

“What keeps you up at night?”

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The devil is in the details: Satisfying the FLSA’s three-pronged Administrative Exemption Test

By Catherine E. Walters and Emily H. Bensinger

The Fair Labor Standards Act (“FLSA”) administrative employee exemption is probably the most difficult of the white-collar exemptions to establish. Specifically, to establish that an employee is exempt from the FLSA’s overtime and minimum wage requirements under the administrative exemption, an employer must satisfy the following three elements:

1. The employee must be compensated on a salary or fee basis at a rate not less than \$455 per week;
2. The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
3. The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

While the first two areas of inquiry are simple enough, the third one — whether an employee’s “primary duty includes the exercise of discretion and independent judgment with respect to matters of significance” — is the most difficult to establish and continues to inspire much litigation and commentary because the analysis is so fact-intensive. Developing case law highlights the old adage, “the devil’s in the details.”

WHAT HAPPENED?

In January, the U.S. Court of Appeals for the District of Columbia Circuit ruled in *Robinson-Smith v. Government Employees Insurance Company*, D.C. Cir., No. 08-7146 (January 15, 2010) that GEICO’s auto damage adjusters were exempt from overtime pay based on the Fair Labor Standards Act (FLSA) administrative employee exemption. The D.C. Circuit painstakingly analyzed the auto damage adjusters’ job duties, finding that the overtime exemption was satisfied because the adjusters exercise sufficient discretion and independent judgment in assessing, negotiating and settling automobile damage claims. The court noted that the adjusters’ discretion exceeds the short-test applicable to the administrative exemption because they negotiate with customers over total loss claims as often as 60 times per year. Even engaging in such negotiations 20 times per year would satisfy the short test, the court said.

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Further, although the lower court had found that the adjusters' negotiations were too specifically structured by the estimating process and GEICO's guidelines to satisfy the discretion requirement, the circuit court disagreed, noting that the adjusters worked in the absence of immediate supervision a majority of the time and made decisions that were reviewed only after an estimate was written and the claim paid. Although adjusters routinely called their supervisors in situations involving non-minor adjustments or concessions, no GEICO policy required them to do so. Based on its extensive analysis, the court held that the adjusters exercised discretion free from immediate direction or supervision with respect to matters of significance, satisfying the administrative employee exemption.

WHY IS IT IMPORTANT?

This case, and many like it, highlights the level of analysis required to establish whether an employee's primary duties include the exercise of discretion and independent judgment with respect to matters of significance. Employers are regularly required to justify classifying their employees as administratively exempt, including establishing the extent to which an employee exercises discretion (decisionmaking), the level of independence involved (lack of immediate supervision), and the degree to which matters the employee works on are significant to the employer's operations (whether the employee's actions have an impact on the business). The exercise of discretion and independent judgment requires more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other resources, and implies that the employee has authority to make independent choices, free from immediate direction or supervision, even if those decisions/recommendations are reviewed at a higher level.

Under the FLSA regulations, some examples of factors to consider in determining whether an employee “exercises discretion and independent judgment with respect to matters of significance” include:

- the employee's authority to formulate, affect, interpret or implement management policies or operating practices;
- the employee's authority to commit the employer where significant financial impact may occur;

- the employee's authority to waive or deviate from established policies and procedures without prior approval;
- whether the employee investigates and/or resolves matters of significance or otherwise represents the company in handling complaints, arbitrating disputes or resolving grievances.

An extensive body of case law continues to develop around this issue. In a recent example, *Reiseck v. Universal Communications of Miami*, S.D.N.Y., No. 06-cv-0777 (March 26, 2009), the court held that an advertising sales representative for the magazine, *Elite Traveler*, exercised sufficient discretion and independent judgment because her job required her to solicit new clients, negotiate contracts with clients and determine what rates they should pay. Although she was required to consult with the president of the company during the first few months of employment, she ultimately exercised discretion and independent judgment on a regular basis.

In *Roe-Midgett v. CC Services Inc.*, 512 F.3d 865 (7th Cir. 2008), a case similar to *Robinson-Smith*, the Seventh Circuit held that material damage appraisers, who provide claims adjustment services with settlement authority up to \$12,000, are exempt administrative employees. The court noted that the appraisers routinely use their discretion and independent judgment to make choices that impact auto damage estimates, settlements and other matters of significance. For example, they inspect a vehicle for damage, verify whether the actual damage is consistent with the claimed damage, evaluate whether the damage is likely preexisting or otherwise suspicious, and they must be on the lookout for fraud when interviewing claimants and witnesses. Because these judgment calls require the exercise of discretion and independent judgment, the court determined the employees were exempt.

In *O'Bryant v. City of Reading*, 197 Fed. Appx. 134 (3d Cir. 2006), the Third Circuit held that the Human Relations Commission Administrator for the City of Reading exercised sufficient independent judgment and discretion to satisfy the administrative exemption. She produced and hosted a television show and created brochures and other informational materials for which she decided what issues were of the most relevance. She also assessed and reviewed all complaints that came into the commission and decided who to interview regarding the complaints. The Third Circuit held that even though some of her

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time was spent on clerical activities, her primary duties involved the exercise of discretion and independent judgment, satisfying the administrative exemption.

WHAT IS THE IMPACT ON EMPLOYERS?

While the *Robinson-Smith* case is yet another in a long line of insurance adjuster cases, it is significant for the fact that it provides a detailed analysis of the level of discretion and independent judgment exercised by the adjusters in question. Moreover, the court noted that because the GEICO adjusters engaged in negotiations over total loss claims, this demonstrated they are an even better fit for the administrative employee exemption than the *Roe-Midgett* adjusters, further expanding the analysis.

Litigation focused on analyzing the administrative exemption will continue as long as the inquiry remains fact-specific; however, employers should see this case and the new year as reasons to review job descriptions and audit employee classifications for possible wage and hour violations. Best practices for employers to minimize exposure include analyzing job descriptions based on the work employees actually perform (rather than relying on job titles), reviewing and re-evaluating whether employees are properly

classified as exempt or nonexempt, and consulting with legal counsel to ascertain the extent of any legal risks involved in their current practices and procedures. In what is developing into a heightened enforcement environment, employers should take the opportunity to perform their own audits before a third party does it for them.

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