Employers should take steps to define the independent contractor relationship, such as setting up a renewable contract for a fixed term and identifying a specific project for the contractor to complete, he said.

Problems with the classification of independent contractors don't typically arise until the contractor himself becomes dissatisfied with the arrangement and files a complaint or someone else with a separate agenda raises the issue, Fishman pointed out. While it may be tempting to allow an employee the freedom of working as a contractor, the employer cannot offer that status if the economic reality doesn't support it.

### Problem Areas

During his presentation, Balter highlighted several occupations that have recently been subject to court cases dealing with employment status. In California, three recent cases involving couriers helped to define the state's independent contractor test. Additionally, Balter listed taxicab drivers, janitors and exotic dancers as employees who have regularly been misclassified as independent contractors under California state wage and hour law. Boonin added companies that outsource their employees, such as staffing agencies, to the list of high-risk occupations (see box, left).

Brown recommends that employers revisit their classification standards from time to time. A properly classified independent contractor may become an employee over time, as the employer assigns more work, limits the individual's ability to work for others, or provides more equipment, thus reducing the individual's need to invest in facilities or equipment, as prescribed by the DOL test.

## Cleaning Service to Pay $4.5 Million for Misclassifying Independent Contractors

A federal court recently ordered a cleaning agency to pay its workers $4.5 million in back wages and damages after incorrectly classifying 385 employees as independent contractors. The case, brought by the U.S. Department of Labor (DOL) against Southern California Maid Services and Carpet Cleaning, illustrates the importance of properly defining the employment relationship (see story, p. 16).

After receiving a complaint, DOL sued the agency, charging minimum wage and overtime violations. The agency also failed to keep accurate time and payroll records for the employees. Under the Fair Labor Standards Act (FLSA), employers are required to pay their employees at least the federal minimum wage and overtime for any hours worked beyond 40 in a given workweek and must maintain certain employee records. Employers engaged in a bona fide independent contractor relationship are generally not covered by the FLSA (see ¶111 of the *Handbook*).

The U.S. District Court for Central California ordered the agency to pay $3.5 million in back wages to 385 current and former employees, plus an additional $1 million in liquidated damages. (*Chao v. Southern California Maid Services and Carpet Cleaning Inc.*, C.D. Calif., CV 06-3903 AG (MANx), Aug. 30, 2007)

# FLSA Q&A

## FLSA Experts Take Your Exemption Questions

*The following questions and answers were taken from the recent FLSA Q&A audio conference presented by Thompson Interactive, a division of Thompson Publishing Group. During the session, listeners could call or e-mail their Fair Labor Standards Act (FLSA) questions to be answered by a panel of experts. The panel consisted of* Handbook *co-author Shlomo D. Katz, Esq., senior counsel with Epstein, Becker & Green, P.C.; Robert A. Boonin, a shareholder with Butzel Long and member of the* Handbook*'s editorial advisory board; and Corrie Fischel Conway, of counsel with Morgan Lewis. For a list of upcoming human resources and employment law audio conferences, please visit www.thompsoninteractive.com.*

**Q:** I have an employee who makes a salary less than $100,000 a year. With a bonus, however, that employee makes more than $100,000. Can that employee be exempt under highly compensated employee test?

**Corrie Fischel Conway:** Well, I think it would depend on what type of bonus you're talking about. As [readers] may be aware, under the 2004 regulations that were issued by the [U.S. Department of Labor (DOL)] for white-collar employees, a new highly compensated test was created. [The test represents] a relaxation … of the duty requirements associated with meeting exemption status if an employee made $100,000 a year.

The regulations specifically state that in addition to salary, nondiscretionary bonuses as well as commissions may be counted towards that $100,000 threshold (29 C.F.R. §541.601(b)(1)). … [T]hat means discretionary bonuses [cannot]. The regulations also provide that if the employee does not meet the $100,000 threshold towards the end of the year, … the employer could use make-up payments [within a month of the end of the year to bring the employee's salary up to $100,000] (29 C.F.R. §541.601(b)(2)).

For example, if someone … received a certain level of salary and then they received commissions, but they didn't actually meet the commission quota [for the year], the employer could add to the commissions either by the end of that year or within a month after that period is closed in order to meet that $100,000 threshold.

Now, having said that, I give everyone a couple of points of caution. When the regulations were first issued, I found that a lot of articles stated that basically if someone made $100,000 a year under the highly compensated test that they were automatically exempt. …[T]here are, in fact, other requirements associated with the highly compensated test (see ¶¶320 (executive), 420 (administrative) and 530 (professional) of the *Handbook*). For example, the employee also must have that guaranteed salary of $455 a week, and the employee must perform office or nonmanual work and at least customarily and regularly perform one or more of the duties or the responsibilities of the executive, administrative or professional exemption. So it's not just about meeting that $100,000 threshold.

In addition, I caution employers that state laws may not necessarily include the highly compensated test (see ¶¶370, 470 and 590 of *Handbook*).

**Shlomo Katz:** Now, the interesting thing about that is …in theory, the highly compensated test could apply to any of the … white-collar exemptions — executive, administrative or professional. I and many other practitioners have been struggling to figure out exactly how it would apply to the administrative and professional exemption. In the case of the executive exemption, the classic case is a manager who doesn't have permission to hire and fire — that is, the manager does most of the executive duties but not all. In the case of the administrative and professional exemptions, it's hard to parse the duties to figure out what … it mean[s] to do some but not all of the administrative duties. Does it mean to say you don't have to exercise discretion and independent judgment? That's hard to believe, because that's really the essence of the administrative exemption.

At one point, the Solicitor, the top lawyer [at DOL], also said, "That's right. This only applies to the executive exemption." Very shortly afterward, he retracted that, and we're all eagerly waiting for a test case or for [DOL] to really come out and tell us: How does it think this applies to the professional or any administrative exemptions? But until then, I guess some employer is going to need to be a guinea pig and try it out, because we're really not clear about that.

**Q:** After evaluating the exempt status of some employees, we have concluded that some may have been misclassified as exempt. How do we reclassify these

**See *FLSA Q&A*, p. 19**

employees and communicate the change with as little risk as possible? How far do we need to look back to make the employees whole?

**S.K.:** That's an excellent question. …[Y]ou've decided to reclassify some positions … that were exempt …[as] nonexempt. You want to know how far back you should be paying back wages. …[I]t's hard to give a very precise answer in this context, but, the first question is: Are you doing this because it's a close call, and you've decided to change it as a risk management tool, or is it because you decided you were clearly wrong all along?

Let's look at both scenarios. If you were clearly wrong, … then, a) there's a good likelihood that some employee will catch on and may sue you for liquidated damages and other penalties (see ¶730 of the *Handbook*). …[I]n that case, you may want to come completely clean and voluntarily pay back wages for two years as a way of demonstrating your good-faith compliance with the law and thereby avoiding penalties along the road.

On the other hand, if it's a close call, then … you could very reasonably say … "This is a close call, and we've decided to do this in the future, but we're going to pay no back wages." And of course the question is, How do you communicate these things to your employees? Again, it depends on why you're doing it. Sometimes we tell our clients simply to say in a very generic memo, … "[A]s part of a periodic review of our jobs, we've decided to reclassify certain positions. In the future, you will be a nonexempt employee and eligible for overtime."

Or you could say, "As part of a periodic review, we have decided to reclassify you and to pay you some additional pay. Here's a check for X hundred or X thousand dollars," with no explanation.

It also depends on whether you're a very large employer or a very small employer, because that will affect how big or how small your potential liability is. Of course, you don't want to do anything that you know is violating the law, because that would be wrong and would result in even greater liability in the future. But those are the issues I would look at if I were in your shoes, making that decision.

**Robert Boonin:** You sometimes have a problem … because you've been treating [your employees] as exempt for so long that you don't have a record as to how many hours they worked. … Did they work through lunch every day? Did they stay until 7 o'clock every night, and so on. But you don't have a record, because you didn't have to keep a record. … And now that's a struggle, …particularly if you want to give employees some kind of back pay, … but how do you calculate it?

[O]ne technique that we've used with clients is that we'll have the supervisor take a stab at estimating … how much time [the] employee spend after hours, how much time did the employee come in early, how often

**See *FLSA Q&A*, p. 20**

## Get Your Newsletter Faster Online!

Did you know that everyone who subscribes to the *FLSA Employee Exemption Handbook* can now read the newsletter on the Web? This online access means you can read — and print out — the current issue of the newsletter as soon as it's ready, days before you will receive your copy in the mail. You can also read newsletters dating back to April 2000.

Subscribers to the online edition or those who subscribe to both the print and online editions already know where to go to read the newsletter, but print-only subscribers gain access this way:

1. Go to Thompson Publishing Group's home page, www.thompson.com.
2. On the upper right-hand side of the screen, click on the red link that says, "Subscriber Login."
3. Follow the instructions to set up your free online account. You will need your account number, which can be found on your invoice, renewal notice and loose-leaf update mailing labels. If none of these is available, please contact a Customer Service representative via e-mail at service@thompson.com or by phone at 800-677-3789. If you prefer to contact Customer Service by e-mail, please provide the subscriber's full name, company name, mailing address and publication title if possible.
4. You will be able to create a username and password.
5. Once you set up your account, all you have to do to read the newsletter online (in PDF format) is to enter your username and password.

did [the supervisor] expect to see the employee work after lunch. And maybe you can say on average the employee worked 43 and a half hours a week for 50 weeks a year for the past two years. If I owe the employee overtime, then it's going to be X amount. And then sit down with the employee and see if the employee agrees. [A]nd if [he] agrees, try to get it in writing, that the employee agrees that this is a fair estimate, and [he] has no reason to believe that [he is owed] more than that. [T]hat helps cover some of your bases, just in case the employee has a change of heart and brings an action down the road.

**C.F.C.:** I would just add a couple of points to what's already been discussed on this issue. First of all, I once again would caution everyone about the statute of limitations. Generally, two years is the standard statute of limitation under federal law — three years for willful violations. If DOL were going to come in [and investigate], they generally look for two years (see ¶720 of the *Handbook*), but some states have longer statutes of limitations, so you just need to be aware of that in terms of potential liability there. …

[A]lso, you need to be aware that you cannot get valid private releases under the [FLSA], except under very limited circumstances. So if this [arrangement] would involve a large amount of money, you might consider — [though] a lot of employers aren't interested in doing this — … [going] to DOL [to] get a supervised settlement, and then you can get a valid release for the federal claims.

Under the FLSA, to get a valid release, it can only be done through [DOL] or through a consent decree by the court (see ¶770 of the *Handbook*). That's something to be aware of. Having said that, the point made about getting employees to acknowledge in writing that this represents an adequate summary of what they're owed, I think [that acknowledgment] would go a long way if employees would turn around and litigate the matter.

**Q:** A nonexempt employee will be performing exclusively exempt work for two months. Should the employer reclassify that person as exempt for two months, or simply leave the employee as nonexempt and pay overtime as accrued?

**S.K.:** Employers often ask about temporary situations and get into questions about how long a period can you make such a change for … if you want to change an exempt employee's hours, or you want to change somebody's pay, or, in your case, the person is performing different duties. And there is no clear guidance on that. … I'd probably say that two months is the very very very minimum that I would want one of my clients to reclassify someone for, and even then, only if the person is clearly performing different duties [and] is clearly going to be exempt for that time. If it's even a close call at all, I would not take that chance. And of course you want to make sure this person is salaried, unless they are doing one of the … few exempt jobs that doesn't require salary.

**R.B.:** I think … the ultimate issue is really what is the employee's primary duty, and if they're changing their job for just a short period, I think it could be argued that their primary duty is not the new job, it's still their old job (see ¶411 of the *Handbook*). That's why if you have someone who just fills in for a manager when the manager's not there, that person doesn't become exempt for those days or hours or whatever. They're still primarily in that nonexempt position.

So, I think two months is … a reasonable rule of thumb, but you don't want to do it if it's a close call, and if it's at all akin to what the person had previously been doing with just a minor tweak.

**C.F.C.:** Just to echo the comments previously made, I think as a practical matter, what happens sometimes with these types of short-term assignments is that employees end up performing both their old job and their new job, … because they're still viewed within the company as having this role. … [T]hat can confuse the analysis of what the person's primary duty is, even for that short period of time. So, I think if you choose to [reclassify your employees] for this two-month period, you need to make sure that [the position] is carefully monitored, and it doesn't really turn into a default where they're really performing their old jobs and performing some exempt duties as well.

**Q:** How can an employer determine if someone in fact uses independent judgment or not when classifying a possible administrative employee?

**S.K.:** [A]ctually, one of the biggest improvements in the regulations that came out in 2004 was the addition of … 10 or 12 items to look at in the regulations as [to] whether someone is exercising discretionary judgment regarding matters of significance (29 C.F.R. §541.202(b); see ¶415 of the *Handbook*).

[T]he rule says that the phrase "discretion and independent judgment" must be applied in light of all the facts involved in the particular employment situation, but some of the factors to consider include:

**See *FLSA Q&A*, p. 21**

## *FLSA Q&A* (continued from page 20)

- whether the employee has authority to formulate, affect, interpret or implement policy;
- whether the employee carries out major assignments in conducting operations;
- whether the employee performs work that affects business operations to a substantial degree;
- whether the employee has authority to convince the employer in matters that have significant financial impact; and
- whether the employee has authority to waive or deviate from established policies.

[That is] about half of them. … [T]hese are not hard and fast rules but more suggestions [of factors] to look at. The basic rule is, Does the employee have to balance alternatives to arrive at a course of action or recommendation?

**Q:** If exempt employees are asked to help alleviate a production backlog and perform exclusively nonexempt work for a period of weeks, should those employees be treated as nonexempt and be paid overtime for that time?

**R.B.:** Well, … from [DOL's] perspective, they usually look … to what is the primary duty for that workweek (29 C.F.R. §541.700; see ¶¶311, 330 of the *Handbook*). I find it troubling when someone starts to pick up a wrench and all of a sudden you say that they're nonexempt. [D]oes the person really forgo all their exempt responsibilities even though they're performing other responsibilities? It's possible to perform a lot of nonexempt duties and still be exempt, if the reason … the employee is there [at work] is primarily for those exempt duties. …

[B]ut if the employee is … a manager for a while, and [the employer] eliminates the manager's position, and [the employee] serves as a custodian for a while, I think the employee becomes nonexempt during that time, if they clearly have no other managerial responsibilities.

**C.F.C.:** [T]he regulations do have a provision for emergency situations, where an exempt employee can jump in and do nonexempt work when there [are] safety issues in place, [when] it would seriously damage the employer's operations if the exempt employee didn't jump in, that type of thing (29 C.F.R. §541.706(a); see ¶335 of the *Handbook*). [O]ne of the examples given [by

**See *FLSA Q&A*, p. 22**

DOL] is a mine superintendent who pitches in after an explosion. …

[The regulations] also talk about when someone would have to leave early or miss part of a day because a nonexempt employee got sick, and the manager or exempt employee would have to jump in. But my reaction would be — and I think DOL's reaction would be — if you're talking about a period of weeks, you're really going to be pushing the envelope to suggest that the primary duty hasn't changed. Just as [in] the earlier example, we talked about with the employee going to the special assignment of exempt duties, I think the same analysis would come into play.

**Q:** Can you review the standards for determining whether confidential executive administrative assistants should be classified as exempt or nonexempt?

**C.F.C.:** [G]enerally the test that would be applied to executive assistants would be the administrative exemption, though you'd of course want to explore the other white-collar [exemptions]. If this executive assistant also happened to direct the work of two or more employees, … their primary duty is management, and they have the authority to hire or fire or be able to have particular weight in such decisions, it's very possible that they can meet the executive exemption (see ¶310 of the *Handbook*).

But most likely, you'd be looking at the administrative exemption (see ¶410 of *Handbook*), which [asks], is that person performing office or nonmanual work — and most likely the executive assistant would meet that test — [and] their primary duty must be directly related to the employer's business operations (see ¶413 of the *Handbook*). And when you look at that primary duty test, what DOL really means there is, the person operates in a support role as opposed to a production role for the employer. So again, the executive assistant is going to satisfy that test most likely.

Where you may get into trouble with the executive assistant is the component of whether the employee sufficiently exercises discretion or judgment with regard to matters of significance (see ¶415 of the *Handbook*). … I know that a lot of employers think that a confidential executive assistant, someone who works for the CEO, the president, [etc.] [should be exempt] because they have access to that confidential information. But that's not a duty, and that's not going to get you past the discretion or independent judgment threshold.

What the executive assistant is going to have to do, as Shlomo explained earlier, is satisfy several of those factors outlined in the regulations, such as do they get to make any type of purchasing decisions, … do they get to decide who the president or the CEO has access to? [Is she] actually making decisions with regard to how that office operates?

I will share with you that the regulations themselves have an example of an executive assistant (29 C.F.R. §541.203(d); see ¶901.2 of the *Handbook*). … I will caution you … however, that the examples in the regulations are not meant to be dispositive of exempt status. They're merely meant to be illustrative, so simply because someone does some of the things outlined in some of these examples in the regs, I don't think I would hang my hat on that exclusively. And what the regs say about an executive assistant or an administrative assistant to a businessman or a senior executive, [is that the assistant will] generally meet the duties if they're able to operate without specific instructions or prescribed procedures, and they've been delegated authority regarding matters of significance. …

Again, I think it's going to be difficult to meet the test for an executive assistant in a lot of cases, even if [the employees] do have access to confidential information, unless, when you look at that list of factors under discretion and independent judgment, they are really able to make decisions. Another example would be, do they have purchasing power? Do they get to make commitments of a financial nature in terms of scheduling meetings? … And then also I would note, they … would need to meet the salary level of $455 per week and have that guaranteed salary per week (see ¶210 of the *Handbook*).

**S.K.:** In the specific case of an executive administrative assistant to a senior executive, I usually advise people to look at whether … the assistant [is] really the gatekeeper for the executive. Does the assistant know, without asking, who the executive wants to see, wants to talk to, wants to write to, which letters the executive wants to read and which letters the executive doesn't want to read. And if the assistant is really in that sense a true gatekeeper, then there's a higher probability — it's still a long shot — but there's a higher probability of exemption.

**Q:** Can an interior designer who services only residential customers be exempt from overtime? If so, which exemption applies?

**S.K.:** I guess there are a couple of exemptions that could apply. One is the professional exemption, if the person is an interior designer [and] has gone through a

**See *FLSA Q&A*, p. 23**

course of study in a design school, the way an architect would (see ¶510 of the *Handbook*). …

The person theoretically could be eligible for the administrative exemption if the person is not doing manual work … that is, consulting on the needs of the customer in the same way that a stockbroker is consulting regarding the needs of customers. [T]hat's not clearly covered by the regulations, but it's a potential avenue to explore.

An interesting issue that is raised by the question is a [little-known] alternative to the salary basis test, which is the fee basis test (29 C.F.R. §541.605; see ¶254 of the *Handbook*). Interior designers … will often be paid not a salary but by the job, and it is possible to be exempt as an administrative or professional employee when one is paid on a fee basis.

**C.F.C.:** I would just throw in a couple of other possibilities. … [T]here's also the creative professional exemption that could potentially apply. In terms of their activities where [the designers] are visiting residential homes, potentially even outside sales (see ¶620 of the *Handbook*) or the retail or service exemption [would apply] if they're working for a retail or service establishment, half their income is from commissions, and they make one and a half times the regular rate (see ¶648 of the *Handbook*). … [Y]ou would need more facts, but [there are] definitely numerous exemptions that could be explored.

**Q:** How can you tell when an advanced degree has become a standard prerequisite for entrance into a profession?

**R.B.:** Well, it's a little abstract, really the easy answer … is, "I know it when I see it." The issue is … can anyone do that job without that advanced degree or is having that advanced degree a prerequisite for doing the job (see ¶512 of the *Handbook*)? You can't be an accountant without having an accounting degree; you can't be an architect without an architectural degree; you can't be a lawyer without a law degree.

So … you can be a vice president of marketing, and maybe your business would require you to have an MBA in marketing in order to have the job, but … there's nothing that would stop the company from hiring someone with a history degree to be the vice president of marketing. But you can't have someone with just a history degree be your general counsel.

## Have You Used Our New *Wage & Hour Resource Center* Yet?

Thompson Publishing Group recently introduced its FLSA subscribers to an exclusive new information tool designed for both public- and private-sector employers. This new online question-and-answer resource, Thompson's *Wage & Hour Resource Center,* provides employers with practical, nuts-and-bolts answers to their most vexing wage and hour questions. All materials have been prepared by Shlomo D. Katz and Pamela Reynolds, of Epstein Becker & Green, P.C.

New questions and answers are regularly added, and subscribers are encouraged to submit their own questions for consideration as possible additions to this resource.

To access Thompson's *Wage & Hour Resource Center*, you'll need a username and password. If you already have a Thompson username and password, you can access the feature by going to http://flsaqa.com and logging in.

If you haven't yet set up an online account with Thompson Publishing Group, please follow these instructions:

1. Go to http://flsaqa.com.
2. Click on "Enter the site."
3. Follow the instructions to set up your free online account. You will need your account number, which can be found on your invoice, your renewal notice and loose-leaf update mailing labels. If none of these is available, please contact a Customer Service representative via e-mail at service@thompson.com or by phone at 800-677-3789. If you prefer to contact Customer Service by e-mail, please provide the subscriber's full name, company name and mailing address if possible.

4.You will now be able to create a username and password.

We hope you find this new subscriber benefit useful in your efforts to understand and comply with the complexities of the Fair Labor Standards Act. Please let us know what you think!

# On Capitol Hill

## Senate Bill Aims to Punish Misclassifications

*Agencies Would Share Information on Misclassifications of Employees as Contractors*

A bill that would strengthen enforcement of the Fair Labor Standards Act's (FLSA's) rules prohibiting employer misclassification of employees as independent contractors (see ¶111 of the *Handbook*) was introduced in the Senate on Sept. 12, following congressional hearings on the topic in July.

Regulations governing how employers determine whether a worker is an employee or an independent contractor are confusing and are enforced by several federal agencies. The bill, the Independent Contractor Proper Classification Act of 2007 (S. 2044), proposes to bring about greater cooperation between these agencies, which include the U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS).

Under the proposed legislation, a worker may petition the IRS for a determination of his or her status in relation to the employer. If the employer is found to have misclassified an employee as an independent contractor, among other actions taken, the U.S. Department of the Treasury would inform DOL of the misclassification for FLSA enforcement purposes.

In addition, DOL would be required to share information it collects on worker misclassifications with Treasury, and both agencies would have to provide such information to the relevant state agencies. Also, after receiving such information, DOL and Treasury would have to determine if further investigation would be warranted in each case.

The bill would require DOL to investigate industries in which worker misclassifications exist, as identified by the IRS, other federal agencies and state agencies. Also, DOL would be required to include on any FLSA-required posters information on a worker's right to request a status determination from the IRS.

The bill, introduced by Sens. Richard Durbin, D-Ill., Edward Kennedy, D-Mass., Patty Murray, D-Wash., and Barack Obama, D-Ill., was referred to the Senate Committee on Finance.

**For More Information:**

For the full text of the bill, go to www.thomas.gov and search for "S. 2044."