



# Assessing The Risk:

## Wage and Hour Tip Of The Week

### Exercise Discretion in Your Use of the Administrative Exemption

**TIP: Audit employee job duties to ensure that employees exempt pursuant to the FLSA's administrative exemption are exercising discretion and independent judgment with respect to significant matters.**

When determining whether an employee qualifies for the administrative exemption, employers often struggle with the requirement that "the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance," as this standard is ambiguous and difficult to apply in many employment contexts. Below are four common misconceptions that employers have in applying this requirement and tips for avoiding these mistakes.

Misconception #1: Assuming that an employee who "analyzes" courses of action meets this standard, even if he does not make decisions. Exercising discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. To meet this standard, the employee must have "authority to make an independent choice, free from immediate direction or supervision." An employee who performs analysis of various courses of conduct but does not act on the analysis by making decisions or recommending courses of action does not meet this requirement. Thus, you should closely examine whether the employee actually makes or recommends decisions, rather than merely analyzing a situation.

Misconception #2: Assuming that an employee meets this test because he is knowledgeable or skilled. Even a very knowledgeable or highly skilled employee will not qualify as exempt if he is simply applying his knowledge or skill, rather than making independent evaluations and decisions. You must determine whether the employee is actually using judgment, rather simply applying knowledge or skill.

Misconception #3: Presuming that an employee satisfies this requirement, even though she closely follows procedures or guidelines, because her job is "important." The exercise of discretion and independent judgment requires more than simply following well-established techniques, procedures, or guidelines described in manuals or other sources. Again, the employee must use his own judgment, which cannot be found in a manual, to evaluate courses of action and make decisions.

Misconception #4: Discretion and independent judgment alone is enough. The inquiry does not end with the authority to make independent decisions – these decisions must be made with respect to "matters of significance." This term refers to the level of importance or consequence of the work performed. Thus, you should closely examine the types of decisions an employee makes. An employee might regularly make independent decisions regarding the type of paper used in the printers

or the brand of coffee served at meetings, but those decisions are not with respect to matters of significance. In addition, an employee does not meet this requirement merely because the company will experience financial losses if the employee fails to perform the job properly. For example, an employee who operates very expensive equipment does not meet this requirement simply because improper use of the equipment may cause significant financial loss to the employer

You should, of course, also be sure to evaluate whether the employee meets the other requirements of the FLSA's administrative exemption and to consider state law exempt status requirements where they differ from the FLSA.

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