

Employers Must Be Vigilant in Classifying Work of Computer Professionals Under FLSA

Jun 01 2001

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Practice Area: Business and Corporate Law & Labor and Employment

With computer professionals becoming more and more integral to the work of high-tech, and even not-so-high-tech, companies, it has become more important for employers to understand and apply correctly the exemption under federal overtime law for computer professionals, according to attorneys interviewed by BNA.

The Fair Labor Standards Act requires employers to pay overtime to employees who work more than 40 hours per week and are not specifically exempted. Section 13(a) of the FLSA exempts computer systems analysts, computer programmers, software engineers, and other similarly skilled workers who make at least \$27.63 per hour.

Despite the law's seeming straightforwardness, "the trend is for employers to overclassify employees as exempt, when they are not exempt," management attorney Douglas Towns, who represents a number of high-tech companies, told BNA. In addition, many entrepreneurs starting up hightech companies begin working out of their garages and hoping to become overnight millionaires, and simply are not aware of their obligations under the FLSA, according to Towns, who is with Jones, Day, Reavis & Pogue in Atlanta.

Legal Basics

Harris Miller, president of the Information Technology Association of America, said that many entrepreneurs starting up hightech companies do not consider the FLSA. "Some companies, in their youthful enthusiasm, will have people working 70-80 hour weeks," but do not think to pay them overtime, he explained, because they do not understand the law.

To start with, employers seeking to apply the overtime exemption must be certain that the work performed by the "computer professional" at issue falls within the parameters of the statute, said Michael Froehlich, a management attorney and shareholder with Shulman, Rogers, Gandal, Pordy & Ecker in Rockville, Md.

Under the statute, a computer professional's primary duties include:

- the application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional specifications;
- 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 systems or programs related to machine operating systems; or
- a combination of the described duties that requires the same level of skill. (29 U.S.C. § 213 (a)(17))

An employer's attempt to label every worker who sits in front of a computer as a "computer professional" will not be successful, Froelich said, explaining that the exemption does not "apply to people who simply do data entry." It also "doesn't cover entry-level employees who aren't proficient in those areas" specified in the law. Nor does it cover those who repair, manufacture, or perform maintenance work on computers, or workers whose jobs are highly dependent on computers, he said.

In addition to considering the statute, employers determining whether employees are overtime-exempt must "walk through" the implementing regulations issued by the Department of Labor in 1992 and "make sure" that their computer workers fall within the guidelines, Froelich said. Those regulations, found in 29 C.F.R. §§ 541.3(a)(4) and 541.303, provide that the overtime exemption applies to highly skilled employees proficient in "the theoretical and practical application of a body of highly specialized knowledge in computer systems analysis, programming, and software positions . . . or . . . employees in these computer-related occupations who have not attained a level of skill and expertise which allows them to work independently and generally without close supervision." (29 C.F.R. § 541.303(c))

Under the regulations, the work of exempt computer professionals is "predominantly intellectual and varied in character," and such workers must be paid on an hourly basis in excess of six and one-half times the minimum wage. (29 C.F.R. § 541.3)

Froelich emphasized that employers must be certain to meet the wage requirement cited in the law – \$27.63 per hour or six and one-half times the minimum wage per hour.

In addition, legal counsel need to make sure that the employers they represent are aware of state laws and regulations exempting computer professionals from state overtime requirements. A law in California, for example, exempts from overtime requirements computer professionals who are engaged primarily in work that is intellectual or creative and that requires the exercise of discretion and independent judgment; are highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering; and earn not less than \$41 per hour.

Case Law Scan

Given the high dollar amount employers must pay to qualify for the exemption from federal overtime law, high-tech firms "must be talking to their attorneys" to ensure they are complying with the law, said Jac A. Cotiguala, of Jac A. Cotiguala & Associates, a Chicago firm that represents plaintiffs.

Cotiguala said that this exemption has not generated many court decisions. "One reason it will be a long time coming" before there is a significant amount of litigation stemming from this exemption is that the law requires companies to pay a "significantly higher rate to programmers," as opposed to pay rates for other exemptions under the FLSA, such as those for executives and professionals.

"To the extent that the computer industry adopts the practices of the rest of industry," legal programs will arise when employers seeking to claim the exemption begin to "manage by being punitive" when it comes to paying workers, he said. He pointed out that some employers that claim that they do not have to pay overtime under the FLSA to salaried workers often stumble into legal trouble when they dock workers' pay for disciplinary reasons. Employers paying computer professionals could face analogous problems, he said.

Attorneys interviewed for this article generally agreed that there is not much case law to guide employers and their counsel in applying the exemptions. Several of those interviewed, however, pointed to *Bohn v. Park City Group Inc.*, 94 F.3d 1457, 3 WH Cases2d 780(CA 10 1996), where the U.S. Court of Appeals for the 10th Circuit reversed a summary judgment for the employer on an FLSA overtime claim brought by a technical writer who worked in the company's software and training departments. The court ruled that there was a question of fact whether his job met the requirements for the computer professional exemption. While the court said a technical writer could fall under the exemption, there was insufficient evidence in the case at hand for it to rule one way or the other.

In that case, the plaintiff argued that he spent most of his time performing clerical tasks, including basic word processing, photocopying, and collating. Meanwhile, the job description for his position stated that he reviewed programming code to determine program functionality, performed support functions, and learned about current advances in training and documentation techniques and methods. In addition, according to the decision, the plaintiff's resume stated that he "[d]efined bug and enhancement tracking system," "[e]dited, expanded, and improved the company's orientation and policies manual," and "[w]rote and illustrated several large volumes of software documentation."

"On their face plaintiff's duties and accomplishments appear to reflect high level skills, but without more we cannot determine whether they involved the depth of knowledge the law requires for the professional exemption," the court concluded, remanding the case.

In another case, a Maryland circuit court ruled that an employee who provided technical writing computer services to a telephone company was exempt from FLSA overtime requirements because her duties, including documentation of complex computer software life cycle program and functions, were included in exempt duties under DOL regulations, and her hourly rate of pay was between \$30.20 and \$38. *Morgan-Chandler v. Consortium of Maryland Inc.*, 3 WH Cases2d 880 (Md CirCt 1996)

Using Updated Descriptions To Avoid Liability

Plaintiff's attorneys warn that the exemption is being applied too liberally. One way to counter that, said Towns, is to maintain updated, accurate job descriptions.

Cotiguala commented that many computer workers covered under the current law are not necessarily exercising the independent judgment or discretion common to other professionals exempted under the act. "It's not independent judgment, by and large . . . a lot of the folks, even those writing [comptuer] code, they are not intellectualizing anything. It's just brute, repetitive" work done by someone following the instructions of others, he said.

"A lot of the people that are doing highly technical things, when you look at what they are doing, there is no independent judgment . . . it's filling in the blanks." Their work has to fit into the "strict confines" of the employer's directives. "Forget the fact that it's highly technical," he said, arguing that much computer work is a rote practice of converting data from one form to another.

Towns also acknowledged that as the high-tech industry develops, jobs that were once considered highly advanced can, in time, require less and less technological know-how. He said that attorneys can advise employers to avoid liability resulting from the improper denial of overtime to workers whose jobs no longer meet statutory or regulatory requirements by maintaining adequate, updated job descriptions. Accurate job descriptions, he said, can be used to "better defend what the employee is actually doing," can help employees to know what is expected of them, and can help the employer in defending against a variety of other job-related discrimination cases.

Towns said he advises his clients to conduct "FLSA audits" to ensure that "however they are classifying their employees is appropriate," noting that "a FLSA audit on the front end, rather than at litigation," could clue employers into the need to change job descriptions or modify an employee's duties.

"Because of the changing nature of technology, you can't do it once and forget it," he said. Employers must review job classifications "on a somewhat regular basis," because a job that today is exempt from overtime requirements might in six months be nonexempt because technological advances have made such work routine, he said. By Victoria Roberts BNA Publications

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