

The Administrative Exemption Under the FLSA For Federal Employees

There are three tests an employee must pass to be classified as exempt from the FLSA as a “bona fide administrator.” First, the primary duty of the employee must be administrative in nature. Second, the work must be non-manual. Third, the employee must show discretion and independent judgment in the performance of the job.

The Department of Labor (DOL)(www.dol.gov) and, for Federal employees, Office of Personnel Management (OPM)(www.opm.gov) offer guidelines which attempt to define work of an administrative nature. These refer to management functions and programs. It must be remembered that when the FLSA was first passed in 1938, those employees most in need of protection were sweatshop style workers, whose employers used the general unemployment of the Great Depression to take advantage of workers. If a worker refused to accept an unlivable wage, or refused to work more than a full shift for a day’s pay, there were plenty of replacements. It was understood that protected employees were what were called “workers”, members of the “working class”. Implicit in the exemption of bona-fide administrators is an understanding that they are not “workers” involved in producing things.

This distinction is explicit in DOL 29 USC 541 § 205 which defines “directly related to management policies or general business operations of his employer or his employer’s customers” as “those types of activities relating to administrative operations of a business as distinguished from ‘production’ or, in a retail or service establishment, ‘sales’ work.”

As our world has grown more complex and we have seen white collar workers don blue shirts, blue collar “production” work has traded in its overalls for suits and ties. The goods and services provided by corporate America are increasingly produced by means of what had traditionally been considered white collar activities. The massive government programs of the War on Poverty introduced a new kind of government worker, who needs white collar skills to provide the goods and services of his or her agency.

It is very clear both from court decisions (*Gusdonovich v. Business Information Company*) and from the Department of Labor itself (*Letter from Elizabeth Dole*) that fulfilling “the mission and function of the agency” is production work, even if in another venue the same work might be administrative (See Segal I Arbitration Award in AFGE Local 1923 and HHS, SSA). The primary duty test is not applied blindly to the duty. The context in which that duty is carried out determines whether the work is that of a bona-fide administrator.

This is the basis of Segal I, where the Arbitrator in a federal employment arbitration decided that Claims representatives and Claims Authorizers at the Social Security Administration are **not exempt** from the Fair Labor Standards Act. He found that the work they perform is in no way administrative. Administrative work deals with managing an organization. Doing the work of that

administration is production and nonexempt. This decision has been accepted and expanded to other categories of workers besides Claim Representatives and Claims Authorizers by more recent arbitrators, including David Vaughn and Isadore Helburn. It should be noted that Arbitrator Helburn regards customer service as an administrative task, and seems to imply that agency goals and management goals are one and the same. This must be reconciled with case law and Mrs. Dole's letter.

The second test which a job must pass to qualify as a bona-fide administrative position is the non-manual labor test. The work must be intellectual and varied in nature, or specialized or technical (OPM 5 CFR §551.206b). Intellectual does not mean merely mental. The OPM guidelines require something resembling higher-level thinking (Definition of *Work of an intellectual nature*). As a benchmark, Arbitrator Helburn obliquely ruled that GS 12 computer specialists (programmers) do not qualify as intellectual. He more definitively states that GS 13s are involved in "varied work, much of which takes a good deal of thought. These are, he stated, characteristics that must be in evidence to meet the non-manual work test."

The third test requires that the employee must "frequently [exercise] discretion and independent judgment." (OPM Regs, 5 CFR 551.206c) The definitions of this test and the intellectual nature test that OPM provides seem to cross-reference each other. By their nature, these tests are intertwined. Arbitrator Helburn refers to non-intellectual work as "'cookie-cutter' work." It is difficult to imagine independent judgment and discretion under such circumstances. Conversely, it is difficult to imagine higher level thought absent one of its major components, discretion. In deciding that GS 9-12 Computer Specialists (programmers) do not display discretion and independent judgment, Arbitrator Vaughn asserts

'discretion and independent judgment' necessarily refers to the manner in which the job is to be performed and the work to be accomplished, rather than the exercises of discretion within and below those levels.

He excludes discretion on decisions such as sitting or standing, light on or off, which are relevant to the worker but not the work.

The arbitrators are not particularly consistent in their reference to either the non-manual or discretion test, with the exception that Arbitrator Helburn mentions the employee's level of supervision in reference to independent judgment and discretion. Supervision, of course, has no bearing on whether work is non-manual. Arbitrator Vaughn goes so far as to imply that independent judgment and discretion are indicative of a staff, not line position, and that it therefore is informative to the primary duty test.

The essence of an administrator is his or her primary duty. This duty involves the "business" end of an organization. Inherently, administration must involve higher level thought and discretion. An employee who is a cog in the agency's machine is not a bona-fide administrative employee, whether a cog in production or

administration. Only those federal employees who clearly fit this description can reasonably be classified as exempt under the Administrative Exemption.