

Are Your Employees Properly Classified?

The webinar will begin promptly at:

12:00 pm



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Susan M. Parrott

Kerry A. Shad

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Kerry A. Shad, kshad@smithlaw.com



Ms. Shad's practice focuses on representing employers in connection with all aspects of employment-related litigation and counseling. She has represented clients in state and federal courts throughout the country, including North Carolina, Arizona, California, Florida, Georgia, Illinois, New York, Pennsylvania, South Carolina, and Tennessee. Her experience includes defending individual, class and collective action claims of discrimination, harassment, wrongful discharge, retaliation, and wage and hour violations; representing clients in investigations by state and federal Department of Labor and The Equal Employment Opportunity Commission and similar agencies; serving as "in-house" employment litigation counsel to large company managing employment litigation across the country; and representing clients in disputes involving alleged violations of non-competition agreements.

Susan M. Parrott, sparrott@smithlaw.com



Ms. Parrott regularly assists clients in complying with state and federal employment-related laws and preventing employee lawsuits. Her experience includes identifying and managing employment-related issues in mergers, acquisitions, reorganizations, and plant closings and developing and interpreting employment, non-competition, confidentiality, and severance agreements. Her appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. Prior to attending law school, Ms. Parrott worked for the United States Environmental Protection Agency and obtained a Masters Degree from the University of North Carolina, School of Public Health.

Introduction

- Salary Basis Test
- Administrative Exemption
- Computer Professionals
- DOL Investigations/Self-Audits

FLSA “White Collar” Exemptions

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative;
 - Professional; or
 - Outside Sales capacity.

FLSA “White Collar” Exemptions

- Certain computer employees may be exempt professionals under
 - Section 13(a)(1) or
 - Section 13(a)(17) of the FLSA

Three Tests for Exemption

- Salary Level
- Salary Basis
- Job Duties

Salary Level Test

- For most employees, the minimum salary level required for exemption is \$455 per week
- Part-time employees still must earn \$455 per week
- The \$455 per week may be paid in equivalent amounts for periods longer than one week:
 - Biweekly: \$910
 - Semimonthly: \$985.83
 - Monthly: \$1,971.66

Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs *any* work
- Need not be paid for any workweek when no work is performed

Can the Employer Make Deductions?

- General Rules:
 - No deduction for absences caused by the employer or by the operating requirements of the businesses
 - No deductions for time when work is not available

Permitted Salary Deductions

- Seven exceptions from the “no pay-docking” rule:
 1. Absence from work for one or more full days for personal reasons, other than sickness or disability
 2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences
 3. To offset any amounts received as payment for jury fees, witness fees, or military pay

Permitted Salary Deductions

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules
6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act

Prohibited Deductions - Examples

- For a partial-day absence to attend a parent-teacher conference
- Of a day of pay because the employer was closed due to inclement weather
- Of three days of pay because the employee was absent from work for jury duty, rather than merely offsetting any amount received as payment for the jury duty

Prohibited Deductions - Examples

- For a two day absence due to a minor illness when the employer does not provide wage replacement benefits for such absences

What is the Risk of Improper Deductions?

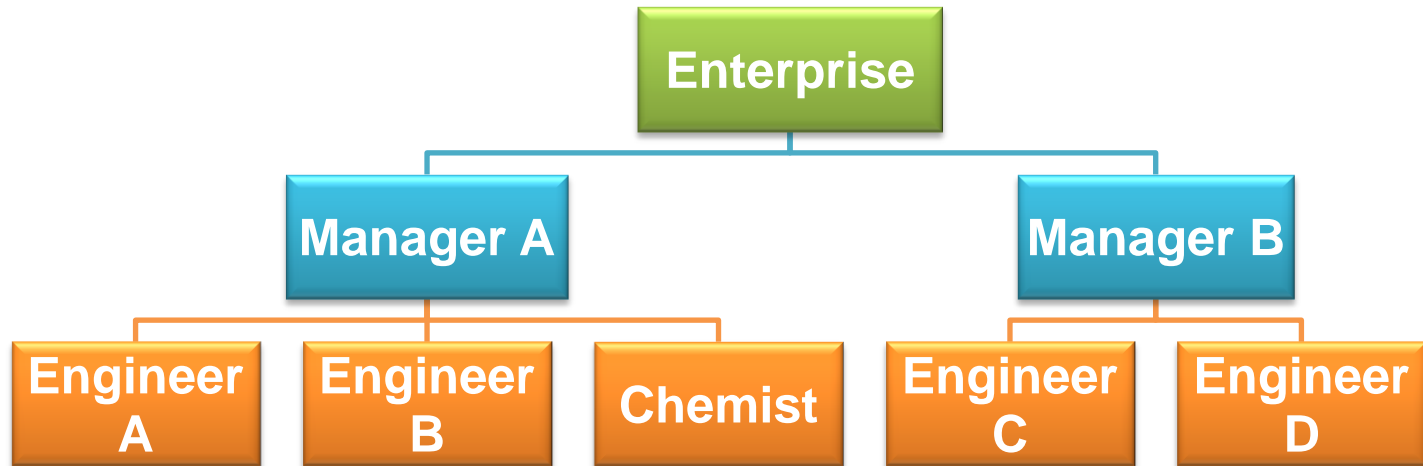
- An actual practice of making improper deductions from salary will result in the loss of the exemption:
 - During the time period in which improper deductions were made
 - For employees in the same job classifications
 - Working for the same managers responsible for the actual improper deductions
- Isolated or inadvertent improper deductions will not result in the loss of exempt status if the employer reimburses the employee

“Actual Practice”

- Factors include, but are not limited to:
 - The number of improper deductions, particularly as compared to the number of employee infractions warranting discipline
 - The time period during which the employer made improper deductions
 - The number and geographic location of both the employees whose salaries were improperly reduced and the managers responsible
 - Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions

Example:

Effect of Improper Deductions



- If Manager A has docked the pay of Engineer A on each of 12 days when Engineer A arrived late for work during the last 3 months, then the exemption could be lost for Engineer A and Engineer B during that 3 months, but could not be lost for the Chemist or Engineers C and D

Safe Harbor

- The exemption will not be lost if the employer:
 - Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
 - Reimburses employees for any improper deductions; and
 - Makes a good faith commitment to comply in the future

Safe Harbor

- *NO* safe harbor for willfully continuing to make improper deductions after receiving employee complaints

Payroll Practices That Do Not Violate the Salary Basis Test

- Taking deductions from exempt employees accrued leave accounts
- Requiring exempt employees to keep track of and record their hours worked
- Requiring exempt employees to work a specified schedule
- Implementing bona fide, across-the-board schedule changes

No Salary Requirements

- The salary level and salary basis tests do not apply to:
 - Outside Sales Employees
 - Doctors
 - Lawyers
 - Teachers
 - Certain computer-related occupations paid at least \$27.63 per hour

Administrative Exemption

- One of the “white collar” exemptions that is frequently challenged by employees and by the Department of Labor
- Misclassification as an administrative employee has resulted in multi-million dollar settlements and judgments (example: USB paid \$89 million to settle with financial advisors it claimed were exempt)

What is the Administrative Exemption?

- Applies to employees employed in a bona fide administrative capacity;
- Who meet both the “salary” and “duties” tests for the exemption

Salary Test for the Administrative Exemption

- Must meet the minimum salary test
 - \$455/week
 - No improper deductions
- 29 C.F.R. §541.200 (a)(1);

or

Salary Test for the Administrative Exemption

- Satisfy the fee basis
 - paid an agreed-upon sum for a single job regardless of how long it takes to complete the job
 - amount is equivalent to at least \$455/week
- 29 C.F.R. §541.605(a)

Duties Test for the Administrative Exemption

- Primary Duty must include both:
 - Performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers

29 C.F.R. §541.200(a)(2)

and

- Exercising discretion and independent judgment regarding matters of significance

29 C.F.R. §541.200(a)(3)

Primary Duty

What is the “Primary Duty?”

- the principal, main, major, or most important duty that the employee performs

29 C.F.R. §541.700(a)

Primary Duty

How do you determine the “Primary Duty?”

- relative importance of exempt duties as compared with other types of duties
- amount of time performing exempt duties (time, alone, not determinative; does not have to be 50% or more)

Primary Duty

- relative freedom from supervision
- the relationship between the employee's salary and wages paid to other employees for the kind of non-exempt work performed by the employee

29 C.F.R. §541.700(a)

What is “office or non-manual work directly related to the management or general business operations”?

- assisting with running or servicing the business (as distinguished from working on a manufacturing production line or selling a product in a retail or service establishment)

29 C.F.R. §541.201(a)

- working in certain functional areas of the business, *e.g.*

What is “office or non-manual work directly related to the management or general business operations”?

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

What is “exercising discretion and independent judgment regarding matters of significance”?

Activities such as:

- comparing and evaluating possible course of conduct, and acting or making a decision after the various possibilities have been considered
- making recommendations for action, even though they may be reviewed, and, on occasion, reversed, by a higher-level authority

29 C.F.R. §541.202(a)

29 C.F.R. §541.202(c); or

What is “exercising discretion and independent judgment regarding matters of significance”?

- working in a way that involves more than skillfully applying well-established techniques, procedures, or standards, as is the case with work that is clerical, secretarial, mechanical or routine

29 C.F.R. §541.202(e)

Assess whether the Employee:

Has authority to:

- formulate, affect, interpret or implement management policies or operating practices;
- commit the employer in matters that have significant financial impact;
- waive or deviate from established policies and procedures without prior approval; or
- negotiate and bind the employer on significant matters

Assess whether the Employee:

- Carries out major assignments in conducting the operations of the business
- Performs work that affects business operations to a substantial degree, even if the employee's assignments relate to operating a particular segment of the business
- Provides consultation or expert advice to management

Assess whether the Employee:

- Is involved in planning long-term or short-term business objectives
- Investigates and resolves matters of significance on behalf of management
- Represents the employer in matters involving:
 - complaints
 - disputes, or
 - grievances

29 C.F.R. §541.202(b)

Discretion and Independent Judgment does not include:

- Applying well-established techniques, procedures or specific standards described in manuals or other sources
- Clerical work
- Recording or tabulating data
- Performing mechanical, repetitive, routine work

Fourth Circuit Court of Appeals decisions on the administrative exemption

- *Altemus v. Federal Realty Investment Trust*, (July 31, 2012)
- Executive assistant exempt from overtime as administrative employee

Altemus

Plaintiff sued for overtime compensation

Facts:

- plaintiff was the executive assistant to the CEO and President of Defendant
- of the 10 to 14 executive assistants, she was the only one classified as exempt
- salary and bonus was approximately \$96,000; other executive assistants were in the \$60,000 range

Altemus

- job description included: “provide high executive-level support to the CEO;” manage day-to-day business activities of the CEO; handle confidential information with discretion; schedule meetings; make travel arrangements
- plaintiff managed CEO’s communications when he traveled

Altemus

- plaintiff assisted CEO with his work for professional and charitable organizations
- plaintiff alleged she spent 75% to 80% of her time on personal work for CEO and his family; planning personal holiday party, scheduling doctors' appointments, assisting with CEO's role as little league baseball coach

Altemus

- performance reviews: “right arm when it comes to organizing and administering all aspects of business;” “give [her] more leeway to make decisions”

Court of Appeals: “The 50 Percent Rule” is not applicable in determining primary duty. Primary duty is based on totality of circumstances and time alone is not the sole test.

Altemus

Her personal work for the CEO did not supplant her administrative tasks; “she nonetheless maintained a responsibility to complete her administrative tasks at all times.”

- she exercised discretion and independent judgment
- her salary supported a finding of exempt status

Fourth Circuit Court of Appeals decisions on the administrative exemption

Desmond v. PNGI Charles Town Gaming, L.L.C., (4th Cir. Jan. 14, 2011)

- racing officials involved in the staging of live horse races were non-exempt and entitled to overtime

Desmond

Facts:

- plaintiffs were terminated for gross violation of procedures for posting an incorrect order of finish for a horse race
- jobs involved some clerical duties and performing as Placing Judge, Paddock Judge, Horse Identifier, and Clerk of Scales

Desmond

District Court: Exempt, in part because the position was required by law and was critical to the business.

Desmond

Court of Appeals: Non-exempt;

- the type of work performed, not whether it was indispensable, is the focus;
- work was not “directly related to the general business operations” of defendant;
- did not “entail the administration of – the running or servicing of” the business;
- applied the “administrative – production dichotomy” and found plaintiffs’ position was carrying out the defendant’s affairs, a “production-side role.”

Best Practice Tips

- review job descriptions
- compare job descriptions with regulatory guidelines - redraft to reflect regulations if appropriate
- consider whether the “highly compensated” exemption applies
- check applicable state laws which may differ from the FLSA

Computer Related Occupations

- The employee must receive either
 - A guaranteed salary or fee of \$455 per week or more, or
 - An hourly rate of not less than \$27.63 per hour
 - \$1,105.20 per week

Computer Related Occupations

- Section 13(a)(17) of FLSA exempts any “computer systems analyst, computer programmer, software engineer, or similarly skilled worker” whose primary duty consists of one or a combination of:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications

Computer Related Occupations

- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems
 - 9 C.F.R. § 541.400
- No particular degree or certification required

Beware!

- Not all Computer-related jobs are exempt
- Positions generally exempt include:
 - Computer systems analysts
 - Computer programmers
 - Software engineers
- Specialized knowledge of computers and software is not sufficient; must require highly-specialized knowledge in systems analysis, programming or software engineering

Beware!

- Positions Currently not exempt include:
 - Employees engaged in repair of hardware and related equipment
 - Employees whose jobs are highly dependent on or facilitated by computers, but who are not primarily engaged in systems analysis, programming, or similar work

Beware!

- DOL declined specific request to include in the regulations as exempt the following job titles:
 - Network manager
 - LAN/WAN administrator
 - Website design and maintenance specialist
 - Systems support specialist performing similar duties with hardware, software and communications networks
 - System integration professional

Beware!

- Help desk professional
- Database analyst/developer
- Internet administrator
- Person responsible for troubleshooting
- Person who trains new employees
- Person who installs hardware/software
- Technical writer

Beware!

- Some of these could be exempt under § 13(a)(17) if
 - Employee is similarly skilled to a systems analyst, programmer or software engineer, AND
 - Primary duty included the list of duties set forth above
- Could also be exempt under administrative exemption

Best Practices

- Carefully review actual job duties
- Carefully review/draft job descriptions
- Be sure to distinguish between “specialized knowledge of computers” and “highly specialized knowledge in systems analysis, programming and software engineering”
- Pay attention to how computer occupations are being paid
- Consider other exemptions

Investigations and Audits

- Department of Labor Investigation
 - What starts the investigation? (DOL does not have to disclose)
 - individual complaint
 - targeted initiative

Investigations and Audits

- How does employer learn of the investigation?
 - telephone call or letter asking for meeting
 - unannounced visit

Investigations and Audits

- What can the investigation cover?
 - can extend back 2 years (3 in limited circumstances)
 - full investigation of all FLSA issues
 - limited investigation
 - self-audit (employer is asked to engage in fact-finding and compute wages)
 - conciliation – resolves minor complaint

Investigations and Audits

- What to Expect – Process of Investigation
 - investigator will have interviewed the complainant and researched the employer's enforcement history with the Department of Labor
 - investigator may request documents in advance of the conference

Investigations and Audits

- Real example of DOL request for information
 1. Legal Name of Business.
 2. Employer identification number (EIN).
 3. Name of company official responsible for compliance with FMLA and the FLSA.
 4. Ownership and incorporation information for the firm.
 5. The total number of employees employed at the firm for 20 or more calendar weeks in both 2011 and 2012 or more calendar weeks in 2012 within 50 miles of [employee's] worksite.

Investigations and Audits

6. The number of employees in [employee's] worksite and the number of employees in [employee's] department.
7. The total number of hours [employee] worked in the last twelve months before her employment ended.
8. A copy of the firm's FMLA policy and medical certification forms if applicable.
9. The termination paperwork for [employee] and all applicable FMLA paperwork including the notification as well as a complete copy of her personnel file.

Investigations and Audits

10. Specific information on the decision to terminate [employee's] employment.
11. The names, contact information and a brief summary of the results for all individuals who took FMLA during the last twelve months at [employee's] location.
12. The name and contact information for [employee's] supervisor.
13. Records of employee wages and hours, including time cards, for each workweek during the 2 year period counted backwards, from the most recently completed pay period. Time records must reflect the accurate number of hours worked by the employees of the firm on a daily/weekly basis.

Investigations and Audits

14. The Home office address and telephone/fax numbers. Address and telephone numbers of all branch locations and information on the overall function at each location.
15. Annual dollar volume of Sales for the last 3 years. This information is necessary to establish coverage under the Act.
16. Last known address, last known telephone numbers, hire dates and termination dates, when applicable, for all current and former employees employed by the firm in [employee's] department within the past two year period.

Investigations and Audits

17. Names, titles and duties of employees claimed not to be entitled to overtime pay in [employee's] department.
18. Methods and rates by which employees' wages are calculated, for example: salary, hourly pay, piece rates, shift pay, overtime premiums, holidays, vacation and sick pay, etc.
19. Procedures for recording hours worked and policies regarding start and stop times, meal breaks, etc.
20. A listing of any H-1B workers that have been employed by the firm at [employee's] location during the past two year period.

Investigations and Audits

21. Names, dates of birth, hire dates, termination dates and occupations of all employees who have worked for the firm within the past two year period and who were under 18 years of age. Please provide for review the North Carolina Youth Employment Certificates for each minor employed by the firm within the past two year period.

Investigations and Audits

- What to Expect – Process of Investigation
 - opening conference
 - Investigator explains purpose of the investigation and starts to gather information on pay practices, recordkeeping, work schedules

Investigations and Audits

- may request tour of facility (could be looking for child labor, posting of required posters)
- document review (no subpoena required) - investigator may ask to review documents *e.g.* payroll records, time cards, job descriptions, records pertaining to child labor, policies

Investigations and Audits

- Employee Interviews
 - may be at the facility, employee's home, by telephone, or by written questionnaire
 - employer generally not permitted to be present for interview (can for management level)
 - questions could include:
 - How are you paid? Hourly? Salary?
 - What is your normal work schedule?
 - More than 40 hours per week?

Investigations and Audits

- Are you paid overtime?
 - How?
 - Straight time?
 - Time and a half?
 - Compensatory time?
- Do other employees work more than 40 hours?
 - Who?
- How does the company keep time records?

Investigations and Audits

- Do you keep a personal record of hours?
- Do you get a meal break?
- Do you work before start time?
 - After quitting time?
 - During lunch?
- What deductions are taken out of your pay?
- Do you receive any bonuses?

Investigations and Audits

- What are your primary duties?
- What is your academic background?
 - Licenses/certificates?
- Any minors work for the company?
 - Names?
 - Ages?
 - Duties?
- What equipment do minors use?

Investigations and Audits

- Closing conference
 - investigator informs of findings
 - investigator suggests ways to comply
 - investigator presents back wage calculation
 - employer can negotiate payment, pay, or refuse to pay
- Release/Waiver
 - if payment of back wages is made, Form 58 should be given to employee

Investigations and Audits

– Practical Tips for Investigations

- be cooperative; treat investigator with respect
- have decision-maker at initial conference (to expedite process)
- be helpful, but don't do investigator's job – *e.g.* give time records, don't create a software program to extract information from records
- listen to employees and identify problems to avoid an investigation

FLSA – Self Audit

Goals:

- Determine that employees are properly classified as exempt or non-exempt
- No improper deductions from salary
- Employees are compensated for all hours worked
- Overtime is properly calculated

FLSA – Self Audit

Process:

- Consider who should perform the audit
- Engage counsel (in-house or external)
- Review job descriptions/titles
- Review actual job duties
- Prepare chart of all positions; identify questionable positions

FLSA – Self Audit

Process:

- Check State laws
- Make sure FLSA mandated posters are prominently displayed

FLSA – Self Audit

Corrections:

- Re-classify if necessary
- If back overtime is owed, consider whether former employees will be included
- Get acknowledgments of payments

Thank you

Kerry A. Shad

Partner

919.821.6672

kshad@smithlaw.com

Susan M. Parrott

Partner

919.821.6664

sparrott@smithlaw.com

Please Plan to Join us for Our Next Webinar:

Understanding How to Effectively Manage Employee Absences Under the FMLA and the ADA

Presented by

Rose Kenyon and Travis Hockaday

October 3, 2013 • 12 to 1 pm

Employers have the ability to manage absenteeism in the workplace, but often get lost in the complicated regulatory maze created by the Family and Medical Leave Act and the Americans with Disabilities Act. During this webinar, we will help demystify the complex federal regulations and discuss practical approaches to successfully navigating these issues.

Webinar Materials

To download the presentation materials and listen/view the webcast of today's webinar please visit

<http://www.smithlaw.com/practices-employment-labor-human-resources.html#flexstab>

Please note that the webcast will be posted Friday (August 30, 2013)

The slides appearing at pp. 6 – 21 are reproduced in whole or in part from the U.S. Department of Labor's presentation, "The Fair Labor Standards Act: Executive, Administrative and Professional Exemptions." <http://www.dol.gov/compliance/laws/comp-flsa.htm>

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