

# Labor and Employment Corner

MICHAEL NEWMAN AND FAITH ISENHATH

## Exemptions 101: Which Employees are Exempt?

These days, employers are doing everything they can to save money: reducing hours; cutting costs; and, unfortunately, laying off employees. However, there is a cost-saving technique that few employers consider: reassessing their employees' exemption status. Some employers may be paying costly overtime to an employee who, in fact, qualifies for an exemption under federal law. Or an employee may be exempt but only performing nominal duties that an hourly employee could

perform more efficiently and cost-effectively. No matter what, an assessment of the exemption status of employees can be helpful in trying to avoid a costly investigation by the Department of Labor. To be considered exempt, the employee must meet three tests: (1) the *salary level* test, (2) the *salary basis* test, and (3) the *job duties* test. Because the Fair Labor Standards Act regulations regarding exemptions can be complex, this article briefly outlines these three tests and the act's requirements for legally exempting an employee.



### Salary Level Test

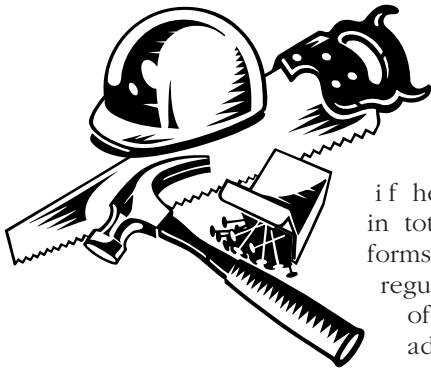
For an employee to even be considered exempt, the minimum salary level an employer must pay is \$455 per week.<sup>1</sup> The employer may pay the \$455 in equivalent amounts for longer than one week (\$910 biweekly, \$985.83 semimonthly, or \$1,971.66 monthly), but the shortest

period of time required to meet this test is weekly.<sup>2</sup>

Alternatively, an individual can be considered a "highly compensated" employee and qualify for an exemption

if he or she earns at least \$100,000 in total annual compensation; performs office or nonmanual work; and regularly performs any one or more of the duties for the executive, administrative, or professional exemptions outlined below.<sup>3</sup> The

total annual compensation could include payment for commissions, nondiscretionary bonuses, or any other nondiscretionary compensation earned in a 52-week period.<sup>4</sup>



### Salary Basis

If an employee meets the minimum salary level requirements, then the employer must determine whether the employee qualifies for the salary basis test. Under the regulations, "an employee will be considered to be paid on a 'salary basis'... if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quantity or quality of the work performed."<sup>5</sup> To satisfy this requirement, an employer must pay an employee his or her full salary for any week in which the employee performs any work—no matter how much work the employee performs or how well he or she performs it.

This test actually gives employers another potential opportunity to save costs. Although an employee must be paid in full if he or she performs any work during the week, employers are able to recommend voluntary weeklong furloughs.<sup>6</sup> The exempt employee must voluntarily agree to the furlough, because an employer may not make any deductions from an exempt employee's pay for any time an employee is ready, willing, and able to work, even if no work is available.<sup>7</sup> However, as a caution, employers must ensure that the employee does not perform any work during the weeklong furlough and should be cognizant of the potential problems an employee's smartphone and laptop computer could present.

If an employer regularly makes improper deductions from an employee's salary, this practice will result in the loss of the exemption for all employees of the same job classification who are working for the same managers who are responsible for the actual improper deductions.<sup>8</sup> The exemption will be lost during the period in which the improper exemptions were made.<sup>9</sup> However, there are seven instances when an employer is permitted to deduct from an exempt employee's pay:

1. absence from work for one full day or more for personal reasons other than sickness or disability;
2. absence from work for one full day or more due to sickness or disability if deductions are made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences;
3. as an offset for any amounts received as payment for jury fees, witness fees, or military pay;

4. penalties imposed in good faith for violating safety rules of “major significance”;
5. unpaid disciplinary suspension for one full day or more imposed in good faith for violations of workplace conduct rules;
6. payment of a proportional part of an employee’s full salary for time actually worked during the first and last weeks of employment; and
7. unpaid leave taken pursuant to the Family and Medical Leave Act.<sup>10</sup>

Finally, the regulations contained in the Fair Labor Standards Act provide that the salary level and salary basis tests do not apply to outside sales employees,<sup>11</sup> doctors,<sup>12</sup> lawyers,<sup>13</sup> teachers,<sup>14</sup> and individuals employed in certain computer-related occupations who are paid at least \$27.63 per hour.<sup>15</sup>

### **Job Duties**

Once an employer determines that its employee is paid the requisite amount at the required time, the final test that an employee must surmount is the job duties test. The three main job duty exemptions are executive, administrative, and professional, which are also known as the “white-collar exemptions.” The employee must perform a certain “primary” duty, which means that the duty is the principal, main, major, or most important duty that the employee performs.<sup>16</sup> Whether a duty is considered the employee’s primary duty will vary on a case-by-case basis, but the following factors are considered in making the determination: relative importance of the exempt duties; amount of time spent performing exempt work; freedom from direct supervision; and relationship between the employee’s salary and the wages paid to other employees for the same kind of work.<sup>17</sup> If an employee spends more than 50 percent of his or her time performing the exempt duties, it is likely that the primary duty requirement will be satisfied.<sup>18</sup> However, the law does not require the employee to spend more than 50 percent of his or her time performing the work to be eligible for the exemption.

### **Executive Duties**

To qualify for the executive duties exemption, the employee’s primary duty must be managing the business of a customarily recognized department or subdivision.<sup>19</sup> Acceptable management duties generally include interviewing, selecting and training employees, setting and adjusting pay or work hours, disciplining employees, and maintaining production or sales records.<sup>20</sup> In addition, the exempt employee must normally and regularly direct the work of two or more full-time employees.<sup>21</sup> Finally, the exempt employee must have the authority to hire and fire personnel or the exempt employee’s suggestions and recommendations about hiring, firing, advancement, promotion, or other change of status must be given particular weight.<sup>22</sup>

### **Administrative Duties**

To qualify for the administrative duties exemption, the employee’s primary duties must be performing office or nonmanual work that is directly related to the management or general business operations of the employer or the employer’s customers.<sup>23</sup> Examples of management or general business operations include taxes, finances, human resources, employee benefits, purchasing, advertisement, and quality control.<sup>24</sup> The employee must also exercise discretion and independent judgment with respect to significant or important matters concerning the business.<sup>25</sup> An employee is considered to exercise discretion and independent judgment even if his or her decisions or recommendations are reviewed at a higher level.<sup>26</sup>

### **Professional Duties**

Under the regulations, there are two potential professional duties exemptions: exemptions for learned professionals and for creative professionals.

To qualify for the learned professional exemption, an employee’s primary duty must be performing work that requires advanced knowledge in a field of science and learning that is customarily acquired by a prolonged course of specialized intellectual instruction that cannot be obtained at the high school level.<sup>27</sup> These employees typically analyze, interpret, or deduce various facts and circumstances related to the business.<sup>28</sup> Examples of potentially exempt learned professionals are accountants, engineers, chefs, pharmacists, and licensed funeral directors or embalmers.<sup>29</sup> Accounting clerks, bookkeepers, paralegals, legal assistants, and engineering technicians typically do not qualify for this exemption.<sup>30</sup>

To qualify for the creative professional exemption, an employee’s primary duty must be performing work that requires invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.<sup>31</sup> Some examples of recognized fields of artistic or creative endeavor include music, writing, acting, and graphic arts.<sup>32</sup> A creative professional’s exempt status will be determined on a case-by-case basis depending on the extent of invention, imagination, originality, or talent used.<sup>33</sup>

### **Conclusion**

For an employer to legally exempt an employee, the employer must pay the employee at least \$455 a week (the salary level test) for any week that the employee performs work (the salary basis test), and the employee must perform the duties outlined for the desired exemption (the job duties test). At a time when every dollar counts, an employer should undertake a review of the exempt status of its employees to ensure they all are accurately and legally classified under the Fair Labor Standards Act. **TFL**

**LABOR** continued on page 53

It is obvious that these criteria eviscerate Fourth Amendment jurisprudence approving the plain view doctrine—a fact that was not lost on the dissenting judges in the case. The life of such criteria as precedent, therefore, may be limited.

More important to the practitioner, however, is that the *Comprehensive Drug Testing* ruling provides a road map for examining potential judicial or government missteps. For example, was the government's search protocol adequately designed to uncover only information sought by the warrant? Surely, computer experts can disagree about the adequacy of the protocols. Was a narrowly tailored warrant merely a pretext for seizing computer data and searching for evidence for which there was no probable cause? In other words, assuming that the government seeks to use evidence outside the scope of the warrant, the *Comprehensive Drug Testing* decision invites us to ask what the government knew when it obtained the warrant and when did it learn it. Was the review procedure structured such that officials involved in the case were directing the review or were privy to the results? The Ninth Circuit's ruling opens the door for requests regarding the details of the government's review. Was the government candid with the magistrate regarding prior attempts to seize information and the need for a warrant rather than a subpoena for the sought-after evidence? Given the risks for overseizure found by the Ninth Circuit, the court's decision provides even greater reason for magistrates to insist on subpoenas rather than warrants for obtaining electronic data.

Several district courts have noted the “deliberate overreaching by the government” in the CDT case as a basis to conclude, in essence, that bad facts make bad law and, therefore, have sought to distinguish *Comprehensive Drug Testing* from subsequent cases. Most recently, a district court noted that the Ninth Circuit's ruling in the case does not explicitly state that the court's enumerated procedures are required by the Fourth Amendment. *United States v. King*, 2010 WL 727981 \*25 (D. Haw. Feb. 24, 2010). Other courts have noted that *Comprehensive Drug Testing* is not an open invitation to voice broad criticism about a government search but have indicated that the defendant must specifically identify how the government erred and how that has violated the Fourth Amendment.

Notwithstanding these decisions, *Comprehensive Drug Testing* is instructive for the practitioner's analysis of the fruits of an electronic search. The decision serves as a checklist of potential pitfalls for the government agent. Certainly, even though the government may share with practitioners that its evidence was seized in connection with a search, unless pressed, the government's disclosures will go no further. *Comprehensive Drug Testing* counsels and equips practitioners to probe further. **TFL**

---

*Steven M. Goldsobel is the principal of the Law Office of Steven M. Goldsobel in Los Angeles and a former federal prosecutor. His practice focuses on defending those charged with white-collar crimes and in parallel proceedings.*

---

## **LABOR** continued from page 17

*Michael Newman is a partner in the Labor and Employment Department of the Cincinnati-based firm Dinsmore & Shobl LLP, where he serves as chair of the Labor and Employment Appellate Practice Group. He is a vice president of the Sixth Circuit. Faith Isenbath is an associate in the same department and a member of the Cincinnati-Northern Kentucky Chapter. They may be reached at michael.newman@dinslaw.com and faith.isenbath@dinslaw.com, respectively.*

### **Endnotes**

<sup>1</sup>29 CFR § 541.600.

<sup>2</sup>*Id.*

<sup>3</sup>29 CFR § 541.601.

<sup>4</sup>*Id.*

<sup>5</sup>29 CFR § 541.602.

<sup>6</sup>*Id.*; see also “Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues,” U.S. Department of Labor, July 2009.

<sup>7</sup>*Id.*

<sup>8</sup>29 CFR § 541.603.

<sup>9</sup>*Id.*

<sup>10</sup>29 CFR § 541.602(b).

<sup>11</sup>29 CFR § 541.500.

<sup>12</sup>29 CFR § 541.304.

<sup>13</sup>*Id.*

<sup>14</sup>29 CFR § 541.303.

<sup>15</sup>29 CFR § 541.400.

<sup>16</sup>29 CFR § 541.700.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>29 CFR § 541.100.

<sup>20</sup>29 CFR § 541.102.

<sup>21</sup>29 CFR §§ 541.100, 541.104.

<sup>22</sup>*Id.*

<sup>23</sup>29 CFR § 541.200.

<sup>24</sup>29 CFR § 541.201.

<sup>25</sup>29 CFR § 541.200.

<sup>26</sup>29 CFR § 541.202.

<sup>27</sup>29 CFR § 541.300.

<sup>28</sup>29 CFR § 541.301.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>29 CFR § 541.302.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*