

## **Administrative / Production Dichotomy – DOL Revisions to FLSA Regs.**

The Department of Labor touched a raw nerve in updating the criteria for the Administrative exemption. Since the first Stein Report of 1940, the FLSA has recognized a clear dichotomy between “staff” and “line” work. That dichotomy was the *raison d’être* of the administrative exemption: only those employees involved in the business of business qualified. As American business has changed, the industrial model of a factory with a proletariat work force has become more historical than practical. There have been those who asserted that the dichotomy between staff and line has joined this model as just a quaint reminder of times past. The administrative exemption means that the FLSA does not apply to white collar workers, they claim. What does it matter if the white collar work fits into the production of the services of the employee? They exercise discretion and their work is intellectual so they should be exempt.

This is not the position which the Department of Labor has adopted. It has been very clear, from the original law passed in 1938 through the Final Rule of 2004, that the administrative exemption is only intended to exempt those employees whose work relates in some way to running a business.

The Department believes that the dichotomy is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption. As the Department recognized in the 1949 Weiss Report at 63, this exemption is intended to be limited to those employees whose duties relate “to the administrative as distinguished from the ‘production’ operations of a business.” Thus, it relates to employees whose work involves servicing the business itself--employees who “can be described as staff rather than line employees, or as functional rather than departmental heads.” 1940 Stein Report at 27. The 1940 Stein Report further described the exemption as being limited to employees who have “miscellaneous policy-making or policy-executing responsibilities” but who do not give orders to other employees. 1940 Stein Report at 4. Based on these principles, the Department provided in proposed section 541.201(a) that the administrative exemption covers only employees performing a particular type of work--work related to assisting with the running or servicing of the business.<sup>1</sup>

The Department of Labor notes that even though a worker is productive does not mean the worker is not an administrator. Employees who produce results enhancing the operation of the business can qualify as bona-fide administrators, assuming they meet the necessary criteria.

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<sup>1</sup> Preamble to DoL Final Rule, p 22142

The Department of Labor softens its position by claiming that the “production versus staff split” is “not dispositive.” It claims that this dichotomy is only illustrative, and is one of many tools which can be used to analyze the FLSA status of an employee. It supports this claim by quoting case law that the dichotomy is

“useful only to the extent that it helps clarify the phrase ‘work directly related to the management policies or general business operations’.” See **Bothell v. Phase Metrics, Inc.**, 299 F.3d 1120 (9th Cir. 2002).

The Department proceeds to point out that many cases investigate the primary duty without mentioning this particular dichotomy.

At this point, the Department’s argument loses a little force. The staff – production dichotomy is inherently related to the primary duty test. The primary duty test determines whether the work which is done is administrative work. This has been defined for sixty-eight years as work involved in running the business in question. If the employee is not involved in a part of the business aspect of his employer’s enterprise, he is by definition not an administrative employee. If his primary duty involves producing the good or service which the business provides, then it does not accomplish the business function. Specious examples of legitimate administrators who claim that they produce reports do not eradicate the protection which the FLSA affords to the many white collar workers who are not involved in the business function of their enterprise.

The Department of Labor is correct in stating that the staff-line split is only illustrative, not dispositive. There are many workers who cross the line into the “staff” camp because they are involved in the business function. The staff-line split would indicate to us that these workers might justifiably be exempt from the FLSA. But when their primary duties are held to the benchmarks established by the FLSA, they fall short of being covered by the exemption. When their work is judged for intellectual content and variation, it is found lacking. When discretion and independent judgment are sought, they are not found. For these workers, the staff-line divide is a starting point to determine their true status. But for workers who never crossed that divide, there is no need to search if they are covered by the exemption.